



**Republic v Nyaribari (Criminal Case 56 of 2019)
[2025] KEHC 1405 (KLR) (Crim) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 56 OF 2019**

**LN MUTENDE, J
JANUARY 30, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

DENNIS KEBIRO NYARIBARI ACCUSED

JUDGMENT

1. Dennis Kebiro, the accused, was indicted for murder. The allegations being that on 10th August, 2019, at about 08:30 hours, jointly with others not before the court, at Fenesi Gardens Apartments, he murdered Wycliff Onyango (deceased) an act that contravened Section 203 as read with Section 204 of the *Penal Code*.
2. The accused denied the charges at the outset, and he was taken through trial as provided in law. Facts of the case are that the deceased took a cell phone, the property of a colleague without his consent. When it was established that he had taken it, he promised to return it in the morning and he lived to his word by returning it the following day, in the morning. Upon arrival he was taken to the guards changing room at Fenesi Gardens Apartments in Westlands, where he was assaulted by the accused jointly with his two (2) colleagues who absconded. He suffered fatal injuries and succumbed. A post mortem carried out established the cause of death as blunt force trauma. In the result, the accused who had been arrested was arraigned to answer the charges.
3. Upon being placed on his defence the accused denied the allegations. He explained that being a security guard at the Fenesi Gardens Apartments, he was waiting for night guards to take over on the 9th August, 2019, when Walter Juma a house cleaner at Fenesi Gardens Apartments made a report of his missing phone. They called the phone number and established that the person in possession of the phone was at Waiyaki Supermarket. The night guards, Mwera and Simiyu reported for duty hence he handed over



to them and joined Walter in pursuing the person, but upon reaching the supermarket the individual had left.

4. Walter talked to him on phone and he promised to return the phone the following morning. Being a Supervisor, he reported on duty to facilitate handing over by the night to the day guards. That when he reached the gate he heard noise coming from the changing room. That he went there and found the deceased having been assaulted. He was bleeding from the face and John Mwera and Paul Simiyu were inside the changing room.
5. Daniel Muchai, the Manager, who arrived after the event, entered the room and he explained to him that he had rang Jeff Hamilton Security Services to send over the motor vehicle to take the deceased to hospital. The Manager instructed them to take the deceased outside the premises. They complied and the vehicle arrived.

The Jeff Hamilton reinforcement Team advised that they had to make a report to the Police. Therefore, they went to Spring Valley Police Station and were advised to take the deceased to hospital. They did but the deceased was pronounced dead on arrival hence they returned to the Police Station. He denied having given orders for the deceased to be assaulted.

7. At the close of the defence case it is urged that the conduct of the accused is not of a guilty mind unlike Paul Simiyu and John Mwera who are still at large. That the accused was charged because he was in the changing room where the deceased was assaulted.
8. That evidence of the accused and PW6 is exculpatory and requires corroboration. It is PW6's phone which was stolen and he was at the changing room which was the locus in quo. That the accused did not have any reason to assault the deceased. That the State did not call Caroline Atwiga as a witness. And had she been called, she would have testified against the prosecution case. The court is called upon to apply the doctrine of adverse inference.
9. I have considered evidence adduced by the prosecution and the explanation given by the defence. This being a Criminal Case, the State/Prosecution is obligated to prove the case beyond reasonable doubt. The offence of Murder is created by Section 203 of the [Penal Code](#) which stipulate thus;

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

10. Principle elements of murder were summed up in Anthony Ndegwa Ngari v Republic [2014] eKLR where the Court of Appeal stated thus;

“ For the offence of murder to be proved, 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.”

11. On the question of death which is acknowledged to have occurred, both the prosecution and defence witnesses agree that the deceased was assaulted and taken away in a motor vehicle owned by Jeff Hamilton Security Services and upon being taken to Kangema Nursing Home, no medical attention



- was given to him as he had succumbed. The death was confirmed by PW11 Dr. Everline Chege, a Pathologist who concluded that the cause of death was severe head injury due to blunt force trauma.
12. As to whether the accused committed the unlawful act that resulted into the death, PW1 Aggrey Isatia reported on duty on the fateful date and was referred to the guard changing room by Caroline, a guard on duty. He stated that upon arrival he found Caroline alone at the gate and she told him that other guards were at the staff changing room. He went to the changing room and found the security guards, Simiyu, Dennis and Mwera and the victim who was standing. And, Dennis (accused) was hitting him. He identified the accused in court as the one he saw in the act of hitting the deceased. He proceeded to state that the accused had been tied hands from behind and the legs were tied as well and he was bleeding from the mouth. He identified the manila rope, yellow in colour that was used to tied the deceased. That is when he questioned their action, they reprimanded him and ordered him to leave. He got scared hence left going to the reception area.
 13. At the reception area he encountered the Receptionist and Cook and upon asking why they did not raise an alarm, they purportedly said that they did not like the deceased. On noting their indifference, he went back to the gate and on seeing members of public having gathered, he got the courage to go back to the staff changing room and asked why they were ‘killing’ the deceased. He noticed the phone which was a smartphone, that he identified in court. He was ordered by Simiyu to leave the room. He was ordered by Simiyu to leave the room. He identified a stick that was broken, a piece of broken baton, a broken green pipe and pieces of a broken sticks. Items that were being used to assault the deceased.
 14. PW6 Walter Okello Juma whose phone had been taken testified to have found his cell phone missing. When a call was made it turned out that it was in possession of the deceased who said he had picked the cell phone at Westlands while going to his place of work. He identified himself as a security guard and asked him to go to Waiyaki Supermarket the individual had identified himself as Evans, hence when he told the accused that he was going to collect the cell phone he did accompany him. However, the person didn’t turnup as promised. When he raised him up he changed the tale and now identified himself as Wycliff and apologized to have gone with the cell phone instead of leaving it with the security guards and promised to take it to him the following day.
 15. The following day, the 10th August, 2019, he reported to work at 9.45am and encountered Clarence a colleague at the gate who told him that Wycliff had been assaulted. He went to confirm and found the deceased, Wycliff having been tied and was lying down. Simiyu who had a pipe was in the act of hitting the deceased in the presence of Mwera and the accused (Dennis). That it was upon the Manager arriving that he ordered them to untie him. He ordered them to carry him out because he could not stand. He was strengthless.
 16. The argument put forth by the defence is that evidence of PW1 and PW6 is exculpatory. And, that the accused conduct also exonerates him from guilt. Evidence adduced by PW1 was direct as to the act of the accused assaulting the deceased. PW6 on the other hand placed him at the scene when his colleague was assaulting the deceased.
 17. Section 21 of the [Penal Code](#) provides thus;

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
 18. The assailants were three in number. If they believed the deceased had committed the offence of theft they were required to report the matter to the police so that lawful action could be taken against him.



However, they decided to punish him. Circumstances under which the punishment was meted out clearly show that they did form a common intention to mete out severe punishment which was an unlawful act. The offence committed was a consequence of the continuation of a course of action with a view to achieve some end. Each one of the assailants is hence deemed to have committed the offence. To that end, it cannot be said that evidence of PW1 and PW6 cleared the accused from fault/guilt it did not demonstrate that the accused was innocent from the accusation.

19. The accused contends that the State did not call Caroline Atwiga who saw the events as they unfolded as a witness. The argument is that she could have testified against the State/prosecution. The court is hence called upon to apply the doctrine of adverse inference.
20. It is a legal principle that would allow the court to presume that failure to adduce some evidence or call a vital witness could be detrimental to the case of a party who alleges. The question to be answered is hence whether the State withheld evidence that should have been adduced by Caroline?
21. Section 143 of the *Evidence Act* provides thus;

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
22. In *Bukenya & Others v Uganda* [1972] EA 594 the court stated that;
 - i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
 - ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
 - iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”
23. Evidence on record is that PW1 was told by Caroline who was guarding the gate that the deceased was being assaulted. He went and confirmed. His evidence as to the assailants was corroborated by that of PW6 therefore evidence adduced that was direct which explicitly supported the fact of who the assailants were. These were first hand accounts that did not require further corroboration. Therefore, failure to call Caroline was not fatal to the prosecution’s case. The accused herein was indeed one of the assailants who caused the death of the deceased.
24. On the question whether the death was of malice aforethought. The issue lingering is whether the accused and others deliberately engaged in the wrongful conduct with a clear intention to cause harm or death?
25. Section 206 of the *Penal Code* defines malice aforethought thus;

“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;

- c. An intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

26. PW10 No. 83321 P.C. Joseph Kigira Gatecha adduced photographic evidence. He observed injuries on both sides of the face, on the chin and forehead, above the right ear. The backside of the hands had injuries. There were signs of tied marks on the wrist area of the hands. Both legs had injuries, there was a scratch mark on the neck and an injury on the backside of the body.
27. The locus in quo (Fenesi Gardens Apartments) at the changing room, there were stains of blood on the floor and on the metal cabinet. There was a green polythene bag alleged to be of refuse, but upon opening it, the contents were broken pieces of black pipe, broken pieces of wooden sticks, broken security baton, pieces of green PVC pipe and nylon and sisal ropes which had blood stains.
28. The pathologist on examining the body of the deceased found bruising of the right side of the face with defence marks over the hands and back. There was haematoma underneath the skin, and abrasion over the skin. Some force was applied to the bladder. There was a blood clot on the head with generalized epidural subdural and subarachnoid haemorrhage. All layers of the brain were touched with the blood and general features of increased intracranial pressure and the brain was compressed. She opined that the severe head injury that was occasioned by blunt force trauma did cause the death of the deceased
29. Considering the defence put forth, it is not disputed that the severe beating occasioned on the person of the deceased not only caused physical and emotional injuries following intensity but also caused his death.
30. In *Rex v Tebere c/o Ochen* (1945) 12 EA CA 63 the Eastern African Court of Appeal stated;
- “In determining existence or non-existence of malice one has to look at the facts proving the weapon used, the manner in which it was used and part of the body injured.”
31. Considering how the perpetrators (accused and his two (2) colleagues) inflicted punishment on the deceased for wrong doing, their actions were so reckless and in disregard of human life. They showed blatant indifference to probable death or serious/grievous harm.
32. From the foregoing, I find the State/Prosecution having proved the case against the accused beyond reasonable doubt. Accordingly, he is guilty of the offence of murder for which I convict him, pursuant to the provisions of Section 203 of the *Penal Code*.
33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY, 2025.

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L.N. MUTENDE

JUDGE

