



**Republic v Musa & 4 others (Criminal Case 1 of 2013)
[2024] KEHC 621 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 1 OF 2013
SM MOHOCHI, J
JANUARY 31, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

DANIEL KIMATHI MUSA 1ST ACCUSED

LUCY NKIROTE KINGERU 2ND ACCUSED

HENRY KARUCHI KIBARO 3RD ACCUSED

JOHN KINUTHIA MAINA 4TH ACCUSED

PATRICK GITONGA KINGARU 5TH ACCUSED

JUDGMENT

1. The accused persons were charged with 2 counts on the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that on the 4th of January, 2013 at Orumwe village in Laikipia county, jointly with others not before court, murdered Elijah Mwangi Nderitu and Kamau Nderitu. All accused persons pleaded “not guilty” to the charges on both counts.

Prosecutions Case

2. PW1 was Dickson Mwangi Wanderi, an IT. Specialist testified that he received a phone call from a neighbour in Nyahururu saying that there was commotion in his shamba that his workers had been invaded by a group. He called Nyahururu Police Station and the chief to report. He travelled to the farm and on arriving he found police and two of his workers killed and police had arrested one person. He was able to identify the body of his worker Elijah.
3. He added that the bodies had been cut with pangas. Elijah had deep cuts on the head neck and leg. The other had cuts on the hands and had blood all over. He saw pangas, hoes or spades at the scene. He



- went to the station to write his statement and found that the 1st and 2nd accused persons had already been arrested. He knew them as he used to see them in the area. The deceased had land problems with the accused persons. The deceased had worked for him for over a year before he bought the land. There had been a land dispute between the deceased and the accused person.
4. On cross examination he stated he did not know who started the fight as he only arrived after the deceased had been killed. He found more than 20 people at the scene. That he did not forcefully grab land from the peasants who were living there. He stated that in his statement he has not mentioned the names of any other accused person apart from Kimathi. He stated that he did not send goons to forcefully evict the accused persons from the land as the accused persons had been cultivation on the land for over one year.
 5. PW2 was Geoffrey Nderitu Mwangi, the son to Elijah Murigi (deceased). Daniel was his uncle. He stated that on 4th January, 2013 at 8.00am his father went to work in the farm of PW1. He later received a call that his father was being killed. He rushed to the farm and found his father standing there surrounded by 7 men. He was talking on his phone and he heard him call the OCS Nyahuru that he needed help that some people wanted to kill him. He went and stood close to his father. Two women came from behind one was carrying a jembe and hit the deceased at the back with jembe. As he fell he held him. He was also hit with a stone on the left ear and fell down. As he was getting up, he saw a panga and lifted his hand to defend himself and was cut on his left hand. He got up and ran and left his father lying there. He ran to seek help. He could not assist his father he was already injured. He identified the jembe used to hit his father but could not identify the stone or panga. He identified the 2nd accused accuse person as the person who hit his father. He knew who she was as she was the wife to the 1st accused person.
 6. On cross-examination he stated that, he was sure that it was the 2nd accused person who hit his father but his statement he said it was the wife of Kingaru (5th accused) who hit his father. The wife of Kingaru was not in court. He did not know who hit him with a stone. He did not mention being hit with a stone in his statement to the police. He could not tell how many people were at the farm when he arrived. He was confused and feared for his father. He did not know whether 1st accused was cut and taken to hospital. He was not aware of any land dispute. He added that he did not go to the farm with a panga or to attack people. He did not know who called him to the farm he just rushed.
 7. He testified that what he told the police is that he was at home drying maize when he heard women shouting and ran to the farm. He stated that he was depressed due to the death of his father. That he had written his statement two weeks after the death. that he found many people at the farm some were armed some were not. Some had gone to help his father. That it was the accused persons who killed his father. Each of them had a panga. He said to have not stated that in his statement. That his statement was only on him. He was hesitant and reluctant to answer questions put on him and talked in a low an inaudible voice. He could not tell how long it took him to get to the farm.
 8. PW3 was Elija Maina Mwangi a carpenter. Knew both deceased persons as they were his uncles. On the material day he was in town. He did not witness the murder but identified the bodies in the mortuary. Both bodies had injuries and cuts that looked like were inflicted with a panga. He showed the photographs of the two deceased persons. On cross examination he stated that he only knew the accused persons from appearance and had not known hem before the incident.
 9. PW4 was Zachary Njogu Wairaya stated that both deceased persons were his uncles. That he did not witness the killings or go to the scene. He identified the bodies at the mortuary. Photographs 1-8 were of Elijah Mwangi and 9-15 of Elijah Mwangi (seemed unsure). He stated to have known the deceased



well and photo 15 was Daniel Kamau. Both bodies had cuts hands, legs and head. Elijah had a cut on his head which opened the head.

10. PW5 was No. 93937 PC Edward Sanya, a scene of crime officer based at DCIO at Nyandarua North. He recalls on 4th January, 2013 at about 10.50 am he was requested by corporal Njuki the Investigating officer to visit the murders scene. He went to the scene and found the bodies of the deceased persons. He took 15 photographs. 1-8 general close-up view with the farm with the body of Eijah with visible multiple cut injuries to the head both hands and leg. The photos also show pipes, a generator, a close-up view showing open skull of Elijah plus the cuts to the head. Photographs 9-15 general close-up view of the body of Kamau with visible multiple cut injuries to hand legs and head. Photograph 16 show the suspected weapons, a fork jembe, a panga and a stone, the weapons lay about 3 meters from the body of the deceased. Produced the photos as P-Exh 2(a) and certificate as P-Exh 2(b).
11. On cross examination he recalls seeing accused 1 and 2 at the scene. Did not recall seeing accused 3,4 and 5 at the scene. There was a crowd that was chaotic. He stated that that the offence occurred before he was gazetted and carried out the crime scene photos as qualified personnel. He was working in the field before he was gazetted. The weapons were taken to the government chemist. He did not use ultraviolet light in his photography.
12. On re-examination, he stated that he had been fully trained and was working in the field and was a professional in handling of the scene. He went to the field due to lack of personnel. He was not the one who investigated the matter.
13. PW6 was Stephen Werighe, a government analyst based at the Government Chemist. He knew Elizabeth Waithira Oyiego a colleague they have worked with for 17 years and could recognize her handwriting and signature. The report was prepared by Ms. Oyiego and wished to produce it on her behalf. There was no objection.
14. He testified that an analysis was conducted and the findings were that the panga, fork jembe, sword and stone were lightly stained with blood. A DNA profile generated revealed that profiles generated from the blood on the panga and stone matched and were DNA of an unknown male person . the DNA profile generates of the sword and stone were of 2 different unknown male persons. Several attempts were made to generate DNA profiles from the deceased persons which failed because the samples were putrid. He produced the report dated 1st July, 2015 as P-Exh 7(a) and memo form as P-Exh 7(b)
15. PW7 was Dr. Patrick Kiruki, a senior medical at Nyandarua County, he stated to having worked with Dr. Njeru and could recognize his writing and signature and wished to produce his report on his behalf. There was no objection. He testified that on 8th January, 2013 an autopsy was conducted on Elijah Maina by Dr. Njeru.(he read the findings in open court) Dr. Njeru filed and signed the post mortem report and it was produced as P-Exh 8.
16. He also stated to having known Dr. Mona. He worked with him and could recognize his handwriting and signature and wished to produce the report on his behalf. There was no objection. He testified that on 8th January, 2013 an autopsy was conducted on Daniel Kamau. Dr. Mona filed and signed the post mortem report and produced as P-Exh 9.
17. On cross-examination he stated that it is the police who fill in the details and history. That he had documents from MOH authorizing him to testify on behalf of his colleagues MFI 10. The exact weapon to inflict the injuries was not stated.
18. The Prosecution closed their case and the accused persons were put on Defence. The accused person did not call any witnesses but testified under oath.



Defence Case

19. DW1 was the 1st accused person, he testified that on the 4th of January 2013, a crowd of about 30 people came to his farm while he was harvesting maize. The crowd was armed with pangas and jembes and water pipes. That one of them attacked immediately with a panga and as he tried to run, the soil tripped him and he fell and was cut with a panga on his upper neck the rest of the crowd joined in and another person cut him on the arm. He became unconscious. He found himself in hospital with a police present who informed him that he was being charged with murder. He stated that the crowd was charged because they wanted to connect water. He knew them as his neighbors. That he lived peacefully with them but was aware that he had a land ownership dispute with PW1. He added that he did not know who killed the deceased person. That the person who cut him is Elijah. He saw Elijah running towards him with a panga. He stated he did not see him cutting him.
20. In cross examination, he stated that the crowd came with farm implements. They were going to connect water but came to his compound. The crowd was in the shamba not in my compound but the compound is in the shamba. He did not have any implement or weapon. He was with his son. He went to confront the crowd alone and left his son in another part of the shamba. That the crowd did not go to his compound but were in the farm (the court noted that the witness came across as shiftily and constantly changed his answer). That he went to ask the crowd as neighbours what was going on and instead Elijah ran to attack him. He fell. He was not sure it was Elijah who cut him. He added that he did not have a panga, his wife, co-accused was inside the house with a small child. That he later learnt that his son who was then about 15-16 years ran after he was attacked. That there was no noise or commotion when he approached the crowd.
21. DW2, was the 2nd accused person, who stated that on 4th January, 2013 was in the house with her two younger children. She was feeding the youngest when she heard a scream and got outside the gate and saw the 1st accused lying on the ground outside the gate. She stated that she screamed and might have fainted since she did not recall what happened thereafter. She stated that she was carrying the small child and someone hit her and she lost consciousness. She woke in hospital and was arrested. She added that she could not have hit Elijah since she was holding a small baby. That she also did not have a weapon.
22. In cross-examination, the 2nd accused stated that on the day of the incident she did not see Elijah but only the 1st accused. She was shocked and fainted when she saw a crowd chanting and did not see anyone trying to help her husband. The people were around fifty screaming and chanting but did not see them fighting. I was too scared to see what was going on. She was blamed because she screamed. She did not know anyone in the crowd
23. DW3 was the 3rd Accused person. He stated that on 4th January, 2013 he was in his shamba and heard noise from the lower side of the farms but from far so he decided to continue with his work. He later learnt the noise came from the shamba of the 1st accused. That he saw many people going towards the 1st accused's shamba carrying pangas and jembes. He called the Deputy OCS. He did not leave his shamba. That he called the Deputy OCS 3 times and the police came later at 4.00pm. the OCS called me and told me to go to the scene and on getting to the scene he was arrested and was told he would be told at the station. He did not kill anyone and only learnt that two people had been killed the next day at the police station.
24. In cross examination, he stated that he never heard any whistles or the 2nd accused's screams and if the police recorded that they made it up. He had no equipment. He did not recall the number of the Deputy OCS or name. He stated that the police asked questions and recorded something but he did not sign anything.



25. DW4 was the 4th accused person. He stated that on 4th January, 2013 he was in his shamba when he heard some screams from far and the four casual labourers from his shamba ran away and was left alone. He then ferried maize home alone. At 4 pm some police came to his office and arrested him. He did not know the reason. He later learnt that there were two people killed. He knew both the deceased persons but did not see them on the fateful day.
26. DW5 was the 5th accused person. He stated that on 4th January, 2013 he went to Nyahururu to look for work. He worked up to around 5 pm and left. He got home at 6.30 pm. That a certain cucu went to his house and told him of the day's happenings and that the 1st accused had been arrested. He added that she told him to go fetch the 1st accused cows as they were still in the field. On taking the cows he found two askaris and as he was starting to leave they asked who he was and they arrested him.
27. The Prosecution stated that it did not intend to file submissions. The Defence filed written submissions on 13th June, 2022.

Defence Submissions

28. Counsel for the accused persons submitted that none of the Prosecution Witnesses were present during the murder and only PW2 testified that he was at the scene of crime and could not identify whether the Kamau Nderitu was present at the time of the murder. That he only spoke of the murder of Elijah. That he contradicted himself on who hit his father. It was submitted that PW2 identified the accused persons in court and relied on the case of *Milton Toroitich Poghon v Republic* [2018] eKLR that dock identification was useless.
29. It was submitted that the prosecution failed to call crucial witnesses and relied on the case of *Republic vs Felix Kanil* [2016] eKLR as well as Jamaleck Kariuki Njururi. It was also submitted that there were inconsistencies and contradicting information in the testimonies of the Prosecution Witnesses.
30. Counsel for the accused persons submitted that the 1st and 2nd accused persons did not harbor motive to kill the deceased and finally that the prosecution failed to adduce enough circumstantial evidence that pointed to guilt of the accused persons. Reliance was placed in the judicial authorities in *John Mwanzo Machal v Republic* [2017] eKLR and *Republic v Juma Kituko Mwambegu* [2020] eKLR.

Determination

31. I have carefully considered all the evidence availed before court and the only issue in question in this case is whether the prosecution have proved whether the accused persons caused the death of the deceased persons and was there actual malice?
32. The offence and punishment for murder is provided for under Section 203 and 204 of the *Penal Code*. The said provisions provide that;
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
33. To establish the offence of murder, the prosecution is required to prove beyond reasonable doubt, proof of death, proof that the death was caused by the accused, by an unlawful act or omission and that, the unlawful act or omission was through malice aforethought.



34. Section 206 of the *Penal Code* defines Malice aforethought as follows:

- “206. 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.”

Proof of Death

35. PW1 confirmed that he saw the bodies of the deceased when he reached the scene. PW3 and PW4 identified the bodies of the deceased in the mortuary. PW5 took photos of the crime scene and produced them in evidence as P-Exh 2(a) and P-Exh 2(b).
36. By the evidence of PW7, he produced the post mortem reports for Elijah Mwangi Nderitu and Daniel Kamau Nderitu as P-Exh 8 and P-Exh 9 respectively both dated 8th January, 2013. The post mortem report revealed that the cause of death for Elijah Mwangi was severe head injury with severe hemorrhage and that of Daniel Kamau Nderitu was severe head injury with severe hemorrhage leading to death. according to the prosecution has satisfied this condition beyond reasonable doubt.

Whether the death was caused by an unlawful act or omission

37. The only evidence placing any of the accused on the scene was by was that of one witness, PW2. The defence challenged PW2’s evidence as contradictory and unreliable. PW2 is the only one who testified and said that he saw the 2nd accused was the one who hit the deceased Elija with a jembe on the back of his head. PW2 also stated that in his written statement, the deceased was hit with a jembe by the wife of the 6th accused person. The reasons for the inconsistency was that he recorded the statement a few weeks after the death of his father and was depressed.
38. In *Abada bin Wendo and Another v R* [1953] 20 EACA 166 the court expressed itself as hereunder on the issue of considering the evidence of a single eye witness:-

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of



identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

39. PW2 testified that his father was hit on the back of the head with a Jembe. It is not clear whether the jembe is the one that inflicted the fatal cut to the head. It is also not clear whether he died instantly or afterwards since PW2 stated that he ran away after he was cut on the hand. As to how the deceased got the other deep cut wounds on the hands and leg, has also not been clearly put out.
40. The Defence contends that the inconsistencies are fatal to the evidence of PW2 and cannot be relied on. The court has to consider his evidence in light of the light of the existing circumstances, and together with other evidence placed on record. From the evidence placed before court, it is quite unfortunate that the evidence of PW2 did not receive corroboration from any other evidence due to shortcomings on the part of the prosecution and the investigation.
41. The 1st and 2nd accused persons testified that they were not armed and thus did not kill both the deceased persons. The 1st accused stated that it was actually Elija who charged at him with a panga. The 1st accused person testified that his wife, the 2nd accused person, was not present at the scene but was inside the house with their youngest child. The 2nd accused persons evidence corroborates that of the 1st accused person as to not being present at the scene and only coming after the 1st accused was on the ground unconscious. The evidence of PW2 places the 1st accused at the scene which the accused admitted however PW2 does not name the 1st accused person as the one who killed his father, Elijah.
42. The death of Elijah is shrouded with uncertainty. According to PW5 a fork jembe, a panga and a stone were the suspected weapons. What weapon rendered the fatal blow is a mystery.
43. As to the death of Daniel, none of the prosecution witnesses actually saw the accused persons kill the deceased Daniel Kamau Nderitu. As a matter of fact, the body of Daniel is just being identified by the prosecution witness and nothing more. From the evidence on record the testimonies of both prosecution and defence witnesses do not address how Daniel died, who killed him or the circumstances that led to his death. The circumstances that surround the death of Daniel are still a mystery up to date.
44. The motive of the killing the deceased persons may not have come out clearly, or who instigated the fight that ensued but from the evidence of PW1 and DW1 there seemed to have been a land dispute. The 1st and 2nd accused persons were at the scene during the incident that led to the murder of Elijah none is directly linked to the death of Elijah. The 3rd, 4th and 5th accused persons were never placed at the scene of crime at the time of the incident or even linked to the deaths..
45. It is my considered view that, the prosecution failed to establish that the accused persons caused the death of the deceased by an unlawful act or omission.
46. The Defence counsel submitted that, the prosecution failed to avail crucial witnesses that were needed to establish the truth. In this case, the investigating officer and the arresting officers never testified in court. The Defence has also faulted the prosecution from availing the OCS and the person who called PW2 to inform him that Elijah was being killed.
47. With respect to the investigating officer never being called to testify in court in this case, the Court of Appeal in *Harward Shikanga Alias Kadogo & Another vs. Republic* [2008] eKLR expressed itself as follows:

“But Mr. Onalo appeared to have been contending that merely because the investigating officer had not been called, the prosecution’s case had not been probed as required by



law. That submission is now frequently made in the courts and it shows that for some unexplained reason or reasons investigating officers are often not called to testify...We can also only hope that the prosecuting authorities in the country will stop the emerging practice of not calling investigating officers to testify and there may well be circumstances in which such a failure may well be fatal to the conviction.”

48. The investigation file was never availed in court and the reasons to charge the accused persons remain a mystery. In this case the effect of the failure by the investigating officer to testify is that the evidence crucial to the case was never exhibited. Therefore, the only evidence that would have linked the accused to the offence was that of identification. Even here, the witness who might have been at the scene PW2 has given contradictory evidence on the death of one deceased person only.

49. With respect to the failure to call the arresting officer, the Court of Appeal in *Francis Mwaura Mwangi v Republic* [2010] eKLR expressed itself inter alia as follows:

“In this appeal, the witnesses said they knew the appellant well and immediately gave his nickname “Blackie” to the police. Yet it took the police nearly four months to arrest him and no explanation at all was forthcoming as to why that was so. The officer who arrested him did not come to explain how he had connected him with the name “Blackie” and why it had taken him so long to arrest him. We are not to be understood to be saying that in each and every case, the arresting officer must come and testify. Each situation must be considered and determined on its own circumstances. The appellant said he was merely arrested in a police swoop and he did not know why he had been arrested. He denied being involved in the robberies and the prosecution was under a duty to leave no loose ends which can lead to reasonable doubt being raised. Neither the trial Magistrate in his brief judgment, nor the two learned Judges on first appeal, dealt with any of these issues.”

50. As to the circumstances that informed the decision of the police to arrest the accused persons remains a mystery. The 1st and 2nd accused persons stated that they were arrested in the hospital after both fell unconscious and woke up in hospital. The 3rd and 4th accused persons stated they were arrested in their homes at around 4.p.m and the 5th accused person was arrested at the homestead of the 1st accused person when according to his testimony, he went to take the 1st accused persons cows back from the field at around 6.30 pm. The prosecution had opportunity to call rebutting evidence but did not do so.

51. Further the murder weapons were never produced as exhibits. Albeit the lack of production of the murder weapon not being fatal, the analysis could not link any of the weapons to either the deceased or the accused persons. There was no nexus between the accused persons the deceased and the weapons. There was an attempt to generate DNA profiles from the samples of the deceased persons but the blood was putrid.

52. Nothing justifies taking the life of any human being. The right to life is provided for under article 26(3) of *the constitution*. The right to a fair trial is provided for in *the constitution* under Article 50. The rights of the accused persons have to be considered and those right cannot be deprived unless there is legal justification. It goes without saying that an accused person under article 50 (2) (a) of *the constitution* is presumed innocent until the state proves beyond reasonable doubt to the contrary.

53. The prosecution has some glaring gaps in their case. The prosecution had inconclusive evidence that the accused persons were the ones who did the act or omission that caused the deceased death, there is legal no basis for inferring guilt on their part. The burden does not shift on the accused persons.



54. In totality, having considered the evidence adduced in this case I do find that the prosecution has not proved the case of murder against the 5 accused persons beyond reasonable doubt. In that regard the court has to accord the benefit of doubt to the accused persons and they are hereby acquitted of the said offence.

55. The Accused persons shall forthwith be set free unless otherwise lawfully held.

It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JANUARY, 2024

-----.....

MOHOCHI. S. M.

JUDGE

