



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL CASE NO. 3 OF 2016**

**REPUBLIC** .....  
.....**APPELLANT**

**VERSUS**

**GERALD KIRIMI** .....**1<sup>ST</sup>**

**ACCUSED**

**PENINAH GACHUGI GITONGA**.....**2<sup>ND</sup>**

**ACCUSED**

**JUDGMENT**

1. The named accused persons, with a third person, were charged with the offense of murder, contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the alleged offence are that on the 20<sup>th</sup> day of November, 2015 at around 10:00Hours at Kianguria Village, Ukuu Location in Imenti Central District (sic) within Meru County, they jointly murdered EMILY NKATHA KIRA.
2. Their co-accused died in the course of the trial. The accused denied the charge.
3. The prosecution case is summarized as follows:

4. PW1 was the deceased's mother, she stated that on the material day, she was at their home with the deceased. The accused arrived and informed her that the deceased had stolen some chicken. The 3 accused persons then started assaulting her daughter and only stopped after she promised to pay for the chicken in question. The accused persons returned at around 5:00 pm and since she had not raised the Kshs. 2000/= as promised, they resumed their assault on the deceased. They also took her jiko and left. After that she took her daughter to the police station, and was advised to take her to hospital, where she was admitted, but unfortunately the deceased succumbed to her injuries on 3<sup>rd</sup> December, 2015.
5. The witness conceded that although the assault occurred on 20/12/2015, she did not take the deceased to hospital immediately. She only did so on 24/12/2015.
6. PW2 was Lorna Muthoni, an aunt to the deceased. She told the court that when she received the news of the assault from her sister (PW1), she went to see her she found the deceased who was bearing some injuries. The accused persons then arrived took the deceased and resumed their assault on her. Later she learnt of the deceased's demise.
7. PW3 was Irene Kanana, a sister to the deceased. She stated that she received the news of the assault on her sister and travelled

to see her. She confirmed that indeed, her sister bore injuries. She then went away. Later, she learnt of the death of her sister.

8. PW4 was Martin Gitonga Kirai, a brother to the deceased. He narrated how he received the news of the assault. He sent some money to enable her get treatment, but unfortunately, his sister succumbed to her injuries. Later he attended the post-mortem examination.
9. PW5 was Corporal Paul Kilei who merely accompanied the deceased's relatives to the post mortem examination.
10. Sergeant Ronald Shikami, was PW6, whose role was to arrest the 1<sup>st</sup> and 2<sup>nd</sup> accused. He confirmed that the 3<sup>rd</sup> accused was also arrested in connection with the offence.
11. The last witness was Police Inspector Samuel Nderitu who testified on behalf of the Investigating Officer. He also produced the Post Mortem Report, which was prepared by a Dr. Bett.
12. At the close of the prosecution case, the accused were placed on their defence.
13. In his sworn evidence, the 1<sup>st</sup> accused stated that on the material day, he went to work at a quarry. In the evening he went home. That at around 6:00 pm he heard screams from the home of PW1. He went there and found the deceased beating her mother,

on the allegation that PW1 had caused her to be chased away by her husband. Other people at the scene separated the two and then he went back home. Later he learnt of the deceased's demise. He denied any involvement with her death.

14. In her sworn evidence, the 3<sup>rd</sup> accused stated that on the material day, at around 10:00 am she was at home. She heard screams coming from PW1's homestead. When she arrived there, she saw the deceased fighting with her mother. The deceased was telling PW1 to take her to her real father. That other people at the scene separated them and she went back home. At 6:00 pm, she heard screams coming from the said home again. She went there and found PW1 and the deceased fighting. She denied assaulting the deceased.
15. With the evidence set out above it is the court's duty to establish if the prosecution's case has met the legal threshold to sustain a conviction.
16. The offence of murder is established under Section 203 of the Penal Code, which provides as follows;  
***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***
17. Therefore, the prosecution needs to establish the following: -

- a. That there was the death of the deceased and the cause of the said death.
- b. That the death was caused by unlawful acts or omission.
- c. That the accused committed the unlawful act which caused the death of the deceased
- d. That the accused had malice afore thought.

18. The Court of Appeal affirmed the above ingredients in **Anthony Ndegwa Ngari vs Republic [2014] eKLR** where it was held:

***“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”***

19. The prosecution case is hinged on the testimony of the deceased’s mother (PW1) who testified that she was present on both occasions when the assault on her daughter took place. PW2 only witnessed the second assault.

20. It is clear from the evidence of the two witnesses that the accused persons are the ones who assaulted the deceased on the allegations that she had stolen some chicken. Her mother

had promised to pay for the same but failed to do so. This resulted in the assault that took place that evening.

21. The accused have tried to blame the deceased's mother, claiming that she was the one who fought her. That line of defence, in my view is not feasible. I say so because if that was the case, then why was PW1's jiko taken away, only to be recovered from the home of the 1<sup>st</sup> accused?
22. Clearly, the accused's defence is inconsistent with the facts of the case. It is thus my finding that the accused persons are the ones who assaulted the deceased, and the injuries led to her death.
23. The post mortem confirmed the cause of death the defence also attempted to put the blame on PW1, for not taking the deceased to hospital on time. It is true that the deceased was only taken to hospital 4 days after the assault, while it is possible that her death could have been avoided with immediate medical attention, that fact does not take away the blame for the accused persons who occasioned the injuries. Their actions were the cause of the death.
24. Section 213 of the Penal Code defines causing death as follows: -  
**A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases: -**

**(a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;**

**(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;**

**(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;**

**(d) if by any act or omission he hastened the death of a person suffering under any disease or injury**

**which apart from such act or omission would have caused death;**

**(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.**

25. It is thus immaterial that the deceased did not receive medical attention on time. The accused are still deemed to have caused the death.
26. The last issue to consider is whether there was mens rea on the part of the accused to kill the deceased, legally known as malice afterthought. Section 206 of the Penal code defines malice aforethought as follows: -

***‘Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***

***a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;’***

27. From the evidence, the accused persons assaulted the deceased twice. According to PW1, when she saw the extent of the assault that fateful morning, she promised to pay for the chicken but that never happened. This led to the second round of assault.
28. In my view the accused persons may have never intended to cause grievous harm to the deceased, or cause death. However, by law their actions are deemed to have been the cause of her death, even though it appears like the death was partly contributed by the fact that the deceased was not taken to hospital immediately after the incident.
29. In my view the crucial element of malice aforethought is missing.
30. After considering the evidence adduced by the prosecution and the defence raised, I am of the view that the prosecution has discharged its burden of proof, but only for the offence of manslaughter.
31. Consequently, the 1<sup>st</sup> and 3<sup>rd</sup> accused are found guilty of the offence of manslaughter, contrary to Section 202 as read with Section 205 of the Penal Code and they are convicted on the same.

**Dated, signed and delivered at Meru this 13<sup>th</sup> day of November, 2025.**

**H. M. NYAGA  
JUDGE**