



**Republic v Karea & 2 others (Criminal Case 31 of 2018)
[2024] KEHC 3065 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL CASE 31 OF 2018
LW GITARI, J
MARCH 21, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

TITUS MUTUGI KAREA 1ST ACCUSED

BONFACE MUGAO MATHENGE 2ND ACCUSED

JOSHUA MUGAO MATHENGE 3RD ACCUSED

JUDGMENT

1. The accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* (Cap 63 of the Laws of Kenya).
2. The particulars of the offence are that on the 9th day of October, 2018 at Ciamuruma village, Kathangacini location, Tharaka North Sub-County, within Tharaka-Nithi County, the accused persons jointly with others not before court unlawfully murdered one Alex Gitonga Muganka.
3. All the three (3) accused persons denied the charge and the matter proceeded to full trial with the prosecution calling a total of ten (10) witnesses in support of their case against the accused persons.
4. Below is a summary of the prosecution’s case.

The Prosecution’s Case

5. PW1 was Purity Karimi Mati. She stated that she knew the accused persons as they are neighbours. That she also knew the deceased person as a teacher at Yombo Primary School. PW1 stated that she is a parent in the aforementioned school and recalled that on the material day between 8 p.m. and 9 p.m., she was going home from Kathangacini riding a boda boda. When she reached a place called Kwa



- Chia Muruma, she found the 1st, 2nd, and 3rd Accused persons had gotten an accident and fallen from a motorcycle.
6. It was PW1's testimony that the deceased was already down and that the 1st Accused was tying the deceased leg using his shirt. That the 2nd Accused was holding the deceased while the 3rd Accused was speaking on phone. The motorcycle was next to them. PW1 inquired what had transpired from the accused persons and the 2nd Accused told her that they had been involved in an accident and that the deceased had been injured on the thigh and was bleeding.
 7. PW1 alleges that she stayed there for almost 10 minutes. She called head teacher Murungi and informed him that the deceased had gotten into an accident and was injured. According to her, several persons went and passed the scene and only PW1 stopped to find out what had transpired. She stated that she did not observe the scene properly.
 8. PW2 was Benjamin Gitonga, also a parent at the school where the deceased was teaching. He also knew the deceased. PW2 recalled that on the material day, he was going to Kathangacini Market from Kariba at around 2 p.m. It was PW2's testimony that he was using a boda boda belonging to the 1st Accused. That when he reached Kathangacini, he went for shopping in the market and request the 1st Accused to wait for him. PW2 finished shopping and then he proceeded to a bar where he had agreed to meet the 1st Accused. He found the 1st Accused waiting for him while in the company of the 2nd Accused. PW2 paid the 1st Accused Kshs. 150/= as his fare to and from. That the 1st Accused asked them to wait for him as he made some business with the boda boda and that he would pick them up later.
 9. PW2 and the 2nd Accused then waited at the bar while drinking. At 5 p.m., the 1st Accused had not returned. He came at 6 p.m. and took two cups of alcohol before telling PW2 and the 2nd Accused that he was now ready to take them. According to PW2, he went and took his shopping bag while the 2nd Accused boarded the boda boda. That the PW2 was then told to wait for them as they went to fuel the boda boda. PW2 then waited for 30 minutes before he decided to take back his shopping to the bar for safe keeping and then went to look for the 1st and 2nd Accused. That he did not find them but only came across Kamwala, the deceased, and Sebastian Mugendi. PW2 then left them and went to the club where he had left his bag. He still did not find them. PW2 stayed up to 8 p.m. and then decided to board another boda boda to take him home.
 10. After about 2.5 kilometers from Kathangacini, at a place called Chia Muruma, they found many people had gathered. The boda boda rider was riding PW2 then stopped the boda boda. They got off the boda boda and that is where they found the body of the deceased lying on the road. According to PW2, the thigh of the deceased had been cut and so had his trouser. He stated that there was a bag and a panga beside the body.
 11. PW3 was Patrick Mwinzi Muriungi, the head teacher at Yombo Primary School. He stated that the deceased was his deputy. He recalled that on the material day, the deceased had gone to the bank to get money so that he could send to Meru to pay for examination. That he went to Transnation Sacco at Kathangacini and he was to withdraw Kshs. 19,000/=. That he left with Peter Kamwara and another teacher at around 1 p.m. That at around 9.13 p.m., PW3 was called by PW1 and informed that the deceased had been injured. PW3 then realized that the situation was serious when PW1 could not give the deceased the phone.
 12. PW3 then called a PTA member and asked him to pick the deceased and take him to the school. That another teacher heard about the incident and told PW3 that they should go to the scene. They proceeded to the scene in the company of the watchman. While on the way, PW3 called a doctor. They then arrived at the scene and found the 2nd Accused trying to tie the deceased's thigh. The police were



- called to the scene and when they checked the pockets of the deceased, they found a bank withdrawal slip of Kshs. 15,000/= and Kshs. 9,150/= cash money. They also found a torch and a black bag. The police then took photographs of the scene and left with the body of the deceased.
13. PW4 was Kamwana Peter Mutonga. He stated that the deceased used to be his colleague at Yombo Primary School and that he also knew the accused persons. PW4 recalled that on the material day at around 1.30 p.m., he was travelling with the deceased and PW4 had carried him as a pillion passenger in PW's boda boda. The two were travelling from Yombo heading to Kathangacini market and the deceased had a black travelling bag. That the two parted ways when they reached at Kathangacini market at around 2 p.m. in the evening at around 6 p.m. they met again at a butchery and each bought a quarter (¼) kilo of meat and then parted company again. The following day, PW4 switched on his phone and got an SMS from a fellow teacher by the name of Henry Mungania indicating that the deceased had been killed the previous night.
 14. PW5 was Geoffrey Muema Ndeto, the sub-country Director of Education for Tharaka North. He knew the deceased as a teacher at Yombo Primary School. PW5 recalled that on the material night at around 9.30 p.m., he was at his home in Gatunga when he was called by the CSO Mr. Mugwika and told that there was a teacher who had been involved in a serious accident. PW5 called the OCPD who told him to call the OCS which PW5 did. PW5 then proceeded to the scene with the police officers where they found the deceased lying down dead. They were then told that the deceased had been involved in an accident involving a motorbike and according to PW5, the three accused persons herein were at the scene. They however did not find the motorbike at the scene and were told that the rider had taken off for fear of being lynched.
 15. PW6 was Charles Kirimi Njambari, he stated that he knew the deceased as his nephew as the deceased's father was PW6's guardian. It was his testimony that he did not know the accused persons but had met the 2nd Accused before. It was his testimony that on the material day at around 10.00 p.m., he was coming from Tharaka University and that by then, he was working as a teacher at Marimanti Primary School and used to stay at Marimanti Town. He then received a call from a KNUST official who informed him of an accident that the deceased had been involved in. That later on, the same person called him and told him that the deceased had died instantly after the accident. PW6 is the one who later identified the deceased body during the postmortem examination.
 16. PW7 was Lydia Kawira Mwangangi, the widow to the deceased. She stated that he knew the accused persons as they were schoolmates at Yombo Primary School. She received information about her husband's accident and instant when she was called on 10th October, 2018 and requested to go record her statement at the police station. She was also present when a post-mortem was done on the body of her the deceased.
 17. PW8 was Ruth Wangari, a government analyst. On 16th October, 2018 they received in their laboratory some items from P.C. Jotham Murithi including a panga with a wooden handle, a blood sample on a swab stick, a khaki in an envelop, and blood samples on cotton wool in small containers. It was desired that they examine the samples. Upon analyzing the samples she found that the panga was stained with human blood which matched that of the deceased.
 18. PW9 was P.C. Jotham Murithi, the investigating officer. He recalled that on the material day at around 9.30 p.m. he was called by the OCS informing of an accident that had occurred at Kathangacini Village, Tharaka North. He prepared for the Education officer who had indicated was coming and they proceeded to the scene. They found the deceased's body on the road and a blood stained panga behind the deceased. PW6 stated that there was also a black bag at the scene but there was no motorbike found at the scene. The 2nd and the 3rd Accused appeared at the scene and informed PW9 that they had been



involved in an accident while on a motorbike that was being driven by the 1st Accused. That they tried to give the deceased first aid after the accident. The 2nd and 3rd Accused were then released to go home but instructed to go to the police station the next morning together with the rider.

19. The following morning, the 1st Accused reported at the police station together with his motorbike and while carrying the 2nd and 3rd Accused persons. PW9 examined the motorbike which was Dyun KMDP739X blue in colour and found that it had no damages. He proceeded to take photographs of the same and recorded the statements of the witnesses.
20. PW10 was Dr. Nicholas Nkonge. He produced in evidence a postmortem report that had been prepared by a Dr. Kitili, who is now deceased. PW10 stated that he had worked with the late Dr. Kitili for 7 years and was conversant with his handwriting and signature. According to the doctor the cause of death was severe haemorrhage from severed blood vessels on the leg. He produced the postmortem from as exhibit 10.

The Defence Case

21. Titus Mutugi Karea testified as DW1. It was his testimony that he knows his co-accused as they are all related. That on the material day, he was at Kathangacini Market operating a boda boda. That at about 8.00 p.m., he met the 2nd and 3rd Accused at the stage and they all boarded the boda boda. That they proceeded from the lower stage to the upper stage where they met the deceased in this case. The 1st Accused then decided to take all of them home. It was his testimony that the deceased had carried a bag and a panga and was drunk. That the deceased insisted on not sitting at the back as he was drunk and he therefore sat between the 2nd and 3rd Accused. That they then proceeded for about one (1) kilometer when they realized that the deceased was asleep as he was making the motorbike to lose balance. They woke him up and then proceeded with their journey. At Ciamoruma, they got an accident when the motorbike lost control and overturned.
22. The 3rd Accused who was sitting at the back lifted the motorbike and that is when they realized that the deceased had been injured on the inner side of the leg and was bleeding. The 1st Accused then removed his t-shirt and tried to tie of the deceased to stop the bleeding but the bleeding continued. In the meantime, the 3rd Accused started making calls to try and get a vehicle but it was all in vain. The deceased passed away and a crowd of people started gathering. The 1st Accused then rushed home on his motor bike as he did not have clothes and feared that he would be blamed for the accident. The following day, the 1st Accused presented himself at the police station together with his co-accused.
23. The 2nd and 3rd Accused testified as DW2 and DW3 respectively. They both corroborated the version of unfolding events on the material night as stated by the 1st Accused.

The defence filed written submissions while the prosecution opted not to file written submissions. It was submitted on behalf of the accused that for the prosecution to secure a conviction, they are required to prove three ingredients against the accused. These are;

- a. The death of deceased occurred.
- b. The death of deceased was caused by an unlawful act or omission
- c. That the accused committed the unlawful act or omission which cause the death of the deceased, and
- d. That the accused had malice aforethought.

See *Anthony Ndegwa Ngari -v- Republic* (2014) eKLR



On the issue of proof in murder cases, it is submitted that it is trite law bears the burden of proving the crime against each of the set ingredients beyond reasonable doubts. Republic –v- Safari Katana Lugo (2011) eKLR. It was further submitted that the components consists of burden of proof and the evidential burden which duly is clearly emanated by Fidelis in his book Morelen Nigerian Law of Evidence, University of Lagos Press, Lagos (1999) 379 as follows:-

“The term Burden of Proof is used in two different senses. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts which constitute his whole case are true , and consequent to have the case established and Judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact or issue. This evidence in some cases, must be sufficient to prove the fat or issue to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used.”

The defence Counsel submits that the prosecution evidence is wanting as it is mere hearsay as nine of the witnesses witnessed the accident. That the evidence is inadmissible and of no evidential value which should not be relied on. Reliance was on Kinyatti-v- Republic Criminal Appeal No. 60/1983 (C.A) where it was stated-

“Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying. It is not original evidence and is inadmissible.”

The defence further submits that the prosecution did proof that the deceased died as the doctor (PW10) testified that cause of death was severe hemorrhage due to deep cut on the right thigh. That there was no any unlawful act or omission that happened. That it is clear from the evidence of the accused persons that they were involved in a motor cycle accident whereby they fell and the deceased sustained injury from the panga that he was carrying and he bled to death. The defence has urged the court to find that the death of the deceased was an accident/misadventure but not due to unlawful act.

Issues for Determination

24. I have considered the evidence adduced by the prosecution and the defence. I have also considered the submissions by accused persons.
25. Section 203 of the Penal Code defines the offence of murder and requires proof of the following elements for the offence be established:
 - a. death of the deceased,
 - b. cause of death of the deceased,
 - c. an unlawful act or omission on the part of the accused resulting in the death of the deceased,
 - d. malice aforethought on the part of the accused.
26. From the provision under Section 203 of the Penal Code the main issues that arise for determination by this Court are as follows:
 - a. Whether there is proof of the fact and cause of death of the deceased; and if so,
 - b. Whether the accused persons caused the death of the deceased; and if so,



- c. Whether the accused persons had the requisite mens rea for murder, that is, malice aforethought

Analysis

a. On the proof of fact and cause of death

27. There is no doubt that the deceased died as his dead body was identified by his wife (PW7) and uncle (PW6). The postmortem examination that was done in this case and postmortem report that was produced by PW10 is additional evidence that the deceased did die.
28. On the cause of death, it was the testimony of PW10 that his late colleague, Dr. Kitili, who performed the postmortem examination on the body of the deceased arrived at the finding that the cause of death was severe haemorrhage due to the injury on the thigh.
 - a. On whether the accused committed the unlawful acts that caused the death of the deceased
29. In *Rex v Mutoro s/o Luigo & another* [1936] 3 EACA the Court held as follows:

“The actus reus for the offence of murder is the unlawful act or omission causing the death of another person.” The dangerous test of the act is as laid down in the case of *DPP v Newbury and another* {1976} 2 ALL ER 365 “It was stated that it is homicide where the death results from an unlawful act directed against the person involving a considerable risk of injury but which no reasonable man would foresee as likely to cause death or grievous harm.”
30. Both PW1 and PW2 found the accused persons at the scene of the crime. On cross examination, PW1 stated that she did not see who rode the motorcycle but the same was there at the scene. There was no other source of light but she was able to identify the accused using the lights from the motorcycle.
31. According to PW2, the panga that he saw next to the body of the deceased had blood stains all over, from the handle to the blade. He stated that it was at night and he could not recognize everyone but was able to recognize Njoroge, Kawira, Bonface, and Joshua among others.
32. PW3 corroborated the testimony of PW2 that at the scene, they found the deceased lying on the side of the road in a pool of blood and that there was a sharp panga beside him. PW8 examined the blood samples on the panga and found that they were of human origin. They then did a D.N.A. profile and found that it matched the blood sample item belonging to the deceased.
33. The accused persons alleged that it is the deceased that was carrying a panga and that he was drunk. The testimonies of the accused as to the level of intoxication of the deceased on the material night was confirmed by the testimony of PW4 who testified that he left the deceased when he was a little tipsy when they left the butchery. The credibility of the testimonies of PW1, PW2, PW3, and PW4 were not shaken. There is no reason not to believe the account that the death of deceased resulted from an accident and not an unlawful act intended to kill the deceased.

The investigating officer like these witnesses was informed about the accident involving the deceased. He got his reservations and decided to investigate that matter. His testimony was that he was called by the OCS who told him that there was an accident at Kathangacini village Tharaka North where a teacher was involved in a motor bike accident and died. He went to the scene and found a body on the road and a bloodstained panga. The panga was behind the scene. He did not find a motor bike at the scene. He did not find the point of impact at the scene. He then concluded that there was no accident. From his testimony, PW9 did not receive any evidence to rule out the allegations that the deceased



sustained the fatal injuries in the motor bike accident. All what the investigating officer relied on was suspicion. It is trite law that suspicion, no matter how strong cannot form a basis for a conviction. The investigating officer did not come across any credible evidence which suggest that the deceased was murdered. His evidence which I have analysed above is mere suspicion that there was no accident that occurred. These amounts to suspicion.

As I have stated above, suspicion alone however weighty can never form a basis of a conviction. It just remains that, suspicion.

The prosecution had the burden to prove the charge against the accused beyond any reasonable doubts.

This is expressly stated under Section 107, 108 and 109 of the *Evidence Act* on prove of existence or none existence of particular facts to the commission of crime in order to obtain Judgment in its favor. In criminal cases, this burden never shifts and remains throughout the trial in the prosecution's backyard. That burden never shifts to any of the accused and the conviction of any one of them or all of them is to be based on the strength of the prosecution evidence. It is also true that an accused person bears no burden to prove his innocence. In the case of *Woolmington -v- DPP*(1935) AC. It was stated that, "the 'golden thread' principle that, in general, the prosecution bears the burden of proof in criminal trials."

This is the cardinal principle of criminal law, not just in England and Wales but right across the common law world.

I come to the conclusion that the facts as stated by the accused persons and corroborated by witnesses rules out any possibility that the accused committed unlawful acts that caused the death of the deceased.

a. On whether the accused persons had the requisite mens rea for murder, that is, malice aforethought

34. 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;
- 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.”

35. What can be deduced from Section 206 (a) to (e) of the *Penal Code* is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. The Court of Appeal in the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR stated as follows:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances.



In the persuasive decision of *Chesakit v. Uganda*, CR. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v. Tubere s/o Ochen* (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...” ”

36. In this case, it was the testimony of PW10 that from the postmortem report (P. Exhibit 10) that was prepared following the examination of the deceased body, the same indicated that the body had a deep cut on the right leg measuring nine (9) centimeters. The blood vessels on the leg were severed. All the witnesses that saw the deceased at the scene indicated that the fatal injury he sustained was on his thigh. What the prosecution wanted this Court to believe was the murder weapon was found at the scene and the 2nd and 3rd Accused was also at the scene. PW9 testified that the blood that was found on the shirts of the 2nd and 3rd Accused was from the deceased. The 2nd and 3rd Accused were all released to go home on that material night and all the accused persons presented themselves at the police station the following morning with the motorbike that was involved in an accident. Even the OCS that called PW9 to attend the scene of crime indicated that there had been accident at Kathangacini that had involved a teacher. It is then more believable that the accused were involved in an accident as a result of which the deceased was injured and they did try to give him first aid.
37. Furthermore, none of the accused persons adduced evidence to possibly suggest that the deceased and the accused persons had a grudge or that the accused persons intended to injure or grievously harm the deceased. In addition, it was the testimony of PW3 that the 2nd and the 3rd Accused appeared quite shaken when he found them at the scene.
38. It is the prosecution's duty to prove mens rea under Section 206 of the Penal Code. In this case it is my considered view that the prosecution equally failed to prove the mens rea for murder to the required standard.

Conclusion

39. From the foregoing analysis, it is my view that the prosecution failed to prove that to the required standard of beyond any reasonable doubt, that the accused person herein murdered the deceased.
40. The accused person are therefore entitled to an acquittal. In the circumstances I acquit the accused under Section 322(1) of the *Criminal Procedure Code*

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF MARCH 2024.

L.W. GITARI

JUDGE

