Republic v Nyaga (Criminal Case E006 of 2022)
[2024] KEHC 13200 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL CASE E006 OF 2022

LM NJUGUNA, J

OCTOBER 30, 2024

BETWEEN

REPUBLIC ..... PROSECUTION

AND

JAMES KINYUA NYAGA ..... ACCUSED

JUDGMENT

1. The accused faces the charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code. Particulars of the offence are that on 29th March 2022 at Kangonde village, Itabua sublocation, Mbeti North Location in Embu West Subcounty within Embu County, the accused murdered Elias Gitonga. Upon arraignment, he pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.

2. PW1, Ann Wanjiru Nyaga stated that on the day of the incident at 7PM, the deceased called her to take him to hospital since he had been beaten. That she went to his house in the company of One Purity and they found the deceased with one Kimanzi. That while they were enroute, there was a man walking ahead of them and when they arrived, they found a man interrogating the deceased about a phone and he told them that the people who beat him up are the ones who gave him the phone.

3. She stated that when the man left, they asked the deceased what had happened and he said that he had been beaten by Gitonga and Mugambi. That Mugambi had asked him where his mother was and when he said he did not know, Mugambi hit him with a fork jembe handle and the accused, Mugambi's father descended on him with his walking stick. That while he was on the ground, both of them continued beating him up and when they saw he was bleeding too much, they told him to go and take a bath but he only wiped the blood off his face.

4. She narrated that the deceased told her that the accused and Mugambi continued beating him while inside the house and they left but promised to return and they took his phone with them. That he

told them he was unable to walk but he crawled out of his house and went to the fence where he called out and Purity heard and went to his rescue first at around 6:30PM. That purity gave her phone to the deceased who in turn called her and she went there in the company of 2 other people. That they reported the matter at Mugoya Police Station and then they took the deceased to Embu Level 5 Hospital where he was treated and a cast placed on his fractured leg. That they also gave him some medicine to take at home.

5. She stated that she spent the following day with the deceased and the next day, while she was away, she received a phone call that the deceased was in bad shape and that she should take him to hospital. That she rushed back and found that the deceased's employer had called his brothers who had taken him to Embu Level 5 Hospital where he was admitted for about a week before he died. On cross-examination, she stated that between her home and the deceased's place is about 6KM and she arrived at about 8PM.

6. That the deceased told her that he had been beaten by Mugambi and the accused and that she did not know who took his phone. That it was Mugambi who was holding the fork jembe handle and she did not see the walking stick because it was carried away. That when the accused was taken to hospital, the first x-ray did not reveal any problem on the head even though the deceased was complaining of headache and his leg had a fracture. That the deceased stayed in hospital for 7 days and he died 10 days after he was beaten. That what she told the court is what she was told by the deceased.

7. PW2 was Purity Wawira Mwigaruri who stated that she heard the deceased calling from the fence but in the compound where he was working. That when she went near, she found that the deceased was looking weak and he asked for some water to drink as he threw the gate key to her so that she could access the compound. That she spoke to him and he requested for a phone to call his employer but since the phone was in the house, she went back to get it and then she called her husband, Kimanzi and together, they went to the deceased's after which she returned to her house, leaving her husband with the deceased.

8. That at around 8PM, PW1 went to her house and asked her to accompany her to the deceased's house where the deceased told them that he had been beaten by the accused and his son Mugambi. In the company of Kimanzi, PW2 took the deceased to hospital and returned at around 1-2AM. On cross-examination, she stated that she did not see the deceased being beaten by anyone but she saw the injuries he had sustained. That the deceased said that the accused and his son used a fork jembe handle and a walking stick to beat him.

9. PW3 was Patrick Kimanzi who stated that he was at home resting after a day of work when his wife, PW2 went to borrow his phone, saying that the deceased was requesting for help. That he went near the fence from where the deceased was calling and the deceased told him that he was beaten by the accused and his son Mugambi. That he went to the deceased's side of the fence and helped him to his house since he complained of pain in his leg. That they found the landlord's number and they called her and she arrived at 8PM. That another man also arrived and when they asked him where he had found the phone, he said he got it from the people who had beaten the deceased. When the deceased said that the phone was not his, the man, whom the later learned was the son of the accused, said that he is returning to ask the people who beat the deceased about his phone.

10. He stated that the deceased told them that the accused and his son Mugambi had found him in the shamba and they asked him where Mugambi's mother was and he told them that he had not seen her since she had not gone to the shamba to pick miraa that day. That Mugambi hit the deceased with a fork jembe handle and he fell before the accused began beating the deceased with his walking stick. That after they beat him, they told him to go and shower but he locked himself inside the house and they threatened to return.

11. He stated that they took the deceased to Embu level 5 Hospital with the landlord and they passed through Itabua Police Station for a P3 form. That some x-ray scans were done and his leg was placed in a cast before they were discharged to go home. That on the 3rd day after the incident, he was informed that the deceased was not getting better and needed to be taken back to hospital. That on 13th April 2022, he was informed by the deceased's brother that the deceased had died. On cross-examination, he stated that he did not witness anyone beating the deceased neither did he see the fork jembe handle and the walking stick in court.

12. PW4 was Julius Micheni Mugambi who stated that on 30th March 2022, the deceased, his brother, called to tell him that he had been beaten by the accused and his son Mugambi. When he asked him why they beat him, he told him that they had asked him where Mugambi's mother was and he told them he had not seen her, that is why they started beating him. That the deceased told them that the accused and his son beat him until he became unconscious and he was taken to hospital by neighbours. He stated that later on, he was informed that the deceased had gotten worse and he arranged for him to be taken to Embu Level 5 Hospital where he died after some days. That he reported the death of the deceased at Itabua Police Station and he was accompanied by police officers to the hospital where postmortem was conducted. On cross-examination, he stated that the deceased told him that he was beaten until he lost consciousness but when he was being taken to hospital, he was awake. That, as far as he was concerned, the deceased was not using a walking stick to walk though he had not seen him for some time.

13. PW5 was Phineas James Nyaga Munyi, who stated that PW1 told him that the deceased had been beaten by 2 people and he went to see him while in the company of one Munene. That when they arrived in the house, they found him inside his house and when they asked him what had happened, he said that the accused and his son had beaten him with a fork jembe handle and the accused's walking stick. That the neighbours assisted the deceased to get to hospital where his head was bandaged and a cast was put on his leg.

14. That the deceased told him that when he was beaten, he lost consciousness but he did not tell him why he was beaten. That he visited the deceased at the hospital and he was unresponsive and later, he was told that the deceased had died. On cross-examination, he stated that the deceased was a handyman in his farm and he had been involved in an accident before he employed him in December 2020, thus he was using a walking stick by then. That the deceased had an implant nail in his leg as a result of the accident and the implant was protruding. When he went to the hospital, he stated that he could not see the deceased's walking stick.

15. PW6 was Dr. Josephat Thuo of Embu Level 5 Hospital who produced the accused person's mental assessment report that was authored by Dr. Sheila Shavulimo. The Examining doctor found the accused person fit to stand trial.

16. PW7 was P.C. Daniel Lepilia, formerly of Itabua Police Station. He stated that the deceased reported having been assaulted by the accused and Gitonga, earlier that day. That the report was made at around 8PM and he was issued with an OB number and a medical note to go to hospital. That the deceased was accompanied by PW1 and his head was wrapped with a cloth and he was limping. He produced the OB report as an exhibit. On cross-examination, he stated that the accused was mentioned by the deceased. That he did not know how the accused was connected to the unlawful act.

17. PW8 was Inspector Oliver Mwandonyi, formerly of Itabua Police Station. He testified that he was at the station when the deceased, in the company of PW1 went to report the incident. That the deceased reported that he had been assaulted by people that he knew and he was given an OB and treatment note. That later on, PW4 reported that the deceased had died and PW5 filed another report. That the accused

was arrested as a suspect on 13th May 2022 and he was arraigned in court. That he was not present when the accused was arrested but the matter was investigated by the DCI. On cross-examination, he stated that the investigations revealed the cause of the assault which the accused said was that the deceased had an affair with his wife. That he recorded statements from the witnesses.

18. PW9 was Dr. Wangari Kamau a pathologist at Embu Level 5 Hospital who produced the postmortem report for the deceased. Upon examination of the body of the deceased, she observed signs of medical intervention on the right leg and on right lateral chest wall, there was a procedure called thoracotomy that had been done. She noted that there were injuries on the head; on the frontal region, the injury had been sutured and there were other injuries on the temporal and occipital regions. On the right lung there was right hemothorax and there was a frontal subgaleal hematoma with no skull fracture.

19. There was focal subarachnoid hemorrhage on the right parietal region and signs of raised intercranial pressure. On the right leg, there was fracture of the tibia and femur. She formed the opinion that the cause of death was complications due to severe head and chest injuries caused by blunt force trauma. On cross-examination, she stated that there was medical intervention because when a patient sustains injuries on the chest, it is a medical emergency since they cannot survive for 3 days.

20. PW10 was P.C. Gideon Gitonga of Itabua Police Station. He stated that the deceased reported the incident and he advised him to seek medical treatment. That he was treated and discharged but when his condition worsened, he was taken back to hospital where he succumbed. That PW9 ascertained the cause of death and indicated it in the postmortem report produced as evidence. That when the deceased first reported the assault, he said that it was the accused and his son who had beaten him.

21. That he arrested 3 suspects including the accused herein who was arraigned. On cross-examination, he stated that no arrests were made until the month of May. That according to the OB, the cause of the fight was Mugambi's mother, that is the reason why the accused beat the deceased. That the deceased had a deep cut on the head, from which he was bleeding. That he did not investigate any injuries the deceased could have had before the assault.

22. PW11 was P.C Christopher Karumba of DCI Embu West who was the investigating officer. He stated that when the deceased was reported as having succumbed, he went to Embu Level 5 Hospital Mortuary where his body was found. That he interviewed PW1 and PW5 who were the deceased's employers, alongside other witnesses who narrated their versions of the events and what the deceased told them. That the postmortem was conducted and a report signed by PW9 establishing the cause of death. That the accused person was subjected to a mental assessment after which he was found fit to stand trial. That according to the OB, the deceased was assaulted by the accused and his son Vincent Mugambi but the said Vincent, who was 16 years old at the time, became a prosecution witness.

23. He established that the accused person alleged that the deceased was having an affair with his wife. That the accused had gone to the farm where the deceased was working to look for his wife Lucy Wanja Njeru. That no exhibits were recovered at the time of arrest of the accused person. On cross-examination, he stated that it took the police 1 month to arrest the accused because they were investigating the case. That it is the ODPP who made the decision to convert Vincent Mugambi and Lydia Wanja into prosecution witnesses. That the deceased died while undergoing treatment for the injuries he sustained following the attack by the accused. He denied that the assault was as a result of a phone, as indicated by Vincent Mugambi.

24. After the close of the prosecution's case, the court found that the accused person had a case to answer and he was placed on his defense.

25. DW1, the accused person, stated that on the day of the incident, he had returned home from his errands at around 1PM when he was told that the deceased and his son Vincent were fighting nearby. That he rushed to the scene where he separated them but they were both bleeding. That the reason for the fight was that the deceased had given Vincent a phone but he had returned it when it was faulty. That he did not engage the deceased but he took his son away but he was later informed that the deceased had been taken to hospital and had reported the matter to the police. That he also reported the matter to the police and later, he heard that the deceased had died. He denied any involvement in the death of the deceased. On cross-examination, he denied that his wife had gone to the farm where the deceased was working. He stated that he did not have a grudge with the deceased.

26. After the close of the defense case, the prosecution filed its written submissions.

27. It was the prosecution's argument that the offence has been proved against the accused person beyond reasonable doubt and it urged the court to consider the testimonies of PW1, PW2, PW3, PW4, PW5 and PW11. That the medical documents speak for themselves in proving the offence. It relied on the cases of Anthony Ndegwa Ngari v. Republic (2014) eKLR and Republic v. Stephen Sila Wambua (2017) eKLR and stated that the death of the deceased was due to an unlawful act by the accused person. It argued that the deceased, before his death maintained that he was assaulted by the accused and his son, thus making his statement a valid dying declaration.

28. Reliance was placed on section 33 of the *Evidence Act* and the cases of Philip Nzaka Watu v. Republic (2016) eKLR and Nelson Julius Karanja Irungu v. Republic (2010) eKLR where a dying declaration was admitted as evidence regardless of whether it was made several days before death. It was its submission that the case is based on circumstantial evidence which is the best evidence as stated in the case of Republic v. Richard Itweka Wahiti (2020) eKLR. That considering the injuries inflicted upon the deceased, the accused bore malice aforethought at the time of committing the offence. It urged the court to find the accused person guilty.

29. The issue for determination is whether or not the prosecution has proved the case against the accused person beyond reasonable doubt.

30. 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 person herein faces the charge of murder contrary to section 203 as read together with 204 of the Penal Code. Section 203 of the Penal Code provides as follows:

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

31. 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."

32. First, the cause of death was established by PW9 who examined the body of the deceased. She concluded that the cause of death was complications due to severe head and chest injuries caused by blunt force

trauma. She detailed several injuries that the deceased sustained on the head, chest and leg and produced the postmortem report as evidence.

33. Secondly, we must establish whether the unlawful act that caused the death of the deceased was caused by the accused. Here, it is important that the accused person is placed at the scene and committing the crime. I do note that none of the prosecution witnesses actually saw the accused beating the deceased. However, PW1, PW2, PW3, PW4, PW5, PW7, PW8, PW10 and PW11 all testified that the deceased told them that he had been beaten by the accused and his son, days before he died.

34. PW2 was the first one to interact with the deceased after he had been assaulted. She testified that the deceased was calling her from across the fence and in the company of PW3, her husband, she went to the compound where he was. That they saw that he had been badly beaten and he couldn't walk so they took him to the house and he told them that he had been attacked by the accused and his son. PW1 and PW5, the deceased's employers, also went to see the deceased the day he was assaulted and they testified that he told them he had been attacked by the accused and his son. PW4, the deceased's brother, said that the deceased called him on phone and told him that the accused and his son had beaten him. PW7, PW8, PW10 and PW11 testified that the deceased went to the police station to report that he was assaulted by the accused and his son and he died a few days later.

35. The evidence adduced by these prosecution witnesses is steadfast to the extent that the deceased told them it was the accused and his son who assaulted him. The deceased's statement speaks to the events that led to his death. The statement does not amount to hearsay when the circumstances under Section 33 of the *Evidence Act* are satisfied. The provision states:

> " Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (a) relating to cause of death
>
> when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

36. When contemplating whether or not to admit a dying declaration, the court proceeds cautiously as warned by the Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR. The court held that:-

> " Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

37. Being thus warned, I note that there is plenty of circumstantial evidence proving that the deceased was beaten by the accused. As a result of this beating, he sustained injuries to which he succumbed after a few days. PW1, PW3 and PW5 took the deceased to hospital on the day he was beaten and he was treated and discharged. PW7, PW8 and PW10 testified that when the deceased went to the police station to report the incident, he was in the company of other people and he had wounds on the head. Eventually, PW9 confirmed that the deceased died as a result of the head and chest injuries.

38. It is my considered view that the deceased's statements to PW1, PW2, PW3, PW4, PW5, PW7, PW8 and PW10 amounts to an admissible dying declaration, regardless of the fact that the statements were made a few days before his death. The deceased's statement places the accused person at the scene. I am guided by the case of Nelson Julius Karanja Irungu v Republic [2010] KECA 158 (KLR) where the Court of Appeal held a dying declaration as admissible where the deceased died 4 days after the declaration.

39. In his defense, the accused stated that he found his son fighting with the deceased about a phone. He stated that it had been alleged that the deceased gave a phone to the accused's son and he returned it being faulty. It was his evidence that all he did was to separate his son and the deceased and he took his son home and did not engage the deceased. PW1 and PW3 testified that when they went to the house of the deceased on the night of the incident, there was a man who went there and asked the deceased if that was his phone and he denied. The man left and said that he was going to ask the people who beat the deceased about his phone. PW3 identified the man as a son of the accused.

40. This goes to say that indeed there was a storyline about a phone that rose a feud between the deceased and the accused and/or his son. However, according to PW4, the deceased told him that he was beaten on suspicion that he was having an affair with the accused's wife, and not because of the phone. That the accused had asked him about his wife and the deceased said he had not seen her. That the accused and his son began beating him with a fork jembe handle and a walking stick. PW11 testified that from the investigations, he learned that the deceased had been accused of having an affair with the accused's wife. He stated that the accused's wife and son had become prosecution witnesses.

41. On the issue of malice aforethought, the prosecution also has to prove that the accused person intended to murder the deceased. In its submissions, it urged the court to infer malice aforethought from the nature of injuries inflicted upon the deceased. Malice aforethought is defined and well explained under section 206 of the Penal Code 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;
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> (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."

42. 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....."

43. In this case, no murder weapon was recovered as evidence. However, PW9 gave detailed evidence on the nature of injuries inflicted on the deceased. She noted that there were injuries on the head; on the frontal region, the injury had been sutured and there were other injuries on the temporal and occipital regions. The right lung had a hemothorax and there was a frontal subgaleal hematoma with no skull fracture. There was focal subarachnoid hemorrhage on the right parietal region and signs of raised intercranial pressure. On the right leg, there was fracture of the tibia and femur. These injuries were inflicted during the beating and they resulted in the death of the deceased, a few days thereafter. From these injuries, malice can be inferred.

44. Therefore, in the end, I find that the prosecution has proved its case against the accused beyond reasonable doubt. The accused person is hereby found guilty of the offence of murder contrary to section 203 of the Penal Code and he is convicted accordingly.

45. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

.....for the State

.....for the Accused Person