



**Republic v Njoka & 3 others (Criminal Case E028 of 2021)
[2024] KEHC 15076 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E028 OF 2021
LM NJUGUNA, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ALBERT MURIITHI NJOKA 1ST ACCUSED

JOSECK MURIITHI MUGO 2ND ACCUSED

EDWARD MURIMI MUTUA 3RD ACCUSED

MORRIS MUCHANGI NJAGI 4TH ACCUSED

JUDGMENT

1. The accused persons are charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars are that on 24th August 2021 at Karundori village, Kiangungi sub-location, within Embu County, the accused persons jointly murdered John Mugendi Njoka.
2. Upon arraignment, they pleaded not guilty and a plea of not guilty was duly entered for each of them before the matter proceeded to full hearing.
3. PW1 was Henry Muiruku Njoka who stated that on the day of the incident, he was at home with his wife and 2 children when he heard noise outside. That when he went to check, he saw the accused persons calling his brother, the deceased, to get out of the house but he was refusing. That the 1st accused pushed the deceased's door open and told him that he wanted to take him to the police station. That since his house and that of the deceased were adjacent to each other, he saw the accused persons clearly and he asked the first accused why they were taking his brother away but he did not tell him why. The 1st accused took the deceased by the hand and they left and the deceased asked him to repair his door. That his brother Josiah Kinyua accompanied the deceased and the accused persons



4. Later, his other brother called Josiah said that he had seen the deceased having been cut and was being taken to the police station. It was his testimony that the police went to his house to ask if he knew the deceased whose body was in the police vehicle and they took it to Kieni Mortuary. On cross-examination, he stated that while sitting outside his house he saw 5 people armed with Pangas at his brother's house but one of them was not arraigned. That the 1st accused, who is a catechist was not there to stop the others from attacking the deceased but he also participated. That he did not hold a grudge against any of the accused persons.
5. PW2 was Josiah Kinyua Njoka, a brother to the deceased who stated that he was in his house at around 7:30PM when he heard a knock at his deceased brother's house and when he went to check he saw the accused persons and another one called Kibara who ran away. There were security lights outside the house thus he could clearly see the accused persons. He said that the 1st accused told him that the deceased was disturbing people around the village so they wanted to take him to the police station but he was refusing. That he persuaded the deceased to get out of the house because the people who had come for him were threatening to burn his house down. That the accused persons took him away in the presence of PW1, their father and the deceased's wife and they threatened to kill him if he ran away. That the police station is about 4KM away. That after about ½km from the home, the deceased started to run away and that is when the accused persons ran after him and began to cut him with pangas. That all the accused persons participated in cutting him and he saw them through moonlight and the incident occurred at Gaturu's tea farm. That the accused persons also threatened to kill him and so he returned home and told PW1 what had happened as he suspected that the deceased was dead. He found that the deceased's wife had already called the police who arrived at the scene and they interviewed them. They identified the body of the deceased and it was taken to the mortuary. On cross-examination, he stated that he was walking with the deceased and the accused persons and he did not know why the deceased decided to run away. That it is the 1st accused person who was threatening the deceased with death. That after they cut the deceased with pangas, they went away leaving the deceased for the dead and when he saw the deceased, he was still alive, and he then went back home to inform the others of what had happened. He stated that the accused persons were threatening to burn down the deceased's house if he did not open the door. That after he saw the accused cutting the deceased with pangas, he did not scream because he had been threatened with death if he raised any alarm. That he saw all the accused persons cutting the deceased and when he saw the deceased's body at the mortuary, he noted that it had many cut wounds. He said that the 3rd accused was not known to him but he knew the 1st, 2nd and 4th accused as they hailed from the same village.
6. PW3 was Njoka Ngenu, the deceased's father who stated that he heard what sounded like a person being beaten and when he went to check, he saw the 4 accused persons near his son's house and asked one of them what he was doing there. He later identified the body of his son at Kieni mortuary.
7. PW4 was Dr. Moses Maina who stated that upon examining the body of the deceased, he observed that it had 15 cuts on the left side of his body and they measured between 2cm to 12 cm long, having been inflicted by sharp objects. There was a deep cut between the 7th and 8th ribs that lacerated the right lung leading to its collapse and hemorrhage into the right side of the chest. 2 liters of blood was collected from that side of the chest. The cause of death was chest injury with resultant bleeding. He produced the postmortem report as evidence.
8. PW5 was Sgt. Hassan Sora of DCI Meru who testified that at around 7:30PM on the material day, he was informed of the incident and he visited the scene together with scenes of crime personnel. That they found a body of a person who was murdered and they took photographs then took the body to Kieni Consolata Hospital Mortuary. That they investigated the matter and arrested 4 suspects who



were arraigned and witness statements were recorded. That the pangas were not recovered but from observation of the scene, there was blood and it seemed like there had been a struggle. That witnesses said that the accused persons alleged that the deceased had stolen their goats. That they took him and killed him while on the way to the police station. On cross-examination, he stated that the distance between the scene and the deceased's home was about 4 meters. That blood samples were collected from the body of the deceased and on examination, it was found to match the blood found at the scene. He stated that he visited the deceased's home and there was no sign of a broken door. That the witnesses named the 4 accused persons as the people who were seen that night and they were identified by PW1 and PW2 at an identification parade.

9. PW6 was Dr. Eric Mbungi, a clinical psychiatrist who produced mental assessment reports of the accused persons who were all found mentally fit to stand trial.
10. At the close of the prosecution's case, the court found that the accused persons had a case to answer and they were placed on their defense.
11. DW1 was the 1st accused person who stated that on the day of the incident, at around 8PM, he was at his house when he heard noises outside. When he went to check, he found the deceased's house surrounded and the people wanted to burn the house down saying that the deceased was a thief. That he did not see any of the accused persons there and he begged the people not to burn the house but they should take the deceased to the police. That he accompanied the people who were escorting the deceased to the police station but somewhere along the way, the deceased ran away and some people pursued him but he did not. That the police arrived shortly afterwards and asked him to help them with investigations and they told him to go to Kathangeri police station the following day. That the police recorded his statement and he was later arrested in connection with the incident. On cross-examination, he stated that he did not see PW2 at the scene that night and his testimony was a not true. That the 3rd accused is the deceased's cousin and he did not see the 3rd and 4th accused at the scene. That the police found him and other people at the scene and he helped the police with investigations because the others were fearing.
12. DW2 was the 2nd accused who testified that on the material day, he was at home watching TV when the deceased's wife knocked on his door and when he opened, she said that there were people at their home who were surrounding their house asking the deceased to get out. That she told him that Mwalimu was among them and he declined to accompany her back to her house. That later on, he was arrested in connection with the death of the deceased. He stated that Joy Mwendu recorded her statement with the police but she did not testify. That he heard the testimonies of PW1 and PW2 and they are all lies. On cross-examination, he stated that he knows PW1 and PW2 since they are all neighbours and if they said they saw him, it is true. He said that he did not hear any noise outside on that day.
13. DW3 was the 3rd accused who stated that on the material day, he went to work and afterwards, he went to buy miraa and immediately headed home. That he did not hear any noise as his radio was on. He stated that the next day while he was going to work as usual, he heard that the deceased had been removed from his house and killed. 3 days later, he was arrested in connection with the incident. He stated that the deceased, PW1 and PW2 are his cousins and that there are 4 people going by the name of 'Murimi' in that village. On cross-examination, he stated that he has lived near PW2 and PW3 for many years and they know him quite well. That there are 3 neighbors around them but they were not arrested.
14. DW4 was the 4th accused who stated that on the night of the incident, he was at his parents' home helping as the cow was calving and he did not hear any noise neither did he see any people passing by going to the deceased's home. That the 1st accused is his uncle while the 2nd and 3rd accused are his



- neighbors. That the testimonies of PW1 and PW2 were false and he had nothing to do with the death of the deceased. That the 1st accused had sued PW1 and PW2. That none of the other neighbors were arrested.
15. The defense case was closed and the court directed that the parties file their written submissions. Only the prosecution complied.
 16. In its submissions, the prosecution relied on the case of Anthony Ndegwa Ngari v. Republic (2014) eKLR and section 203 of the Penal Code. It also relied on the case of Republic v. Stephen Sila Wambua (2017) eKLR. It was its submission that PW2 was present at the time of the incident and he identified the accused persons who inflicted fatal injuries upon the deceased and his testimony was corroborated by that of PW5. That DW1 confirmed his presence at the scene at the time of the incident.
 17. Reliance was placed on section 9 of the Penal Code and the cases of Choge v. Republic (1985) KLR 1 and Republic v. Richard Mbaabu (2014) eKLR and it argued that criminal responsibility is not pegged on proof of motive to commit an offence. It also relied on section 21 of the Penal Code and the cases of Njoroge v. Republic (1983) eKLR, Dickson Mwangi Munene v. Republic (2014) eKLR and Otieno Evans Oduor v Republic (2021) eKLR and argued that the accused had the common intention of killing the deceased. It urged the court to convict the accused persons.
 18. It is now upon this court to determine whether the prosecution has proved the offence of murder beyond reasonable doubt against the accused persons.
 19. 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 face the charge of murder contrary to section 203 as read together with 204 of the Penal Code. It is the duty of the prosecution to prove beyond reasonable doubt, that the accused persons murdered the deceased. These provisions of the Penal Code provide the elements of the offence as follows:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 204. Any person who is convicted of murder shall be sentenced to death.”
 20. 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 stated, being 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.”
 21. On the first element of death and cause of death, PW4 produced postmortem reports and observed that the deceased suffered multiple cuts on his body. He had a cut between the 7th and 8th ribs and the cut had penetrated his lung causing bleeding in the chest on that side. 2 liters of blood were removed from the chest. It was his opinion that the cause of death was chest injury with resultant bleeding.
 22. On the element of unlawful act which caused the death of the deceased, the prosecution has the legal burden of proving that the accused persons are linked to the death of the deceased. This means that the accused persons should be placed at the scene of crime at the time of the incident. PW1 testified that he saw the accused persons who are his neighbours and they were trying to get the deceased out of his



- house, saying that they wanted to take him to the police station. That the 1st accused hit the deceased's door and it broke and the deceased got out and accompanied them, asking PW1 to fix his door for him. That later on, PW2 told him that the deceased was dead. He also said that the 1st accused was the one threatening to burn down the deceased's house if he did not get out of the house.
23. On his part, PW2 testified that he found people gathered outside the deceased's house and they were telling him to get out of the house but he was refusing. He said that he saw the people who were outside the deceased's house because there were security lights outside the house. He identified the accused persons at the scene and stated that when he enquired what was happening, the 1st accused told him that the deceased had been disturbing people in the village.
24. That when the deceased left the house accompanied by the accused persons, he followed them until the deceased ran away and they followed him into Gaturi's tea farm where the accused persons cut him with pangas. PW2 stated that he did not raise alarm because he had been threatened with death if he screamed but he returned home and informed PW1 of what had happened. He stated that he later identified the accused persons through an identification parade at the police station. That PW1 was left at home repairing the deceased's door while PW2 accompanied the people who were taking the deceased away. On further cross-examination, PW2 said that he did not know the 3rd accused and had never heard of him.
25. According to PW5, the investigating officer, it is the area chief who gave the police the names of the accused persons who were arrested and charged. In their defenses, DW1 admitted to being at the home of the deceased that night but he was there to stop the crowd from harming the deceased. DW2 and DW3 denied being anywhere near the scene that night. DW3 said that PW2 was his cousin although PW2 denied any knowledge of him. DW4 testified that DW1 had sued PW1 and PW2 in Embu HCCRC 8 of 2016.
26. From this evidence, PW1 and PW2 seem to be the key witnesses in the case. Both of them said that they saw the accused persons at the scene and they identified them through an identification parade. There was no proof of an identification parade having been conducted and the investigating officer said that the names of the deceased were given to him by the area chief and no murder weapon was recovered.
27. The 1st accused was placed at the scene by PW1, PW2, PW3 and his own evidence. He however stated that he did not go after the deceased when he ran off. That he did not see the 2nd, 3rd and 4th accused persons at the scene that night. DW2 stated that the deceased's wife went to his house to ask for help but he did not accompany her. That he called the police and gave her his phone so that she could talk to them. His testimony did not necessarily remove him from the crime scene that night even though he said that he did not accompany the deceased's wife. In the case of the 3rd accused person, he was not seen at the crime scene and his defense hold water. He said that he was at home and only learned of the incident the following day. The 4th accused person stated that he was helping a calving cow at his parent's home but he did not see anyone going towards the deceased's home. His evidence does not remove him from the scene.
28. This evidence places the 1st, 2nd and 4th accused persons at the scene of crime that night. As to whether or not they inflicted the injuries on the deceased, their presence there creates a joint intention as provided under section 21 of the Penal Code which provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence



is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

29. Lastly, is the issue of malice aforethought. In the case of Republic v Stephen Sila Wambua Matheka [2017] eKLR it was held;

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the Ogelo v Republic [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

30. The injuries inflicted upon the deceased were such that his lung perforated and there was massive bleeding in his chest. The 1st, 2nd and 4th accused persons were placed at the scene and in fact, the 1st accused was heard hurling death threats at the deceased if he tried to run away while they were taking him to the police station, which threats were intentionally actualized. It is my view that the 1st, 2nd and 4th accused persons possessed malice aforethought to commit the offence herein.

31. In conclusion, I find as follows:

- a. The prosecution has failed to prove beyond reasonable doubt its case against the 3rd accused person. He is hereby acquitted of the charge of murder; and
- b. The prosecution has proved its case against the 1st, 2nd and 4th accused persons beyond reasonable doubt. They are hereby accordingly convicted of the offence of murder contrary to section 203 of the Penal Code.

32. It is so ordered.

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

L. NJUGUNA

JUDGE

