



**Republic v Kariuki & another (Criminal Case 12 of 2019)
[2024] KEHC 8535 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 12 OF 2019
CM KARIUKI, J
JULY 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

CHARLES MUCHEMI KARIUKI 1ST ACCUSED

PETER KIMULI 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with the offense of murder contrary to Section 203, read as with Section 204 of the Penal Code Cap 63 of Kenya.
2. The particulars of this offense are that on the 20th day of July 2019, in the Manguo area in Nyahururu Sub-County within Laikipia County, the accused persons, namely Charles Muchemi Kariuki and Peter Kimuli, jointly murdered JOHN GIUTHI MWANGI NYOKO.
3. They pleaded not guilty, and the Prosecution called nine (9) witnesses to prove its case. The accused were put on their Defence, where they called two witnesses.
4. At the close of Defence, the parties were directed to put submissions for their arguments.
5. State/Prosecution Submissions
6. The Prosecution submitted that the offense of murder is defined under Section 203 of the Penal Code Cap 63 Laws of Kenya as follows;

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



7. The definition highlights three crucial ingredients that must be proved for murder. The Standard of proof being "beyond reasonable doubt as it is in criminal cases. These ingredients are -
 - a. On proof of the fact and cause of death of the accused;
 - b. proof that the deceased met his/her death due to the unlawful act or omission on the part of the accused; and
 - c. proof that the said act or omission was committed with malice aforethought.
8. On proof of fact and cause of death of the accused;
9. The late John Giuthi Mwangi was identified as the deceased by James Kimotho Nyoko and Michael Wambugu, who are brothers to the accused. James Kimotho Nyoko testified in Court to have been present during the post-mortem.
10. The post-mortem that was produced confirms that the deceased succumbed to the injuries he sustained from the accident.
11. From the above, the fact of death of the deceased was proved, and the cause of death was equally proved by the post-mortem as produced.

b).Proof that the deceased met his/ her death due to the unlawful act or omission on the part of the accused;

12. Three prosecution witnesses testified to having witnessed the incident;
13. While riding his motorcycle, P.W. I, Protus Ondisi Mokaya testified that he saw three motorcycles on the road on 20/7/2019. He stated that the deceased's motorcycle was ahead of those of the accused persons, and it appeared as if he was trying to escape from them as he accelerated at a high speed.
14. Suddenly, he saw that the deceased had been forced off the road by the accused persons, and later in the day, he heard that the deceased had been involved in a road accident.
15. PW 2, Peter Kihoro Dereva, stated that when he visited the deceased in the hospital, he revealed to him that he saw the two accused persons speeding towards him. He tried to speed off, but they caught up with him. The deceased told PW2 that the 1st accused pushed him using his left hand, making him lose control, thus hitting the electric pole with his motorcycle. He landed in a ditch after his motorcycle hit the electric pole. The two accused persons then took his motorcycle and left him in the ditch.
16. PW 4, Richard Mwenda Gacheche, testified that on the material date and time, he spotted the three motorcycles being ridden by the two accused and the deceased coming from the opposite direction. He stated that he saw the two accused persons kicking the deceased while riding their motorcycles. All three motorcycles passed by him, and after a short while, he heard a loud bang, which he later found to be the accident that occurred when the deceased hit the electric pole.
17. The testimony from the prosecution witnesses points to the cause of the accident, which occasioned the injuries sustained by the deceased after that, causing his death. This proves that the accused persons are criminally culpable for the act leading to the death of the deceased.
18. c). proof that the act or omission was committed with malice.
19. Section 206 of the Penal Code clearly defines malice aforethought as;



20. An intention to cause the death of or do grievous harm to any person, whether that person is the person killed or not.
21. The 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 killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, by the wish that it may not be caused.
22. An intent to cause a felony.
23. An intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit a felony.
24. The Prosecution had two witnesses testifying to the accused persons having malice aforethought;
25. PW 3, Eric Bundi Mureithi, the chairperson of the Manguo boda boda self-help group, testified that on an unclear date between 15th and 19th July 2019, the deceased had been banned from operating his boda boda for two weeks after a disagreement with a customer in the stage in which members of the Manguo boda boda self-help group operate. The deceased, through 'father boy,' approached PW3 and requested to be fined rather than being banned, as he had a young family to fend for.
26. PW3 agreed to the request and, after a meeting with some members, agreed that the deceased should be fined Kshs. 3000/=, to which the deceased paid Kshs. 2500/= requesting more time to pay the balance. The 1st accused was unhappy with this decision and told PW3 to return the money to the deceased, which he did, and the ban was reinstated.
27. PW 8 CPL Alex Torotich testified that on the fateful morning, the deceased reported at the Manguo stage for work and was seen by other boda boda riders. PW8 stated that, per his investigations, the accused persons were unhappy with the deceased's motorcycle operating after the earlier ban imposed on him. They consequently gave him a chase along the Nyahururu-Nyeri road, as earlier testified by PW I and PW4, later collaborated by PW2's testimony.
28. From the above, the Prosecution established a grudge against the deceased to the extent of the 1st accused demanding that the fine preferred by the chairperson be returned and the two-week ban reinstated. The accused persons did not want the deceased to operate his motorcycle business and consequently gave him the deadly chase on that fateful day.
29. They did not only dangerously chase him on the road but kicked him in the process to ensure that they inflicted harm on him. These actions are enough proof of malice aforethought, beyond reasonable doubt.
30. When placed on their Defence, both accused gave sworn statements;
31. DW I, Charles Muchemi Kariuki, stated that he received a business call from a customer at 5.50 am and left home at 6.00 am to pick up the customer. On his way to Liberty, at Panari, he found a large crowd, and on approaching, he met one Kimani who informed him the deceased was injured at the time.
32. He stated that the deceased's motorcycle was in a ditch. He later assisted in getting help for the deceased, and they took him to the hospital. He further tries to explain how he was arrested, but the explanation contradicts the other witnesses, both prosecution and defense witnesses. No one corroborates his claim of his home having been attacked, leading to him seeking refuge at Nyahururu police station.
33. D.W. 2, Peter Kimuli, narrates how the first accused called him for work at Liberty. On his way to Panari, he found a large crowd gathered, and on inquiring, he found the deceased lying on the ground. He,



however, stated that the deceased's motorcycle was lying beside him and not in the ditch, as earlier stated by DWI.

34. DW3, Miriam Wambugu, states to have called DWI the 1st accused at 5.45 am. She collaborates with DWI's statement on how they arrived at the scene. She states that on arrival, the 1st accused offboarded her from the motorcycle and left her in the crowd, and she did not know where they (1st accused and DW4) went. She later states that she was left guarding the motorcycles belonging to the accused persons and later called the first accused to come for the motorcycles.
35. D.W. 4, Anthony Kimani Kamau, stated that he was well acquainted with the accused persons and the deceased as they had worked together for around ten years. He stated that on his way to work, he found a crowd at Panari at around 6.00 am and later found it to be the deceased, who was lying injured at the site. On cross-examination, he could not tell at what time DWI and DW2 arrived at the scene, yet he stated that the first accused had a customer.
36. The Defence's testimony, though sworn, did not displace the prosecution case. If anything, the testimonies from the Defence witnesses had glaring gaps that prove that the same was an attempt to create a scenario separate from what happened.
37. The chronology of events, as stated by the prosecution witnesses and the evidence adduced, proves beyond reasonable doubt that the accused persons committed the offense of murder by chasing after the deceased along the Nyahururu-Nyeri road in a reckless manner, which led to him swaying off the road and hitting an electric pole which caused the injuries that he succumbed to.
38. It is, therefore, a prosecution submission that the Prosecution has made a case against the accused persons to warrant the Court's convicting the accused
39. accordingly.
40. ACCUSED SUBMISSIONS
41. The Defence submitted the three issues below as follows;
 - a. Whether the Prosecution did prove its case beyond any reasonable doubt.
 - b. Whether the accused committed the unlawful act which caused the death of the deceased.
 - c. Whether the prosecution evidence was free of doubt and if any existed in whose favor the same should be resolved.

Whether the Prosecution was able to prove its case beyond any reasonable doubt?

42. It is submitted that there is no doubt that the deceased succumbed to injuries that arose when he had a road traffic accident. The only doubt is whether the accused persons committed the unlawful act.
43. The burden of proof lies with the Prosecution in proving the charges against the accused person beyond any reasonable doubt. This burden does not shift to the accused person. In the circumstances, the Prosecution must adduce evidence to prove the three ingredients of murder under section 203 of the Penal Code.
44. These ingredients are: the accused person carried out an unlawful act or omission; the execution of the unlawful act or omission caused injury to the deceased person, causing the death of the deceased; and the accused person had formed the intention to either cause death or grievous harm to the deceased person at the time of the unlawful act or omission.



45. The Prosecution called Nine (9) witnesses in total. All the prosecution witnesses never saw the accused persons kill the deceased. All witnesses stated that the deceased herein was riding his motorcycle, and he hit an electricity post near Panari Resort.
46. Like all evidence relied upon by the Prosecution, these allegations were only founded on the unfounded claims of two (2) Bodaboda riders who alleged that they saw the two accused persons chasing the deceased person. The element of malice aforethought was not proved beyond reasonable doubt.
47. Regrettably, the accused persons Were charged with the offense herein because they were the discipline masters and/or in charge of security for the Manguo Bodaboda group and had allegedly disciplined the deceased person the previous day. He had been banned from ferrying customers for some time for mistreating customers.
48. Further, DW2 and DW3 testified that the accused persons were not present during the accident. More specifically, DW3 testified that he got to the scene of the accident before both the accused persons got there and that both of them found them at the scene.
49. The Prosecution relied entirely on circumstantial evidence. It is submitted that the Prosecution must establish the elements. Laid down in Joan Chebichii Sawe v Republic [2003] eKLR, for the Honourable court to solely rely on circumstantial evidence. In Republic v Kelvin Mukhu Wambui [2020] eKLR, in acquitting the accused person, this Honourable Court was guided by the Court of Appeal Case Joan Chebichii Sawe v Republic [2003] eKLR, Abang'a alias Onyango v Republic Cr.A. 32/1990 further guided this Honourable Court.
50. WHETHER THE ACCUSED COMMITTED THE UNLAWFUL ACT THAT CAUSED THE DEATH OF THE DECEASED
51. According to the testimonies of several witnesses, no one saw the Accused persons hit the deceased person, and all their evidence was consistent that the injuries were caused by him hitting an electricity post with his motorcycle.
52. The investigating Officer interestingly stated clearly during cross-examination that he never visited the scene of the crime during the investigations and has never visited the scene up to date.
53. He further stated that he had no exhibits in the matter as the Motorcycles of the accused persons were only held as their security to attend to the police station when they were first granted cash bail and not as exhibits.
54. By the time the Investigating Officer was testifying, he had not established the ownership of the motorcycles, and no proof was presented to the Court.
55. Further, during cross-examination, PW4 recanted his evidence in chief and stated that he did not see either of the accused persons pushing the deceased off the road.
56. During his investigations, he could not establish whether the deceased and accused were wearing helmets and how the witnesses could identify them in darkness.
57. Further, the Investigating Officer stated that the deceased person was taken to the hospital by police officers from Maili Nne police station. They reported the matter as a road traffic accident. However, he did not call any of them as witnesses in this matter.
58. PW4, in cross-examination, stated that he passed the three motorcycles and went towards Maili Nane, and that is when he heard a loud bang, which seemed to have originated from the Panari Resort, and



that he never went to the scene. However, the witness could not explain why he chose not to assist his supposed friend if he indeed saw that he was in distress and/or when he heard the loud bang.

59. The Prosecution had more than ample time to organize for such an examination. The evidence adduced by the Prosecution never ascertained whether the accused committed the injuries that caused the death of the deceased or not. The Prosecution relied on hearsay to accuse the accused of the charge.
60. WHETHER THE PROSECUTION EVIDENCE WAS FREE OF ANY DOUBT AND IF ANY EXISTED IN WHOSE FAVOUR THE SAME SHOULD BE RESOLVED.
61. The burden is upon the State to prove beyond reasonable doubt that the accused is guilty of the crime. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the accused person's doubt. The State must prove each element of the charged crime by evidence that convinces you of the accused's guilt.
62. It is submitted that it is not enough for the State to show that the accused is probably guilty. That the accused must not be convicted on speculation or suspicion.
63. The Standard of Proof emphasized in section 107 (1) of the *Evidence Act*: "Whoever desires any court to give judgment as to any Legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist."
64. Further, some essential witnesses were not called as witnesses in this case all the evidence the ten (10) prosecution witnesses presented was based wholly on hearsay.
65. PW4 testified that a person, namely Mburu Tulaga, was the one who informed him that the deceased was lying in a ditch and was crying in pain. However, that witness who allegedly saw the deceased lying in a ditch was not called as a witness. The police officers who allegedly took the deceased from the scene to the hospital and who made the initial report of a road traffic accident were not called as witnesses.
66. These witnesses were supposed to come and fill in the gaps that had been left by the other secondary witnesses.
67. It is trite law that failure to call material witnesses by a party should conclude that the same would be adverse to the party not calling the same if such evidence were called. The same conclusion should be drawn in this matter. No explanation was given as to whether the Prosecution faced any difficulty or expense in availing the witnesses to Court. Reliance is made on the case of Republic-vs Frederick Kipkirui Korir,
68. However, it is trite law that all evidence on record must be placed before the Court for a just determination of such a case. Failure to call such evidence is fatal to the case for the Prosecution.
69. There were too many contradictions in the Prosecution's case. These include;
70. PW 1 Protus Ondisi Mokaya testified that on a fateful day at around 5.30 am, he was riding his motorcycle from Nyahururu Town headed to Maili nine when he met with the deceased and the accused persons riding in the opposite direction, and they were speeding, on cross-examination, he stated that he did not see the accused persons do anything to the deceased person.
71. PW 2 Peter Kihoro Dereva was declared a hostile witness by the Court, and therefore, his evidence should be disregarded.
72. It is worth noting that PW2's evidence was full of contradictions. He testified that he had seen the accused person at around 5.30 am at the waiting bay and later met with them as he returned from



Nyahururu town that the 1st accused person was carrying the deceased's motorcycle. He, however, did not explain that he had identified the three (3) motorcycles since it was dark.

73. He further testified that a person, namely Mburu Tulaga the one who informed him that the deceased was lying in a ditch and was crying in pain. However, that witness who allegedly saw the deceased lying in a ditch was not called as a witness. The question that arises is why he left the deceased person in a ditch in pain without offering any assistance if it is true that he found him there.
74. PW 2 further testified that he went to the hospital with ERICK, PHILLIP, and MILKA GICHUKI to see the deceased person, and he was allegedly speaking; however, all these persons were never called as witnesses in this matter.
75. PW 3 Eric Bundi testified to the effect that he was the Chairman of the Manguo Bodaboda group and that they had disciplined the deceased person for mistreating the customers.
76. On cross-examination, he testified that he went to visit the deceased at the hospital, and he found him with the accused persons. Upon inquiring, the accused person explained to him how the deceased person was involved in a road traffic accident, but the deceased person was not talking. He confirmed to the Court that the accused persons were implicated because they were the discipline masters/ security in the Bodaboda group.
77. He confirmed that he never recorded anything relating to the accident in his statement at the police station, and this only confirms that all his evidence relating to the accident is not factual.
78. PW 4, in his testimony, stated that the incident happened at 5.30 am and that it was dark when he met with the deceased and the accused persons while they were headed towards Nyahururu Township. However, he did not state how he identified them while wearing helmets; it was dark.
79. Further, during cross-examination, PW4 recanted his evidence in evidence in chief and stated that he did not see either of the accused persons pushing the deceased off the road.
80. PW4 further, in cross-examination, stated that he passed the three motorcycles and went towards Maili Nne, and that is when he heard a loud bang that seemed to have originated from the Panari Resort and that he never went to the scene. However, the witness could not explain why he chose not to assist his supposed friend if he indeed saw that he was in distress and/or when he heard the loud bang.
81. PW 6 PC Lucas Mutai was the Investigating Officer (I.O). He testified that his cardinal duty was to arrest the two accused persons, which he did, and he gave them cash Bail as there was not enough evidence to charge them then. He later arrested them when the deceased passed on, and the mob wanted to lynch the two accused persons.
82. He also detained the three motorcycles allegedly ridden by the deceased and the two accused persons. surprisingly, he never sought to establish the ownership of the three motorcycles before rushing to charge the accused persons, and interestingly, even at the time, he testified he never produced any evidence to prove the ownership.
83. The investigating Officer stated clearly during cross-examination that he had never visited the crime scene during the investigations and had never visited the scene up to date.
84. He further stated that he had no exhibits in the matter as the Motorcycles of the accused persons were only held as their security to attend to the police station when they were first granted cash bail and not as exhibits.



85. He further stated that the accused persons made the initial report, which was reported as a Road Traffic accident.
86. When he visited the deceased at the hospital, the deceased was in a bad condition and was not able to talk; this contradicts other witnesses who had testified that they talked to the deceased person before he passed on. When the Investigating Officer was asked who was his key witness in the matter or an eye witness, he responded.....I AM NOT SURE.” This shows that investigations were shoddily and hastily done.
87. PW 7 PC Erick Nyaga testified that he arrested and detained the accused at the Manguo police post before transferring them to the Nyahururu Police station. He indicated that the first report was made by Spice at 10 am; he was at a loss to explain what took the reporters all that time, and the incident allegedly happened at 5. 30am. He stated that Peter and Spice took the deceased to the hospital, contradicting the Investigating Officer, who stated that the deceased was taken to the hospital by Traffic Officers.
88. He stated that by the time he visited the crime scene, the same had already been disturbed and that he had never taken any photographs at the scene. He stated that he detained all three motorcycles but did not bother establishing their ownership.
89. PW8 CPL Alex Toroitich's was merely hearsay, and he only stated what the Chairman of the Bodaboda group told him at 1300hrs; it is worth noting that the alleged Chairman and those people he was with when he made the report never witnessed the incident and were not present when the incident happened. It is worth noting that the witness testified that the only reason that made him arrest the accused persons was because the mob had threatened to lynch them, and they escaped to the police station for safety when they were arrested.
90. He further stated that when he visited the deceased person, he was in a bad state, and he was not talking.
91. PW9 was the doctor who carried out the post-mortem; his evidence was to the effect that the deceased died from injuries that were consistent with injuries caused by a Road Traffic accident.
92. ISSUES, ANALYSIS AND DETERMINATION
93. After going through the evidence on record and the parties' submissions, I find the issues are: Were the ingredients of murder proved beyond reasonable doubt?
94. The accused persons have been charged with the offense of murder Contrary to Section 203 as read together with Section 204 of the Penal Code.
95. Particulars of this offense are that on the 20th day of July 2019, in the Manguo area in Nyahururu Sub-County within Laikipia County, the accused persons, namely Charles Muchemi Kariuki and Peter Kimuli, jointly murdered John Giuthi Mwangi Nyoko.
96. The Prosecution called a total number of nine witnesses. Upon listening to the Prosecution's evidence, the honorable Court placed the accused on their Defence. Both accused gave sworn Defence and called two more defense witnesses.
97. To succeed in conviction, the Prosecution was obligated to prove the following ingredients of murder; i.e., the Prosecution must adduce evidence to prove the three ingredients of murder under section 203 of the Penal Code.
98. These ingredients are:



- a. The accused person carried out an unlawful act or omission;
 - b. The execution of the unlawful act or omission caused injury to the deceased person, causing the death of the deceased;
 - c. The accused person had formed the intention to either cause death or grievous harm to the deceased person at the time of the unlawful act or omission.
99. From the above, the Defence does not contest nor rebut the fact of the death of the deceased as was proved in via doctors testimony and production of the post-mortem report. The Court thus finds that the first ingredient is proved beyond reasonable doubt.
100. On the second ingredient, the Prosecution called Nine (9) witnesses. All the prosecution witnesses never saw the accused persons kill the deceased. All witnesses stated that the deceased herein was riding his motorcycle, and he hit an electricity post near Panari Resort.
101. Like all evidence relied upon by the Prosecution, these allegations were only founded on the claims of two (2) Bodaboda riders who alleged that they saw the two accused persons chasing the deceased person.
102. There were too many contradictions in the Prosecution's case. These include;
103. PW 1 Protus Ondisi Mokaya testified that on a fateful day at around 5.30 am, he was riding his motorcycle from Nyahururu Town headed to Maili nne when he met with the deceased and the accused persons riding in the opposite direction, and they were speeding, on cross-examination, he stated that he did not see the accused persons do anything to the deceased person. This evidence proves no element as to the occurrence of the incidence leading to the victims death.
104. PW 2 Peter Kihoro Dereva was declared a hostile witness by the Court, and therefore, court urged to disregarded his evidence. In the case of Daniel Odhiambo Koyo v Republic [2011] eKLR, the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

“... The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In Maghenda v. Republic [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

“The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.”

There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.

Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify...

105. It is worth noting, that PW2's evidence was full of contradictions. He testified that he had seen the accused person at around 5.30 am at the waiting bay and later met with them as he returned from Nyahururu town that the 1st accused person was carrying the deceased's motorcycle.



106. He, however, did not explain that he had identified the three (3) motorcycles since it was dark. He further testified that a person, namely Mburu Tulaga is the one who informed him that the deceased was lying in a ditch and was crying in pain.
107. However, that witness who allegedly saw the deceased lying in a ditch was not called as a witness. The question that arises is why he left the deceased person in a ditch in pain without offering any assistance if it is true that he found him there.
108. PW 2 further testified that he went to the hospital with ERICK, PHILLIP, and MILKA GICHUKI to see the deceased person, and he was allegedly speaking; however, all these persons were never called as witnesses in this matter. In view of the inconsistencies and the fact that he was treated as a hostile witness, the court finds little value of his testimony.
109. PW 3 Eric Bundi testified to the effect that he was the Chairman of the Manguo Bodaboda group and that they had disciplined the deceased person for mistreating the customers.
110. On cross-examination, he testified that he went to visit the deceased at the hospital, and he found him with the accused persons. Upon inquiring, the accused person explained to him how the deceased person was involved in a road traffic accident, but the deceased person was not talking. He confirmed to the Court that the accused persons were probably implicated because they were the discipline masters/security in the Bodaboda group/community.
111. He confirmed that he never recorded anything relating to the accident in his statement at the police station, and this only confirms that all his evidence relating to the accident is not factual.
112. PW 4, in his testimony, stated that the incident happened at 5.30 am and that it was dark when he met with the deceased and the accused persons while they were headed towards Nyahururu Township. However, he did not state how he identified them while wearing helmets; it was dark.
113. Further, during cross-examination, PW4 recanted his evidence in evidence in chief and stated that he did not see either of the accused persons pushing the deceased off the road.
114. PW4 further, in cross-examination, stated that he passed the three motorcycles and went towards Maili Nne, and that is when he heard a loud bang that seemed to have originated from the Panari Resort and that he never went to the scene. However, the witness could not explain why he chose not to assist his supposed friend if he indeed saw that he was in distress and/or when he heard the loud bang.
115. PW 6 PC Lucas Mutai was the Investigating Officer (I.O). He testified that his cardinal duty was to arrest the two accused persons, which he did, and he gave them cash Bail as there was not enough evidence to charge them then. He later arrested them when the deceased passed on, and the mob wanted to lynch the two accused persons.
116. He also detained the three motorcycles allegedly ridden by the deceased and the two accused persons. Surprisingly, he never sought to establish the ownership of the three motorcycles before rushing to charge the accused persons, and interestingly, even at the time, he testified he never produced any evidence to prove the ownership.
117. The investigating Officer stated clearly during cross-examination that he had never visited the crime scene during the investigations and had never visited the scene up to date.
118. He further stated that he had no exhibits in the matter as the Motorcycles of the accused persons were only held as their security to attend to the police station when they were first granted cash bail and not as exhibits.



- 119. He further stated that the accused persons made the initial report, which was reported as a Road Traffic accident.
- 120. When he visited the deceased at the hospital, the deceased was in a bad condition and was not able to talk; this contradicts other witnesses who had testified that they talked to the deceased person before he passed on. When the Investigating Officer was asked who was his key witness in the matter or an eye witness, he responded..I AM NOT SURE.
- 121. PW 7 PC Erick Nyaga testified that he arrested and detained the accused at the Manguo police post before transferring them to the Nyahururu Police station. He indicated that the first report was made by Spice at 10 am; he was at a loss to explain who took the reporters at that time, and why it took all that time as the incident allegedly happened at 5. 30am. He stated that Peter and Spice took the deceased to the hospital, contradicting the Investigating Officer, who stated that the deceased was taken to the hospital by Traffic Officers.
- 122. He stated that by the time he visited the crime scene, the same had already been disturbed and that he had never taken any photographs at the scene. He stated that he detained all three motorcycles but did not bother establishing their ownership.
- 123. PW8 CPL Alex Toroitich's replicated what the Chairman of the Bodaboda group told him at 1300hrs; it is worth noting that the alleged Chairman and those people he was with when he made the report never witnessed the incident and were not present when the incident happened. It is worth noting that the witness testified that the only reason that made him arrest the accused persons was because the mob had threatened to lynch them, and they escaped to the police station for safety when they were arrested.
- 124. He further stated that when he visited the deceased person, he was in a bad state, and he was not talking.
- 125. PW9 was the doctor who carried out the post-mortem; his evidence was to the effect that the deceased died from injuries that were consistent with injuries caused by a Road Traffic accident.
- 126. The evidence relied on by the Prosecution is circumstantial in the case of KIMWERI V REPUBLIC (1968) EA 452, it was held that, although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that, taken as a whole the evidence leaves no doubt whatsoever.
- 127. First and foremost, it is trite law that in cases dependent on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused, and the circumstances should be conclusive and tendency and should be such as to exclude every hypothesis but the one proposed to be proved.

"Circumstantial evidence must be a combination of facts, creating a network through which there is no escape for the accused because the facts taken do not admit any inference but of his guilt. Circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (SARKAR ON EVIDENCE pp. 32 – 33). The way to deal with circumstantial evidence was stated in TOPER V. R. (1952) A.C. on Page 489 as follows:- "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Before drawing the inference of the accused's guilt from circumstantial evidence, it is also necessary to be sure that no other co-existing circumstances would weaken or destroy the inference."



128. The burden is upon the State to prove beyond reasonable doubt that the accused is guilty of the crime. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the accused person's doubt. The State must prove each element of the charged crime by evidence that convinces court of the accused's guilt. It is not enough for the State to show that the accused is probably guilty. The accused must not be convicted on speculation or suspicion.
129. The Standard of Proof emphasized in section 107 (1) of the *Evidence Act*: "Whoever desires any court to give judgment as to any Legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist."
130. Further, some essential witnesses were not called as witnesses in this case—all the evidence the ten (10) prosecution witnesses presented was based wholly on hearsay.
131. PW4 testified that a person, namely Mburu Tulaga, was the one who informed him that the deceased was lying in a ditch and was crying in pain. However, that witness who allegedly saw the deceased lying in a ditch was not called as a witness. The police officers who allegedly took the deceased from the scene to the hospital and who made the initial report of a road traffic accident were not called as witnesses.
132. These witnesses were supposed to come and fill in the gaps that had been left by the other secondary witnesses. It is trite law that failure to call material witnesses by a party raises an inference that if such evidence were called, the same would be adverse to the party not calling the same. The same conclusion should be drawn in this matter.
133. No explanation was given as to whether the Prosecution faced any difficulty or expense in availing the witnesses to Court. Moreover, it is trite law that all evidence on record must be placed before the Court for a just determination of such a case. Failure to call such evidence is fatal to the case for the Prosecution.
134. In JOO vs Republic [2015] eKLR, Mrima, J held that:
- “It is not lost to this Court that the offense that the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty of the Prosecution to ensure adequate evidence is adduced against a suspect to uphold any conviction. The Standard of proof required in criminal cases is well-settled proof beyond any reasonable doubt; hence, this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person”.
135. There were too many contradictions in the Prosecution's case. DW2 and DW3 testified that the accused persons were absent during the accident. More specifically, DW3 testified that he got to the scene of the accident before both the accused persons got there and that both of them found them at the scene. The Prosecution relied entirely on circumstantial evidence, which has not displaced the Defence nor met the threshold of proving beyond reasonable doubt.
136. Thus, the Court finds that the Prosecution fails to prove murder ingredients beyond any reasonable doubt and, therefore, makes the orders;
- The Charges are dismissed, and the accused are acquitted of murder.
 - They shall be released forthwith unless otherwise lawfully held.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 11TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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C. KARIUKI

JUDGE



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