



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Njiru (Criminal Case 11 of 2018)  
[2024] KEHC 10503 (KLR) (27 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10503 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 11 OF 2018  
LM NJUGUNA, J  
AUGUST 27, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ERICK MUKUNDI NJIRU ..... ACCUSED**

**JUDGMENT**

1. The accused person herein was charged with the offence of murder contrary to section 203 as read together with section 204 of the penal code. The particulars of the offence are that on the 2<sup>nd</sup> day of March 2018 at Gititu village Kigumo sub-location, Kyeni East Sub-location within Embu County murdered Fidel Muthomi Kariuki. Upon arraignment he pleaded not guilty and a plea of “not guilty” was duly entered before the matter proceeded to full hearing.
2. PW1, APC Doreen Gaceri stated that on the 2/03/2018 she was at Kigumo Police Post when members of Public went with the accused herein alleging that they had arrested him having stabbed a child. She reported the matter to Inspector Mwitikari Lukaria who informed the O.C.S who sent inspector Njoroge to the scene. That she handed the accused over to the investigating officer together with a small knife which she was given by members of the public which they alleged the accused person used to stab the child.
3. PW2 Dr. Moses Maina stated that he performed post mortem examination on the body of the deceased, an infant aged nine (9) months. On examination, there was a 2 cm cut on the right maxillar caused by a sharp object. Internally, there was a 5cm linear fracture on the right temporal bone. There was global sub-dural hematoma on the brain. He came to the conclusion that the child died of head injury.
4. PW3, Duncan Gitonga John stated that on the 2/3/2018, he was on his way to Chuka to buy materials for his tailoring business, when he received a call from his sister, Esther Kagendo, at around 6.30 a.m. She told him that it was the mother to Eric Mukundi who wanted to talk to him on phone. He talked



- to her and she informed him that his son Eric Mukundi had killed the son to Luka Kariuki. He turned back and went to the home of Luka Kariuki where he found many elders who had gathered and they told him that Eric Mukundi had killed the deceased and that he had been taken to Kigumo Police Post. He followed them to the station and he called the area Chief on phone and told him what had happened, and he went home. On arrival home, he was called on phone by a police officer namely Doreen Gacheri who requested him to go back to the police post so that he could accompany police officers to the home of the accused person.
5. At home, there were no people but after sometime the neighbours came and directed them to where the mother to the deceased was. They went back with her to the home compound and she showed them where the deceased was killed which was like 10 meters from the house but within the compound. That at the scene, there was blood. She told them that the child was taken from the house from the bed where he was sleeping before he was killed. He stated that when he asked the accused person why he had killed the child, he said that he wanted to kill the father to the deceased instead, but he did not find him.
  6. PW4, John Njeru Sospeter an uncle to the deceased stated that he accompanied the father of the deceased to Kyeni Hospital Mortuary where the postmortem of the body of the deceased was done.
  7. PW5, Luka Kariuki Nderi, the father to the deceased and the uncle to the accused person stated that on the 2/8/2018, at around 6.30 a.m, his wife, Pauline Kairmori woke up and put some water on the Jiko to boil and went to pick milk for the vendor and he was left with the child in the house. He went to the Kitchen to check on the water and then went to check on the tree nursery and then went back to the house to check on the water that was on the Jiko. He saw the accused going away with the child, and he asked him where he was taking him. He followed the accused but before he could catch up with him, he met with his wife who was in the company of one Murugi. They all followed the accused who was holding the child with his left hand, and was holding a knife with the right hand. They tried to snatch the child from him but he stabbed the child on the left side of the head and in the process, he (PW5), was also injured.
  8. The mother to the deceased took the deceased and started screaming. His brother John Njeru heard the screams and ran towards the direction that they were, and they all started going back to his home compound where they found his mother who helped them get a motor bike and they took the deceased to hospital. The child died while undergoing treatment and the doctor advised him to report the matter to the police.
  9. PW6, Josephat Thuo, a psychiatrist examined the accused person on the 13/3/2018. On examination he formed the opinion that he had a mental problem and required treatment in a maximum-security mental hospital. He found him not mentally fit to plead. That later through a Court order, the accused was escorted to Mathari Hospital where he was admitted for one month and was found fit to plead. On cross examination, he stated that when he examined the accused person, he had an acute psychiatric episode.
  10. Pw7, Jim Njeru Nderi stated that on the 2/3/2021 at 6.00 a.m he was at home when he heard distress calls coming from his brother Luka Kariuki's house. He ran to his brother's home and found his brother Luka, the accused herein and the wife to his brother, who is the mother to the deceased. That the accused was holding a knife. He struggled with him and managed to snatch the knife from him and he took him to Kigumo Police Station. The deceased who had been stabbed on the right side of the head was taken to Hospital. On Cross-examination, he stated that by the time he arrived at the scene, the deceased had already been stabbed.
  11. PW8, Corporal Lilian Kajuju stated that on the 2/3/2018 when she was in the office, she was instructed to accompany the Deputy OCS, One Inspector Gathogo to a scene of murder at Kigumo. When they



- arrived at the scene, they found the suspect, one Eric Mukundi who was being held at Kigumo Police Post after he was taken there by members of the Public. He accompanied them to the scene of murder. At the scene they found that the child had been taken to Hospital by his mother and father but while still at the scene, they received information that the child had died while undergoing treatment at Kigumo Level (4) Hospital. On cross examination, she stated that the accused said he was remorseful and that he had intended to kill the father of the deceased whom he had a grudge with, and not the deceased.
12. PW9, Inspector Peter Kimani stated that he is the one who investigated the case. That on the 22/6/2022 he was handed over a number of files, this being one of them. That he took over investigations from the former investigating officer who resigned from the police force and joined Kenya Revenue Authority. He narrated the events as stated by PW8 in her evidence and told the Court that by the time he took over the file, all the statements of the witnesses had been taken save for the mother to the deceased and one Lucy Murugi who, according to him were threatened by the accused person and ran away and their whereabouts are unknown.
  13. After the close of the prosecution's case, the accused person was placed on his defence.
  14. He gave unsworn statement and stated that he cannot remember what happened on the 2/3/2018 when the incident took place. He stated that he was taken to Mathare Hospital where he was treated and by the time he was testifying he was still on treatment and he is usually seen by Dr. Thuo from time to time. He then closed his defence case.
  15. The Court gave directions on filing of submissions but only the prosecution complied with the said directions.
  16. In its submissions, the prosecution relied on the case of Antony Ndegwa Ngari Vs. the Republic (2014) eKLR on the elements of the offence of murder. On the element of prove of death, it relied on the evidence of PW2, the pathologist who testified on the cause of death. On the element of the accused as the perpetrator and the unlawful act that led to the death of the deceased, the prosecution relied on Article 26 of *the constitution* and on the case of Republic Vs. Stephen Sila Wambua (2017) and the case of Guzambizi Wesonga Vs. R (1948/15 EACA 63. On the element of malice aforethought, the prosecution relied on section 206 of the penal code on what constitutes malice aforethought. It urged the Court to find that it has proved its case beyond reasonable doubt.
  17. The accused person herein has been charged with the offence of murder contrary to Section 203 as read with 204 of the penal code.
  18. The issue for determination is whether or not the offence of murder has been proved.
  19. Article 26 of *the constitution* provides that a person shall not be deprived of his life intentionally, except to the extent authorized by *the constitution* or written law.
  20. In the case of Republic Vs. W.O.O (2020) eKLR Migori High Court Criminal Appeal Number 26 of 2017 the elements of murder were explained, as guided by the Court of appeal in the case of Antony 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 death.
    - b) that the accused committed the unlawful act which caused the death of the deceased and



c) that the accused had malice aforethought.

21. On the first element of death and cause of death, PW2 testified that he examined the body of the deceased and formed the opinion that the cause of death was head injury. He observed that the deceased had a 2 cm cut on the right maxillar caused by a sharp object.
22. As to whether the death of the deceased was unlawful and who caused the death, the evidence of PW5 who is the father to the deceased was direct evidence. He witnessed when the accused person stabbed the deceased with a knife after he took him from the house, from the bed when he was sleeping. The father of the deceased asked the accused why he had taken the deceased and he followed the accused closely from behind. The accused was holding the deceased with the left hand and on the right hand he was holding a pen knife that he used to stab the deceased.
23. With PW2 was his wife and a lady called Murugi both of whom did not testify as according to the investigating officer, they were threatened by the accused person and they could not be found by the time the prosecution closed it's case.
24. PW7 is the accused person's uncle who stated that on the 2/3/2018 he heard distress calls emanating from his brother's house and he ran to find out what was happening. He found his brother Luka, the father to the deceased, the accused and the mother to the deceased. That the accused was holding a knife, he struggled with him and managed to get it from him and took him to Kigumo Police Station. The child had been stabbed on the right side of the head and though he did not witness the incident, his brother told him that it was the accused person who stabbed the deceased and the accused was at the scene and he was holding the knife that he used to stab the deceased. When he was put on his defence the accused did not deny having committed the offence but stated that he could not remember what happened on the said date. He was placed at the scene and he was positively identified as the perpetrator.
25. On the element of malice aforethought, the prosecution must prove beyond reasonable doubt that the accused person intended to cause the death of the deceased. From the evidence on record, the accused person left his home, went to the house of the parents of the deceased nine (9) month's old baby, picked him from the bed where he was sleeping and took him away. All this while, he was armed with a pen knife which he had with him. As he went away with the deceased, the parents of the deceased pleaded with him to return the child, to no avail. He stabbed the child in full view of the deceased parents and the deceased died on arrival at the hospital, when he was receiving treatment. When he stabbed the deceased on the head, he must have had knowledge that the act would cause death or grievous harm to the deceased.
26. 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 actually died 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 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.
27. Further, the Court in *R. Vs Njeru & other (Criminal Case number 2 of 2019)* (2023) KEHC 19141 (KLR) stated as follows;

“The Court of appeal in *Bonaya Tutu Ipu & Another Vs R* (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 the weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.

28. That being said, from the foregoing, malice aforethought can be strongly inferred from the evidence. The fact that the accused had with him a pen knife which he had carried with him to the home of the deceased’s parents and the part of the body he stabbed the deceased. There can be no doubt that he had malice aforethought and he intended to kill the deceased.
29. There is no doubt in my mind that the prosecution has proved it’s case against the accused person beyond reasonable doubt. I find that he is guilty for the offence of murder contrary to section 203 of the penal code, and I hereby Convict him accordingly.
30. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF AUGUST, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the State

.....for the Accused person

