



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Chege (Criminal Case 5 of 2019)
[2025] KEHC 5293 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 5 OF 2019**

**HI ONG'UDI, J
APRIL 30, 2025**

BETWEEN

REPUBLIC STATE

AND

GEORGE GITHINJI CHEGE ACCUSED

JUDGMENT

1. George Githinji Chege the accused herein stands charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that the accused on 29th January, 2019 at Munanda Trading Centre in Gilgil sub-county, Nakuru county murdered Stephen Githae Gitau.
2. He denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses.
3. PW1 – Rachel Wamaitha Mburu is the owner of the bar in Kiambogo known as Kirathimo bar where the deceased, accused and others were taking alcohol. She testified that on 29th January, 2019 at around 9.00pm she was in the bar and the deceased and accused were seated each at a different table taking alcohol being bought by the accused. The two men later disagreed when the deceased refused to give the accused alcohol, making the latter hit the former with a fist. She warned the accused and took the deceased outside.
4. She further stated that the accused followed the deceased outside and the two fought. There was electricity light outside. She saw the accused remove a knife with which he stabbed the deceased who bled and fell down. She went to call a doctor from a nearby hospital and on her return, she found when the deceased was dead. The accused was still there.



5. In cross examination she said she stood at the door of the bar after taking the deceased outside. She said she saw the accused stab the deceased. She had known both the accused and deceased for about three (3) years.
6. PW2 Paul Kamau Njogu testified that on the material day he joined the accused and deceased who were drinking at PW1's bar. He witnessed the accused and deceased disagree every now and then over drinks but they later agreed and he told the deceased to go home and he left. Shortly thereafter the accused followed him. He then heard noise a few meters from the bar. He went to check and learnt that the accused and deceased had fought and the deceased was on the ground bleeding.
7. In cross examination he confirmed having been in the said bar with PW1, accused, deceased among others. While there the accused and deceased only disagreed over drinks but did not fight. He denied removing any of the two (2) men from the bar.
8. PW3 Gitau Njenga was at home on the material day at 9pm when he heard a neighbor who is the accused's mother calling out saying the accused had stabbed his son. He went to the centre and found his son (deceased) bleeding from his left side towards the chest and he was dead. Police later came.
9. PW4 Eliud Njoroge Njenga told the court that the deceased was his brother's son. He was at the mortuary on 2nd February, 2019 and identified the body of the deceased for post mortem. The doctor told them that the deceased had died from a stab wound on the left side of the chest from the back.
10. PW5 Dr. Anthony Wainaina conducted the post mortem on the body of the deceased. He said the deceased had a wound on the left axillary region on the back caused by a sharp object. There was a wound deep inside the lungs. The pulmonary veins and arteries were torn. He formed the opinion that the cause of death was massive internal haemorrhage due to the stab wound to the chest. The body was identified by Gitau Njenga and Eliud Njoroge (PW3 and PW4). He produced the post mortem report as EXB 2.
11. PW6 – Ruth W. Kahi the government analyst stated that on 5th March, 2019 their office received an exhibit memo from the police with a sword with a black rubber handle, which was moderately stained with blood. The next item was a blood sample from the deceased's body. The two exhibits were examined for DNA analysis. She found the DNA profile of the blood stains on the sword to match the DNA of the blood sample. She did her report which she produced as EXB3.
12. In cross examination she admitted that the report (EXB 3) had an error showing they received a knife instead of a sword.
13. PW7 No. 112789 P. C Charles Francis Waweru of Elementaita police station testified that on 30th January, 2019 he was informed of a murder incident at Munanda village. Officers who had received the report ran to the scene and brought him information. He too went to the scene which was behind the shops. There was blood at the scene. A suspect George Githinji had been arrested and placed in the police cells. He had been arrested from his house with a blood-stained knife, which was kept. He took statements from six (6) witnesses.
14. On the date of the post mortem he requested the doctor to take samples of the deceased's blood and preserve them. He stored them in a paper bag in the armory. He filled the exhibit memo form forwarding the exhibits. He produced the knife/sword which was sharp on both sides as EXB 4.
15. In cross examination he said the eye witness was Wamaitha (PW1) who was the club owner. He said recovery of the murder weapon was by I. P Kalundu who did not record a statement, same to the arresting officers and the officer who attended the post-mortem. He explained that he was a medical



- nurse and he knew how to handle exhibits and that the paper used to store the blood could not contaminate the blood. He explained further that they have a supply place in the armory, where they safely keep blood samples. He also personally presented the exhibits to the government chemist. He confirmed that the EXB 4 is what he presented to the government chemist.
16. In re-examination he admitted that the Exhibit Memo had not been produced in court. Further that the black and green colours mentioned in the report (EXB 3) are not rhyming. It was his evidence that he gave the Exhibit Memo to counsel Murunga for the prosecution for service on the defence counsel.
 17. When placed on his defence the accused elected to give a sworn statement without calling any witnesses. He said he was aged 42 years, married with three (3) children aged between 6 years and 22 years. It was his evidence that on 19th January, 2019 he was working with the deceased on the shamba. They left for home at 4pm and he arrived home at 5.00pm. While checking on his donkey which had a broken leg the deceased came there. He told him (accused) that he wanted to go to the centre. He declined as he had work to do and his wife was at the centre. When he finished his chores he went to his hotel at the centre, where his wife works.
 18. The wife left him behind at 8pm. The deceased came and together they went to Kirathimo bar after being persuaded. At the bar the deceased bought the first two bottles of alcohol while he bought the 3rd one. The time by then was 10.30pm. He suggested they leave but the deceased refused. After a while the two of them collided but his friend Paul came and they were able to resolve their issue. Paul bought alcohol which they took. The deceased then left at around 10.50pm leaving them behind.
 19. He bought half a bottle of alcohol which him and Paul took. He left twenty (20) minutes after the deceased left, but Paul remained behind. As he went home he saw three (3) people 100M away. When he reached them he identified the deceased, as one of the three and he was under attack. On asking what it was the other two wanted to attack him. He removed the knife he had and on seeing it the two men released the deceased and pushed him towards him. It was then that the knife he was holding pierced the deceased on the left side of the ribs. On seeing this the two attackers ran away.
 20. He checked at the centre but the person he saw with a motorcycle already had three (3) passengers whom he was rushing to hospital. He decided to go and seek assistance from home. He met the deceased's mother and explained to her, what had happened. He then went to the house to pick a jacket and he was arrested as he came out of the house. He confessed that the deceased was his good friend and he never intended to hurt him. He also confirmed that the knife he had had a green handle.
 21. In cross examination he admitted that him and deceased had taken alcohol. That they collided because he had told the deceased they leave and go home. He said he carried the knife as a defence weapon, and it was in his trouser. That when the knife struck the deceased he was holding it in his right hand.
 22. Both parties filed written submissions.

Prosecution's submissions

23. These were filed by M/s Emma Okok Principal prosecution counsel and are dated 19th November, 2024. She referred to their earlier submissions dated 10th November, 2023 in which it was submitted that from the evidence on record the prosecution had proved all the ingredients required in a Murder



case. In respect of the ingredients of malice aforethought counsel referred to the case of Nzuki v Republic 1993 KLR 171 where the Court of Appeal stated:

“ 1. Malice is a term of art and is either an express intention to kill or an implied whereby voluntary act by a person intending to cause grievous bodily harm to his victim and the victim died as a result”. (sic)

24. Counsel contended that the facts and evidence are cogent. Referring to *Rex V s/o Ochen* (1945) 12 EACA 63 she stated that the said case held that in determining whether malice aforethought has been established the court should consider the weapon used, the manner in which it is used and the body part targeted, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident.
25. Counsel submitted that the accused in his defence confirmed that he was at the scene of crime on the material night and that he was armed with a knife. That his attempt to explain how the deceased met this death was shaky and not corroborated and was thus an afterthought. It is counsel's contention that the evidence against the accused is direct as PW1 saw him kill the deceased using the knife he was armed with. Further that PW2 also confirmed that he was present during the arguments and he saw the accused follow the deceased shortly after the deceased left. She thus submitted that the prosecution had discharged its burden of proof.

The accused's submissions

26. The same were filed by Murunga Mwangi & Associates and are dated 19th November, 2024. Counsel while relying on the cases of: *Ramanlal Trambaklal Bhatt V Republic* (1957) E.A 332 and Anthony Njue Njeru V Republic (2006) eKLR submitted that the legal onus of proof is always on the prosecution to prove its case beyond reasonable doubt. He contended that there were quite some inconsistencies with the evidence presented herein by the prosecution.
27. Counsel while referring to the evidence of PW2 submitted that the accused and deceased had been quarrelling during their libations at the bar. The same was however resolved before their departure from the establishment. He thus submitted that there was no evidence indicative of the accused harbouring an intent to murder the deceased.
28. Counsel raised issue with the blood samples which were extracted on 29th January, 2019 but only reached the government chemist on 5th March, 2019. Further that the officer who arrested the accused, the one who retrieved the murder weapon and the one who oversaw the post mortem never recorded statements. In reference to EXB 4 counsel pointed out that PW7 in his evidence stated that the said exhibit had a green handle but PW6 testified that the sword subjected to analysis had a black rubber handle.
29. Thus, to counsel it was not clear whether the sword recovered was the same sword presented for analysis. He thus submitted that the prosecution case was full of substantive inconsistencies, thereby falling short of establishing a solid case against the accused.



Analysis and determination

30. I have carefully considered the evidence on record plus the submissions by both parties' counsel. The main issue falling for determination is whether the charge of murder has been proved against the accused. Section 203 of the *Penal Code* provides:

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

31. Further section 204 of the *Penal Code* provides:

“ Any person convicted of murder shall be sentenced to death”.

32.

29. For a charge of murder to be proved the following ingredients must be proved:

- i. The fact and cause of death.
- ii. Whether the cause of death was as a result of the accused's unlawful act (actus reus)
- iii. Whether the killing was committed with malice aforethought (Mens rea).

The fact and cause of death

33. The fact of death has been confirmed by PW1, PW3, PW4 and PW7. The body was identified for post-mortem by PW3 and PW4. PW5 Dr. Wainaina who performed the post mortem gave a detailed account of the cause of death. It was massive bleeding secondary to a stab wound in the chest (EXB 2). I therefore find that the fact and cause of death were established.

Whether the cause of death was as a result of the accused's unlawful act (actus reus)

34. To prove this issue the prosecution relied on the evidence of PW1 – an eye witness, and PW2 who had been with the accused and deceased drinking. PW1 is the owner of Kirathimo bar of Munanda trading center where the accused, deceased and PW2 were drinking. She told the court that this incident occurred on 29th January, 2019 around 9.00pm while she was at the bar. Following a disagreement over alcohol the accused hit the deceased with a fist. She told the accused to stop fighting in her bar and she removed the deceased from the bar. The accused followed the deceased and they fought while outside.

35. She had remained standing at the bar door. There was electricity light on, outside the bar. There were also two women outside at another bar. It was her evidence that while outside she saw the accused remove a knife and stab the deceased, who fell down bleeding. She went to call a doctor but upon her return she found the deceased already dead. This witness was very firm in her evidence which was not shaken at all in cross-examination.

36. PW2 confirmed having joined the accused and deceased for a drink at PW1's bar. He also confirmed that the deceased and accused had been disagreeing as they continued to take alcohol. He further confirmed that upon resolving their disagreements over drinks he told the deceased to go home and he left. After a short while the accused followed the deceased and shortly thereafter he heard noises and he went outside from where he learnt that the accused and deceased had fought and the latter was on the ground bleeding.



37. PW3 the father of the deceased was in his house sleeping when he was woken up by the accused's mother who was calling out. On meeting her, she told him the accused had stabbed his son. On going to the centre he found the deceased lying down bleeding and was already dead.
38. In his defence the accused admitted that it is the knife that he was holding in his hand that pierced the deceased (his friend) in the chest on the material night. That is was the knife with a green handle which was produced before this court as EXB4. In other words, he does not deny the fact that the deceased died as a result of the stab wound in his chest which was caused by the knife that he was holding. Further that the knife produced in court (EXB 4) was the murder weapon.
39. In his submissions Mr. Murunga for the accused raised several issues which I wish to address at this point. The issues are: The police officer who retrieved the alleged murder weapon did not record a statement. The three officers who arrested the accused did not record statements. The police officer who oversaw the post mortem did not record a statement. Whether the colour of the handle of the murder weapon, was black or green.
40. The impact of failing to call the arresting officers and the officer who retrieved EXB 4 really depends on the specific circumstances of the case, and the importance of their testimony. In this case none of the said officers witnessed the commission of the crime. In fact, there is no dispute in respect of the arrest of the accused. In his defence the accused said he was arrested as he left his house after picking his jacket.
41. As to the officer who retrieved EXB 4, PW7 who was the investigating officer stated that the accused was arrested from his house with the blood-stained knife on his body and brought to the police station. He received the accused plus all the information from the arresting officers. Again, the accused raised no issue about him being in possession of EXB 4 and the same being the murder weapon.
42. The knife that was produced as EXB 4 had a handle, and was sharp on both sides. The accused himself told the court that the knife he had and with which the deceased was pierced had a green handle. PW6 confirmed that it was the investigating officer (PW7) who took to the government chemist EXB 4 and requested for the examination of the exhibits. PW7 explained how the blood samples were stored before being taken for testing. He further stated that he was a medical nurse and he knew how to handle such exhibits. He also confirmed that EXB 4 which has a green handle is what he had taken to the government chemist for examination.
43. Counsel Murunga also raised issue with the failure by the officer who attended the post mortem to testify. The main witness in the conduct of the post mortem is the pathologist plus the witnesses who identify the body for the exercise. In this case PW3 and PW4 identified the body to PW5 for the post mortem exercise. No issue on the identification of the body or the conduct of the post mortem came up during the hearing.
44. I am guided by the following decisions on failure to call witnesses: In *Nyandoro v Republic* (Criminal Appeal No. 75 of 019) [2023] KECA 964 (KLR) the court held:
- “ Failure to call the arresting officer was not fatal. He said he was arrested”.
45. In *Orata v Republic* Criminal Appeal No. 73 of 2021 [2023] KEHC 21972 KLR (23rd August, 2023) (Judgment) Wendo J stated as follows:
- “ As to failure to call the arresting officer, the law is settled. Courts have over the years held that whereas it is important to call the investigating officer or arresting officers, failure to call them is not fatal to the prosecution case but it depends on the circumstances of each case. In *Kiriungi V Republic* [2009] KLR 638 the court said”



“..... the effect of failure to call police officers involved in a Criminal trial including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case is so demonstrated. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and arresting officers would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged”.

46. Further in *Keter v Republic* [2007] I EA 123 the court held:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt”.

47. From the above analysis and the decisions cited above I am of the humble view that the failure to call certain witnesses would only have assisted the defence if the prosecution case was weak. The evidence by PW1, PW2, PW6, PW7 and the accused himself has made out a full case against the accused. He is the one who stabbed the deceased killing him instantly. I therefore find that the second ingredient of committing an unlawful act by the accused led to the deceased’s death.

Whether the killing was committed with malice aforethought (mens rea)

48. Malice aforethought which refers to “mens rea” is the mental state or intent that a person must have had at the time of committing an offence. In a murder case the prosecution must prove not only that the accused committed the act (actus reus), but also that he/she had the necessary intention, (mens rea) to do so.

49. PW1 and PW2 confirmed that the deceased, accused and PW2 had been in PW1’s bar drinking alcohol that night. Infact PW2 said he found the two (deceased and accused) already in the bar drinking and he joined them. They continued drinking after PW2 joined them. When PW1 chased out the deceased, he was followed by the accused shortly thereafter.

50. It was confirmed by PW1 that the accused and deceased had disagreed when the deceased refused to buy alcohol after taking the one bought by the accused. It was then that the accused hit the deceased with his fist, which led to the deceased’s eviction from the bar.

51. On the other hand, PW2 who had joined the two men drinking said the two continued drinking as they disagreed. He confirmed that it was the deceased who left the bar first before being followed by the accused.

52. On his part the accused stated that he removed his knife to shield his friend (deceased) who was under attack by two unknown men. That when the two men noticed the knife they pushed the deceased towards him as he held the knife in his hand and that’s how the knife pierced him in the chest.

53. The facts clearly show that both the deceased and accused had been in PW1’s bar drinking alcohol. Its not clear for how long they had been there and just how much alcohol they had taken. Was the accused in the right state of mind to know what he was doing to his friend? It was the duty of the prosecution to prove that. The accused should have been tested to know the level of alcohol content in his system, which was never done.

54. This turns out to be a grey area and I find that malice aforethought has not been established in this case. It is only the unlawful killing which has been proved.

55. I therefore reduce the charge from Murder to Manslaughter contrary to section 202 as read with section 205 of the [penal code](#) and convict the accused of the same.



56. Orders accordingly

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

