



**Director of Public Prosecutions v M'arimi (Criminal Case  
86 of 2019) [2024] KEHC 4738 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4738 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 86 OF 2019  
TW CHERERE, J  
APRIL 25, 2024**

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... PROSECUTION**

**AND**

**KITHAKA M'ARIMI ..... ACCUSED**

**JUDGMENT**

1. Kithaka M'arimi and 5 others were charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 13<sup>th</sup> November, 2019 at Maraa sub-Location Nkachie Location in Imenti South sub-county within Meru County murdered Samuel Marangu M'Miriti

2. Accused 3 died during the pendency of the trial and Accused 2, 4, 5 and 6 were by a ruling dated 23<sup>rd</sup> March, 2022 found not guilty and set at liberty.

**Prosecution case**

3. Aquarina Marangu w/o Samuel Marangu M;Miriti (Marangu) stated that on 10<sup>th</sup> November, 2019, her daughter Kagwiria held a party at their home to celebrate recovery of her lost motor cycle. That on 13<sup>th</sup> November, 2019, Accused herein who was the area assistant chief and their family friend, in company of other elders visited their home in the evening and went away with her husband Marangu for questioning concerning consumption of illicit brew during their daughter' celebration party. That immediately thereafter, she heard some sounds near a road passing near their home and upon going there found her husband Marangu lying down and foaming from the mouth. That by the time she got assistance, her husband Marangu was long dead.
4. Elosy Karimi, the daughter of Marangu was in her room on the evening of 13<sup>th</sup> October, 2019 when she heard the Accused 1 call her father's name and suspected that the assistant chief had visited their home



- at night concerning the celebration party that her sister had held at their home on 10<sup>th</sup> October, 2019. That a short while later, she heard voices on the road near their home and together with her mother went to the scene to find her father lying down foaming from the mouth and he later died.
5. Bernard Mbii stated he found Marangu coughing and vomiting near his home and he told him he had been assaulted by the area assistant chief. His attempt to take him home failed because Marangu started to foam from the mouth and was unable to walk. The witness stated he called for assistance but didn't get any.
  6. IP Onyancha visited the scene of crime on 13<sup>th</sup> November, 2019 around 11.00 pm to find Marangu lying dead on a path near his home and Marangu's wife and daughter informed him that Marangu had that evening been picked from home by the assistant chief Cosmas Kithaka and other nyumba kumi elders. He escorted Marangu to Mitunguu hospital where he was confirmed dead on arrival. After recording statements from witnesses, Accused and others were arrested. The witness collected Marangu's clothes and blood samples of Marangu and the Accused herein and his co-accused and submitted them to government chemists for analysis.
  7. Lucy Wachira the government analyst found that Marangu's coat and trouser were stained with his own blood as shown in the report marked PEXH. 2.
  8. An autopsy on Marangu's body was conducted by Dr. Gitaka on 18<sup>th</sup> November, 2019. He found that Marangu suffered the following injuries:
    - a. Peripheral cyanosis which is dark bluish discoloration of finger tips signifying lack of blood
    - b. Two irregular abrasions on right knuckles
    - c. Bleeding from the nose
    - d. Dark bluish discoloration from the nipples upwards involving the neck, face and head
    - e. Bilateral conjunctival petechial hemorrhage (bleeding in eye vessels)
    - f. Chest muscles were swollen with hematoma
    - g. Neck muscles were swollen with hemorrhage
    - h. The right lung was swollen and bruised
    - i. Increased intracranial pressure with bleeding in the cerebral cavity
  9. The doctor formed an opinion that Marangu died of asphyxia (suffocation) secondary to chest and neck compression as shown on the postmortem form marked PEXH. 1.
  10. In his defence, Accused 1 stated that upon receiving information concerning consumption of illicit brew during their daughter's celebration party at Marangu's home held on 10<sup>th</sup> November, 2019 where neighbours had complained of commotion, he sent summons to Marangu's daughter through the area manager but she did not honour the summons. That on the evening of 13<sup>th</sup> November, 2019 in company of nyumba kumi members, they went to Marangu's home as a follow up on the summons to his daughter and not finding the daughter asked Marangu to accompany them to his office. He stated that he released Marangu after walking with him for about 100 metres from his home and was surprised when he received information on 14<sup>th</sup> October, 2019 that he had died. He denied that Marangu was assaulted on the material night.
  11. Accused's first witness the Principal Chief Gilbert Gichugu Mutua did not know anything about how Marangu died other than that Accused 1 had reported to him the incidents of 11<sup>th</sup> and 13<sup>th</sup> October,



2019 which included how Accused 1 and others had visited Marangu's home on the night of 13<sup>th</sup> October, 2019 and asked him to accompany him to his office.

12. Accused 1's second witness who was Accused 6 stated he was with Accused 1 on the night they called Marangu from his house but denied that Marangu was assaulted.

### **Analysis and Determination**

13. By a ruling dated 23<sup>rd</sup> March, 2022, this court found Accused 2, 4, 5 and 6 were found not guilty and stated that the reasons would be given in this judgment. The three main prosecution witnesses did not mention that Accused 2, 4, 5 and 6 were with Accused 1 on the night he called Marangu from his house.
14. Concerning Accused 1, I have considered the evidence on record and the issues for determination is whether the DPP has proved the three main ingredients of murder i.e the death, that Accused person/s committed the murder and that they were actuated by malice. (See Anthony Ndegwa Ngari v Republic [2014] eKLR).
15. At the trial, the burden is always on the prosecution to prove that Accused was a significant contributing factor of the deceased's death and an accused person assumes no burden to prove his innocence. Any doubt raised by an accused person is to be given to that accused.
16. In Republic vs Andrew Muecha Omwenga, Maraga J (as he then was) considered the provisions of section 203 of the Penal Code and expressed himself as follows with respect to what the prosecution must prove to establish the offence of murder:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder 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.”

#### **a. The death of the deceased**

17. That Marangu suffered peripheral cyanosis which is dark bluish discoloration of finger tips signifying lack of blood, two irregular abrasions on right knuckles, bleeding from the nose, dark bluish discoloration from the nipples upwards involving the neck, face and head, bilateral conjunctival petechial hemorrhage (bleeding in eye vessels), chest muscles were swollen with hematoma, neck muscles were swollen with hemorrhage, swollen and bruised the right lung and increased intracranial pressure with bleeding in the cerebral cavity and had died of asphyxia (suffocation) secondary to chest and neck compression was confirmed by Dr. Gitaka in his evidence contained in the postmortem form marked PEXH. 1.

#### **b. Proof that Accused 1 committed the unlawful act which caused the death of the deceased**

18. In order to establish the accused's culpability, the prosecution relied on the evidence by PW1 and PW2 who stated that Accused 1 and others collected Marangu from his house on the material night. Accused and his second witness have indeed confirmed that they picked Marangu from his house on the material night that he suffered the fatal injuries.
19. A few minutes after Accused 1 and others picked Marangu from his home, the prosecutions 3<sup>rd</sup> witness found Marangu lying on a path next to his home. Marangu who was groaning in pain, coughing and vomiting informed the witness he had been assaulted by the assistant chief (Accused 1 herein). It was



from that very scene that Marangu was found by his wife and daughter and it was from the same scene that police found his body.

20. There being no eye witness to the murder of Marangu, Accused 1 was charged on the basis of circumstantial evidence that he was the last person who was seen with Marangu and the dying declaration in which Accused 1 was implicated by Marangu.

21. As we know from Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”

22. In *Abanga alias Onyango v Republic* CA CR. Appeal NO. 32 of 1990 (UR), the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

23. Concerning the probative value of a dying declaration, the Court of Appeal in the case of *Musili v Republic* [1991] eKLR considered the circumstances under which a dying declaration becomes acceptable and held as follows:

1. The law in Kenya relating to acceptance of a dying declaration as evidence is clear that whilst corroboration of a statement as to the cause of death made by the deceased before his death is desirable, it is not always necessary in order to support a conviction.
2. Although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, it is generally unsafe to base a conviction solely on an uncorroborated dying declaration.
3. The learned judge in his summing up had given correct directions with regard to the cautious manner in which the dying declaration was to be approached.
4. There was strong corroboration in the suspicious circumstances in which the appellant, armed with a bow and arrows was seen during the two material occasions. This court concurred with the High Court’s finding that the appellant was guilty of murder.

24. I have considered whether Marangu’s dying declaration was corroborated. In the case of *Stephen Haruna v The Attorney General of the Federation* {2012} LPELP 782 the Court had to say thus:

“The Law requires a person last seen with the deceased, whose cause and nature of death is in contention to offer an explanation of what he knows about the death of the deceased onus is always on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.” (See also *Republic v E K K* [2018] eKLR and *Stephen Haruna v The Attorney-General Of The Federation* (2010) 1 iLAW/CA/A/86/C/2009).



25. That Marangu was fine and sound on the night Accused 1 picked him from home is not denied. That Accused 1 was the last person seen with Marangu alive is also not disputed. From the foregoing, I find that Marangu's dying declaration corroborated evidence of the fact that Accused was the last person that was seen with him alive.
26. Flowing from the foregoing, I reject Accused 1's defence and find that the circumstances in this case are of a definite tendency unerringly pointing towards guilt of Accused 1 and taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the injuries that culminated in the death of Marangu were caused by Accused 1.

### **Malice aforethought**

27. In *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 [1997] eKLR*), the Court of Appeal cited the case of *Rex Vs Tubere S/O Ochen (1945) 12 EACA 63* with approval where it was stated as follows:

“If repeated blows inflicted the injury, then malice aforethought could well be presumed.....”.
28. In this case, there is evidence of injuries that Marangu died of suffocation that involved compression of neck and chest leading to lack of blood flow to the hands, neck, face and head, bleeding in eye vessels and cerebral cavity.
29. The injuries inflicted on Marangu were targeted at the most delicate parts of the body i.e the neck and chest and points at malice on the part of Accused 1 for he ought to have known that such grave injuries could possibly cause grievous harm or the death of Marangu. Additionally, the fact that Accused 1 picked Marangu from his house at night allegedly to take him to his office which was obviously not open in the night additionally points at malice on the part of Accused 1.
30. Right to life is protected by Article 26 of *the Constitution* and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. (See *Guzambizi Wesonga v Republic [1948] 15 EACA 63*). The death of Marangu was in the circumstances of this case intentional and unlawful.
31. Having considered all the evidence in this case, I find that the defence by Accused 1 does not raise any doubt on the well corroborated prosecution case. Accused 1's defence is considered and rejected and he is found guilty and is convicted accordingly.

**DELIVERED IN MERU THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

### **Appearances**

Court Assistants - Kinoti/Munene

Accused 1 - Present

For the Accused 1 - Mr. Kurauka Advocate

For the DPP - Ms. Rotich (PC -1)

