



**Republic v Kanyoti & another (Criminal Case E017 & E014 of 2020
(Consolidated)) [2024] KEHC 10499 (KLR) (27 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E017 & E014 OF 2020 (CONSOLIDATED)
LM NJUGUNA, J
AUGUST 27, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

NELSON MURITHI KANYOTI 1ST ACCUSED

AGOSTINO MUGO NYAGA 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on 23rd March 2020 at Karerema village, Nthawa location, Mbeere North subcounty within Embu County murdered Harrison Njue Njogu. They pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. PW1, Eustus Ileri Njeri the area assistant chief stated that he was at home when a village elder went and told him that the deceased had died and his body lay along Karereme-Mang’oti road. That the wife of the deceased also went to report the incident and together, they went to the scene and found the body which had multiple injuries on the head and sticks used to assault him were still there. He asked the deceased’s wife if she suspects anyone but she said that some people invaded their home the previous night and took the deceased away. That the deceased was beaten but his face looked burned. On cross-examination, he stated that they walked to the scene and no-one else was there. That there were crude weapons near the body of the deceased which was lying on the way to his home. That the crude weapons were sticks cut from tree branches and some jembe handles.
3. PW2 was Zipporah Wakere Ileri, widow of the deceased. She stated that on 22nd March 2020, she was at home with the deceased when the 2nd accused person, who was a neighbor, started insulting the deceased and asking if he had stopped stealing chicken. That when the deceased asked why he was



- insulting him, the 2nd accused asked him to get out of the house so that they could fight. That the 2nd accused fought with the deceased at the gate and afterwards, he returned to the house. That the following night at around 10PM, some people went to their home and began removing the roof, doors and windows of the house and they were calling the deceased to get out of the house, which he did.
4. That she did not see the people carrying weapons. That she called the deceased's brother but he said he was in Nairobi and couldn't help and when she called out for help from her mother-in-law's compound, nobody came and so she returned home and slept until morning. It was her testimony that the next morning, she woke up to go to the assistant chief's home to report the incident but on the way, she found the body of the deceased lying on the road with head appearing burned. She did not know whether the accused persons were armed that night. On cross-examination, she stated that she was not able to identify any of the people who called out for her husband. That the body was found about 5KM from her house.
 5. She stated that her mother-in-law's house was near her house and the 2 homes are separated by a wooden fence although to access the other home, one had to go around the fence. That at the scene, she saw the deceased's shoes and nothing else and the deceased was tied up with a rope. That she saw the 1st accused who was standing at the window that night. That the deceased had not stolen chicken but he had sent her to buy them from one Gitonga but she did not know where the vendor had gotten the chicken from. She later found out that the chicken belonged to Ken and they were found in her house and that the 2nd accused, Peter Njue, Daniel Njagi and Ken had gone to collect the chicken from her house.
 6. PW3 was Edith Muthoni Njogu, the deceased's mother who stated that the day before the incident, the 1st accused picked a fight with the deceased outside his gate and he sustained some injuries. That they took him to hospital and he was treated. That on the day of the incident, several people carrying torches went to the deceased's home and she could not identify most of them but the 2nd accused person was there. They were removing doors and windows from his house. That the deceased ran from his house towards the river and they followed him and he never returned. That PW2 called out for help but nobody came to help and later, the body of the deceased was found with his head having been burnt. That a rope was recovered at her gate while some sticks were recovered where the body was found.
 7. On cross-examination, she stated that she did not witness the fight between the 1st accused and the deceased. That a mob beat the deceased for stealing chicken on a different date in a separate incident. According to her, it is the 1st accused person who killed the deceased following the fight they had the previous day. That when the group of people went to the deceased's home and started removing doors and windows, she did not come out of her house because she was afraid. That on the said night, she did not see anyone but she recognized the voice of the 2nd accused who was speaking in ki-Mbeere. She stated that she heard footsteps heading towards Ena River but she did not know who the people were in as much as there was torch light. She said that she did not see the accused persons killing the deceased. That the 1st accused who must have contributed to the death of the deceased since he fought him the previous day.
 8. PW4, Dr. Winnie Wambui Njeri produced the postmortem report authored by Dr. John Muriithi. The report showed that the body of the deceased had 2 deep lacerations on the occipital and the left parietal temporal region. The lacerations were approximately 4cm and there was a subdural hematoma on the left side. That there was clotted blood in the nasal area and the ears. There were burns on the neck and upper limbs which also had bruises and blistering. She observed that there were 1st degree burns on the chest, left shoulder and the posterior tarsal. The cause of death was severe head injury secondary to intracranial hemorrhage (left subdural hematoma). She produced the death certificate.



- On cross-examination, she stated that the injuries were most likely caused by blunt force trauma. That the body was partially burned but the burns were not the cause of death even though it contributed.
9. PW5 was Alex Mwangela of DCI headquarters Nairobi, an expert in analyzing handwritings and signatures. He stated that he received 2 signature samples appended on 2 separate documents one being a Maendeleo Chap Chap membership card bearing the 2nd accused person's name and signature. He analyzed the same and found that they were similar and indistinguishable and were appended by the same person. He produced his report as an exhibit. On cross-examination, he stated that he examined original copies of the documents containing the signatures and that they were unkempt, maybe even exposed to weather elements.
 10. PW6 was Ephantus Mwangangi Kikuki, the area senior chief. He stated that his assistant, PW1 called to inform him that the deceased had been murdered. That he called the OCS of Ishiara Police post who escorted him to the scene. That they also called DCI officers and together, they visited the home of the deceased where the windows and doors had been broken. That there was a blue shoe which PW2 said belonged to the deceased and a red shoe whose owner was unknown. In the compound of the deceased, they also found a Maendeleo Chap Chap membership card bearing the name of the 2nd accused. The body of the deceased was removed to Ishiara Level 4 Hospital Mortuary. On cross-examination, he stated that the accused persons and the deceased were neighbors and their homes were separated by trees. That before he was informed of the incident, there had been no prior reports of any other incidents. That it was unusual to find the 2nd accused person's Maendeleo Chap Chap membership card in the deceased's home.
 11. PW7 was Sgt. Awath Issa Mohamed of DCI Mbeere North who stated that he was assigned the case for investigation. He stated that he proceeded to the scene of crime with his colleague where he found the body of the deceased lying in the middle of the road and that it had injuries on the head and other parts of the body. That next to the body, there were sticks which he presumed were used to beat the deceased and his body was tied with a manila rope on the waist. That before removing the body from the scene, they went to the house of the deceased where they found that the door and window were broken.
 12. A few meters from the house, they recovered a pair of blue slippers and 2 membership cards of a political party in the name of the 2nd accused, which items were collected as exhibits and he collected statements from the witnesses. He stated that from the investigations, he gathered that a group of people had gone to the home of the deceased and had flushed him out of the house so that they could lynch him. That the wife of the deceased recognized the voice of the 1st accused person from the gang and after the deceased had been flushed out of the house, they took him away from his home and then he was found dead. That the 2nd accused person was arrested when his belongings were found at the scene and because he had fought with the deceased the day before he was found dead.
 13. He stated that the body of the deceased was taken to Ishiara Level 4 Hospital where a postmortem was conducted. That the 2nd accused's signature sample and the political membership card were examined by a handwriting and signature expert to ascertain that the cards belonged to him. He produced as evidence all the exhibits he had secured as well as a mental assessment reports authored by Dr. Eric Njuguna for each of the accused persons, concluding that they were fit to stand trial. On cross-examination, he stated that the crime scene was about 600 meters from the home of the deceased.
 14. That the names of the people who were part of the gang consisted of more than just the 2 accused persons but no report was made to that effect. That the 1st accused person was arrested because he was identified by the wife of the deceased. He stated that the alleged murder weapons were not dusted for fingerprints. That the political party membership cards were found within the compound although the 2nd accused and the deceased fought outside the compound. That he has Safaricom data but he



- disowned it as evidence since it did not appear accurate. That it is not possible that the 2nd accused's cards were brought by another person and it was not possible to get fingerprints from them.
15. The prosecution closed its case and the court found that the accused persons had a case to answer. They were placed on their defense.
 16. DW1, the 1st accused person, stated that the deceased did not have a good relationship with other people in the village but a cordial one with him. That on the day of the incident, he was at home burning charcoal the whole day and he was in the company of his sister Camelina (DW2). That he did not, at any point, leave home on that day. That the following day, the wife of the deceased and her sister went to asked DW2 to take them to hospital. He denied knowledge of anything about the death of the deceased. On cross-examination, he stated that the deceased had the habit of threatening people but so far, he had not threatened him. That he had stayed with DW2 the whole day and that he sleeps in his own room/house away from his mother and sister. That if he left his room at night, his family wouldn't be able to hear him. He stated that he went to bed at 11PM on that day.
 17. DW2 was Camelina Wangari, the 1st accused person's sister. She stated that on the night of the incident, she was at home with her brother and they parted ways at around 11PM and that her brother did not leave his house that night. That the next morning, DW1 woke up late and said it was because he was too tired the previous night. That they spent the day working in the farm and at 3PM the deceased's wife came asking for help to reach the hospital and she assisted them to the dispensary where she was treated for an injury. That she left the deceased's wife with her sister looking for transport to Ishiara Level 4 Hospital where they had been referred. That their family did not relate well with the family of the deceased and even so, her brother was not involved in the death of the deceased. On cross-examination, she stated that she did not hear her brother leaving his house that night although it would have been possible for him to leave without being heard.
 18. DW3 was the 2nd accused person who stated that on 22nd March 2020, he was at JS bar where the deceased was and they both left at around 8PM. That while they were walking home, they disagreed on some issues and the deceased hit him on the head with an object. That he screamed and his brother's wife and her daughters come to his rescue and he was taken to Ishiara Level 5 Hospital where he was treated and he reported the incident at the police station. That he went back to hospital for 2 more visits for follow-up treatment. That the following day, he stayed at home the whole day and at night he went to sleep and did not leave his house at all. That his political party membership card got lost but it was always kept together with his other cards which were intact and he was surprised when it was produced as part of evidence.
 19. He stated that after the deceased assaulted him, he did not think of revenge. He produced hospital receipts as evidence of his treatment. On cross-examination, he stated that when he parted ways with the deceased who had assaulted him, no one knows where he went. That on the night of the incident, he was at home sleeping and he did not leave at any point in the night. That his political party card membership had gotten lost but he did not report the loss at the party office or at the police station. That his card must have been planted near the scene to incriminate him since there was bad blood between his family and the family of the deceased. That he was with the deceased the day before he died and not on the material day.
 20. DW4 was Juliet Thaara Ngungi, the 2nd accused's sister-in-law. She stated that on 22nd March 2020, she was sleeping when she heard distress calls from DW3 and when she responded, she found him lying down unresponsive. That she called a boda-boda and took him to Ishiara Level 4 Hospital where he was treated and they reported the incident at the police station and were given an OB. That he was not admitted in hospital since it was during the Covid pandemic. That the injuries sustained by DW3



were so serious that he could not eat or walk on his own and they had to take him back to hospital for further treatment.

21. Later, they heard that the person who assaulted him had died. She stated that DW3 was too weak to kill the deceased considering that he was also on treatment for his injuries. On cross-examination, she stated that on 23rd, they arrived home at around 2AM and spent the day there with the 2nd accused's mother. That she took some porridge to the 2nd accused at around 9PM and that she wouldn't know if he left his house that night.
22. At the close of the defense case, the parties filed their written submissions except the 1st accused person.
23. The 2nd accused person, in his submissions, relied on the case of Anthony Ndegwa Ngari v. Republic (2014) eKLR and argued that none of the witnesses saw him at the scene. That even circumstantial evidence is not sufficient in this case since his defense displaced the prosecution's evidence regarding his lost card. He relied on the cases of Ahamad Abolfathi Mohammed and Another v Republic (2018) eKLR, Teper v. Republic (1952) AC at pg.489 and Erickson Cheng'oli Wanyonyi v. Republic (2018) eKLR. He stated that the fact that his card was found at the scene raises a suspicion but it does not place him at the scene. That the burden of proof lay on the prosecution but it failed to discharge this burden. He urged the court to acquit him.
24. The prosecution submitted relying on the case of Anthony Ndegwa Ngari v. Republic (2014) eKLR and the provisions of section 203 of the Penal Code. It also relied on Article 26 of *the Constitution* on the right to life and the case of Republic v. Stephen Sila Wambua (2017) eKLR. It was its argument that the testimonies of PW2 and PW3 were consistent and they identified the accused persons. That the 1st accused was identified through his voice while the 2nd accused person's card was recovered from the deceased's compound.
25. That it had discharged the burden of proof according to section 111 of the *Evidence Act*. Further reliance was placed on the case of Abanga alias onyango v. Republic CRA No. 32 of 1990 (UR). That malice aforethought as provided for under section 206 of the Penal Code was established through evidence and it also relied on section 21 of the Penal Code and the cases of Njoroge v. Republic (1983) eKLR, Otieno and Evans Oduor v. Republic (2017) eKLR. It was its case that the accused person had the joint intent of killing the deceased and that their alibi defenses do not hold water. It urged the court to convict them.
26. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
27. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused persons herein are facing the charge of murder contrary to section 203 as read together with 204 of the Penal Code. It is upon the prosecution to prove beyond reasonable doubt, that the accused persons murdered the deceased. Section 203 of the Penal Code provides:

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



28. In the case of *Republic v W.O.O.* [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, as guided by the Court of Appeal in the case of *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, as follows:

“For the offence of murder to be proved, there are three elements 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.”

29. The first element is death and cause of death. According to the postmortem report, the cause of death was severe head injury secondary to intracranial hemorrhage (left subdural hematoma). PW4 stated that the fatal injuries could have been inflicted through blunt force trauma. The second element is identification of the accused persons as the perpetrators. PW2 stated that on the day before the deceased died, he had been involved in a fight with the 2nd accused person. That on the day of the incident, she identified the 1st accused person through his voice as he was speaking ki-Mbeere language. She also stated that she saw him standing outside the window of her house. PW3 stated that the 2nd accused person fought with the deceased prior to his death.

30. PW7 stated that a political party membership card belonging to the 2nd accused was found at the scene and PW5 confirmed that the card belonged to him after examining the signature on it. DW3, the 2nd accused person, stated that he had lost that card previously and that he did not report its loss because he was not actively using it. He said that it must have been planted at the scene to incriminate him since the other cards that he kept with it were intact and where they should be. The 2nd accused person further testified that he had been attacked by the deceased on the day before his death.

31. DW4 testified that the 2nd accused person was taken to hospital and the assault was reported at the police station. That he was too weak to go and attack the deceased. However, she was not sure if the 2nd accused person left his house that night since they parted ways at 9PM. The 1st accused person claimed that he was at home the whole day with his sister and that they parted ways at 11PM. DW2, his sister stated that she couldn't tell if the 1st accused person left his house that night since it is possible that he would have left without her noticing because they slept in different houses.

32. This evidence does not directly identify the accused persons as the perpetrators. However, it is important to examine circumstantial evidence as I am guided by the case of *Chiragu & another v Republic (Criminal Appeal 104 of 2018)* [2021] KECA 342 (KLR) where the court stated:

“Thus, there was no direct evidence linking the appellants to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence: “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but 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 from evidence to say that it is circumstantial.”

Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990(UR) in which this court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) 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.”

And in *Sawe Vs. Republic* [2003] KLR 364, the Court of Appeal amplified on the above thus: “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

33. The 2nd accused person is said to have been involved in a fight with the deceased outside his compound one day before his death (see the evidence of PW2 and PW3). The two were neighbors living within a few meters of each other. The 2nd accused person’s card was found inside the deceased’s homestead and this is how the police zeroed in on him as a suspect. PW2 stated that on the night of the incident, a group of people went to her home and they were removing the roof, doors and windows until the deceased went outside. According to the 2nd accused person, on that night, he was at home nursing injuries inflicted upon him by the deceased the previous day when they were returning home from JS bar.
34. He produced medical records showing that he was indeed treated on the day before the deceased was found dead. In the case of the 1st accused person, he was identified by PW2 as the only eye witness. PW3 stated that on the said night, she did not leave her house out of fear thus she did not see anyone but she said that she heard footsteps outside her home. The 1st accused person, in his defense, stated that he was at home all night but even DW2 was not able to corroborate his evidence. The defenses by the accused persons, their alibis leave open the possibility that they could have left their houses that night. In fact, DW2 stated that she parted ways with DW1 at around 11PM but he woke up late and when asked, he said that he was tired the previous night.
35. In as much as nobody saw the 2nd accused person at the scene, it is evident from his testimony and that of PW2 and PW3 that he was involved in a tussle with the deceased and he sustained injuries that were treated and reported to the police. In his case, it could be appropriate to hold him as the person last seen alive with the deceased and in the mist of an altercation. However, the doctrine applies when the period between their contact and the death is short but here it is one full day. In the Nigerian case of



Stephen Haruna v. The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death.

Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

36. From the circumstantial evidence, I find that the 1st accused person was at the scene while the 2nd accused person was placed at the scene by his documents that were found at the scene, the following day after the incident.
37. As to whether the accused persons bore malice aforethought, I am guided by section 206 of the Penal Code which provides 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.”

38. Further, the court in *Republic v Njeru & 3 others (Criminal Case 2 of 2019)* [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another Vs Republic* [2015] eKLR stated as follows on the prove of malice aforethought; -“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 Vs Uganda*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining 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.....”

39. The 1st accused person stated that the deceased was a hostile person who issued threats to people all the time but he was yet to threaten him. He stated that on the day of the incident, he did not leave his house at all but PW1 evidence places him at the scene. The injuries sustained by the deceased were inflicted using blunt objects and PW7 produced some sticks as the murder weapons. According to PW4, the deceased was burned all over his body, which burns were not the cause of death but they contributed to his death. The information records that the accused persons committed the offence jointly with others who were not charged. Given the nature of injuries, the murder weapon and the cause of death, I find that the accused persons bore malice aforethought.
40. In the end, having considered the evidence before the court and the relevant laws, I find as follows:
- a. The prosecution has proved the offence of murder against the accused persons beyond reasonable doubt. The accused persons are therefore found guilty of the offence of murder contrary to section 203 of the Penal Code and are hereby convicted accordingly.
41. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

.....for the State

.....for the 1st Accused person

.....for the 2nd Accused person

