



**Republic v Mwaura (Criminal Case 41 of 2019)
[2024] KEHC 14705 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL CASE 41 OF 2019
RB NGETICH, J
NOVEMBER 22, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

MICHAEL MBURU MWAURA ACCUSED

JUDGMENT

1. The accused Michael Mburu Mwaura has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that the accused person on the night of 19th September, 2019 at Ndarasa village at Juja Sub County within Kiambu County murdered Catherine Nyambura.
2. The accused denied the charge and the matter was set down for full trial with the prosecution availing 8 witnesses in support of the charge preferred against the accused.

Prosecution Evidence

3. PW 1 Carols Loboke testified that he knew the deceased Catherine Nyambura as his elder sister. He said the deceased lived with the accused who was her husband at Ndarasha Murera. He said he received information that the accused hit the deceased with a hammer on the 24th September, 2018. Together with his mother Annah Nyambura, they identified the deceased's body to the doctor for postmortem with his mother
4. PW2 Esther Wanjiru minor aged 13 years old and in class 6 testified that in the year 2019, she was in Mogomano primary school in Juja and on the night of 19th September, 2019 at 8:00 p.m, she was sleeping on the lower bed of a double decker bed in the sitting room and Richard was on the upper bed while Faith slept with her mother and father in the bedroom and their brother Bernard was in



- Secondary School. She said at around 3 00a.m, she heard her mother scream calling his brother Richard while saying she was being killed.
5. She said her mother was speaking in Kiswahili saying her dad was killing her. She went out of bed but her father opened the door to the sitting room and said they should go back to sleep and they should not open the door. She said her mother was no longer screaming. She said her mother screamed for 3 minutes. She called her brother Richard to sleep with her in her bed as she was scared. In the morning, she knocked her mother's bedroom asking her father to open for her to pick school shoes which were in her mother's bedroom but he did not open the door. She wore sleepers and went to school and while going to school, they went through her Aunt Isabella's house and informed her that his father refused to open the door.
 6. Pw3 was given sports shoes by her Aunt and they went to school which is a walking distance ahead. She later saw Aunt Isabella and her uncle in school at headteacher's office and a young boy in school informed her that her mother had died. She said she was taken home but she did not find her mother and the headteacher explained to her that her mother was not there. She said when she was asking for shoes in the morning she could hear Faith crying and her father did not talk to her in the morning. She said the hammer she saw in court was the one her father used and kept in the bedroom. she also identified the mosquito net produced in court. She said her father used to arrive home drunk and would quarrel with her mother in the sitting room.
 7. PW3 Richard Kamau a form 1 student at St. Paul's Gathanyanga Secondary school Thika in Form 1 confirmed that the accused Michael Mburu is his step father and the deceased Catherine Nyambura was his mother. He said he lived with his biological father up to class 3 and started living with step father from class 4 to 7 and that he lived together with his brother and 2 sisters but when his brother joined High school, he went to Nairobi. He said while living in Juja, they lived in a 2 roomed house where he slept with her sister Esther Wanjiru in the sitting room while his step father, mother and Faith slept in the bedroom which also served as a kitchen. He confirmed that they had a double decker in the sitting room which also had furniture and accused's construction tools.
 8. Pw3 testified that on 19th September, 2019 at 3:00 a.m, he heard screams from her mother saying there was something pulling the child and then heard her saying "Richy, Richi I am dying". He said he opened the sitting room door to shout for help but no one responded. He said the accused asked him to enter the house and sleep. He entered the house and closed the door. He confirmed that he slept with his sister in the lower bed as she was scared. He also confirmed that her mother's bedroom was not opened in the morning and his sister went to school without school shoes.
 9. Pw3 said while in the sitting room, he heard her sister faith crying while the accused was trying to make her keep quiet. He said that they went to school without breakfast because their parent's bedroom was used as a kitchen and it is their mother who used to make breakfast for them. He later learnt from his neighbor Emmanuel Karuiki that his mother had died and their mother's friend went for them and took them to their grandmother's home. He said in the previous evening, his mother had prepared supper and by the time he slept at 8 p.m, his step father had arrived, taken supper and entered the bedroom. He said the accused used to keep the hammer he saw in court in the bedroom and always carried it while leaving the house in the morning and that it had nails and white spots.
 10. He stated that there was white mosquito net in the bed in the bedroom and it was the one in court and that the bedroom had 2 beds which one was used for clothes and they slept on the other which had bed sheets which he positively identified in court.
 11. PW4 John Kimani Njenga testified that the deceased herein was his cousin and, on the 19th September, 2019, at 6:30 a.m., the deceased's children Richard and Esther passed their home to look for



shoes for Esther to wear to school and his wife Isabella Simiyu gave Esther shoes. He said on enquiring, he learnt that the child did not have shoes because they called the deceased but did not respond. He went to the deceased's house and arrived at 7:00a.m. He found the door closed and there was a crowd. He learnt that his cousin the deceased herein had been killed and the body had been taken by police. He went to the mortuary with the deceased's brother carlos and later planned for the funeral. He said he had known the accused as the husband to the deceased for 2 years because he used to visit them.

12. PW5 No. 68200 P.C Simon Maina Njuguna a police officer who worked at Juja police station testified that on 19th September, 2019, he was at Juja Police station when the accused arrived to report that he had disagreed with his wife and hit her with a hammer killing her. He referred him to PC W. Kithaka to record the report and it was reported as OB No. 6 of 19/2019. Pw5 informed duty officer Madam Masita who called PC driver Murithi and later informed DCI team who were on duty. The accused led them to their house in Darasa in Juja Sub-County where he opened the door and took them to the room they slept and found his wife's body. He said the deceased was hit on the head and there was blood on the bedsheets and on the side of the deceased a child aged about 1 year who appeared like she was looking for mother's breasts. He said the deceased showed them a hammer which he used to kill his wife under the bed on the floor. Pw5 positively identified the hammer, the mosquito net and the bed sheets used to cover the mattress in court. He said accused had taken poison trying to kill himself but was given milk as first aid.
13. PW6 No. 78062 Sgt. Salome Mugi who worked at DCI Juja testified that on 19th September, 2019 at 5pm madam CPL Masita who was with PC Maina called her and informed her that a woman had been killed at Ndarasha an dpw5 P.C Maina PW 5 informed her that accused had gone to the police station to report .She confirmed that they went to the scene led by the accused where they arrived at around 5.30 pm and found the deceased's body on the bed and it is the accused who opened the door. She said the deceased's body was with a child of about two (2) years and there was a net hanging on the bed, a bedsheet spread on the bed and a hammer was under the bed. She confirmed that they took the exhibits and called scene of crime officers. She said people became rowdy wanting to kill accused. She said photographs were not taken because the crowd was hostile. She identified mosquito net, hammer and bedsheets which she handed over the exhibits to CPL Mwasa. She said the body was taken to Thika Mortuary by CPL. Maina.
14. PW7 No. 85807 CPL. Cornelias Araswa the Investigating Officer herein testified that on 19th September, 2019 in the morning, he was requested to assist Sgt. Salome to investigate Murder case and the suspect was in cell and they had visited the scene already. He said that he received exhibits from CPL. Salome and let them dry as they were wet with blood. That he recorded statement of accused who stated that he had killed his wife.
15. He said that he took him to CM's Court Thika vide Misc. 104 of 2019 to record confession .He said he informed the accused that he could avail his witnesses and the accused said he wanted his sister and brother to attend and his brother Joseph Njuguna Mbugua and sister Anna Wangui Mwaura attended and on 24th September, 2019 before SR O.M Wanyaga where he explained what he did and how he killed his wife and the confession duly signed by the Magistrate on 24th September, 2019 was produced in court.
16. PW8 Dr. John Mathaiya, the County Pathologist Kiambu County and a Consultant Pathologist in Thika Level 5 testified that on 24th September, 2019 at 11.00hrs at their affiliate funeral home General Kago Funeral Home, he conducted postmortem on the body of Catherine Nyambura the following identification of the body Carlos Ochunge brother to deceased and Hannah Magiri mother to the deceased. The doctor formed the opinion that the cause of death was strangulation and head injury due to blunt force trauma to the head.



17. Upon the closure of the prosecution case, by ruling delivered on 7th July, 2022, the court found that the prosecution had established prima facie case to warrant accused be placed on his defence in accordance with Section 306(2) of the criminal procedure code.

Accused's Defence

18. In his defence, the accused gave sworn statement. He stated that he is a Mason and that he knew the deceased Catherine as his wife and they lived together for seven (7) years and they had 4 (four) children, Faith Wangari 6 years, Esther Wanjiru 10 years, Richard Kamau 13 years and Benard Kiragu aged 15 years. He testified that his relationship with deceased was good and they did not disagree the night she died.
19. He further stated that on 18th September, 2019, he left the house and went to work and as he left the house, his wife informed him that there was money she needed. He said he went to where he was to work that day and found building materials had not been taken to site. They waited up to 2p.m and left for home. Before reaching home, he went to meet with other Masons and his friends bought him alcohol up to 11.00pm when he went home. He said when he entered the bedroom, his wife asked him for money she had requested him to look for and he informed her that they did not work that day and she started a quarrel. The quarrel led to a fight and in the process, he held and pushed her from him; he then went to the sitting room locking door heading to the sitting room and slept on the seat. He said when he became sober, he went to the bedroom and on entering the bedroom, he found his wife had been hit on the head and he did not know if she was hit by the bed or she fell on a hummer. He said he touched her and felt she was cold and he got shocked and screamed. He said the children asked what was happening and he told them to sleep and he would wake them up in the morning.
20. The accused further stated that at 5.00am, he went to the police station to report and explained what happened to police and the police requested him to go and show them the house. He led the police to the house where they found the body and police took the body. He said that he informed them that he had pushed the deceased and she was hit by an object which he did not know and that it was not intentional as he was defending himself from a fight. He said that he had no intention of killing his wife and asks for forgiveness and said he did not expect his wife to die.

Accused's Submissions

21. The defence counsel submitted that out of the 8 witnesses who adduced evidence, only few of them unsuccessfully tried to link him to the alleged offence and argued that the threshold for proving the guilt of the accused must be beyond a reasonable doubt that he indeed committed the offence as charged. He submits that there must be no iota of doubt as to the guilt of the accused to sustain conviction and this being a case of murder, the onus of proving the case beyond a reasonable doubt rests with the prosecution. He relied on the case of Court of Appeal in the case of Anthony Ndegwa Ngari v Republic [2014] eKLR, where the court stated that the prosecution is duty-bound to prove each of the following ingredients of murder beyond reasonable doubt that:
- (1) The fact of death.
 - (2) The fact that the deceased's death was caused by unlawful act or omission
 - (3) That the accused caused committed the unlawful act which caused the death of the deceased; and
 - (4) That the accused had malice aforethought.



22. On proof of death counsel submits that the deceased's death is not disputed but on loss of blood, it is not clear whether the deceased had any other underlying conditions which may have contributed to her death and submit that lack of clarity by the doctor on the same raises doubt as to whether the loss of blood was the only cause of death of the deceased.
23. On whether deceased's death was caused by unlawful act or omission, counsel submits that it is vital to note that not all homicides are unlawful.
24. He further submits that post mortem report by PW8 Dr. John Mathaiya showed that the cause of death of the deceased was blood loss as a result of being hit by a blunt object and from the evidence adduced, no one witnessed what really happened between the deceased and the accused and it is difficult to disregard the evidence of the accused that the deceased was the one who was aggressive and wanted to kill him but in self defence he accidentally hit her causing her death.
25. Further, the accused did not come to terms with what had happened and even tried to kill himself by taking poison to take his life because he did not believe the deceased died and thereafter, he went to report the incident to police. He said accused's actions are not for a person who unlawfully intended to kill his wife but rather a regretful person who is struggling to come to terms with the death of his wife and urged this court to look at the evidence in that context and find that the ingredient of unlawful act was not proved to the required standard; more importantly that the evidence before it leads to an inference that the death of the deceased was a result of self defence by the accused, who instantly regretted the same by his actions after the death of his wife and urged this court to consider the principles of self defence as was discussed by Court of Appeal in the case of Ahmed Mohammed Omar & 5 Others V. Republic [2014] eKLR and in the case of Republic v Ann Karimi [2020] eKLR.
26. On whether the accused had malice aforethought, counsel submits that the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused and in the instant case, the prosecution was not able to establish existence of such facts. That from the prosecution's evidence one is unable to make a positive finding that the accused person harbored ill intentions against the deceased person and secondly, no evidence was placed before the court that the accused and the deceased had earlier quarreled prior to the date of the incident; all that was adduced was that the accused had hit the deceased on the head with a hammer and that the same amount to malice aforethought but the prosecution evidence did not establish a case of the accused's mens rea or his intention to cause death or grievous harm against the deceased.
27. Counsel urged this court not to infer the element of malice aforethought from various circumstances such as the nature of the weapon used (hammer), the nature of the injuries suffered and or caused the death and the purported admission of the accused that he had killed the wife. Further that it is important for the court to note that the evidence of the deceased of self defence was not disputed and or rebutted by the prosecution and we urged this court not to ignore and or disregard it; and prosecution having failed to prove the element of malice aforethought is enough to acquit the accused and urged this court to acquit the accused.

Analysis And Determination

28. Under section 203 of the penal code, the ingredients for the offence of murder are as set out hereunder: -
 - a. The death of the deceased.
 - b. That the accused unlawfully killed the deceased.
 - c. That in the causing death of the deceased the Accused had malice aforethought.



29. This was also upheld in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, in which the elements of the offence of murder were listed as follows:

- i. The death of the deceased occurred;
- ii. That the Accused committed the unlawful act which caused the death of the deceased; and
- iii. That the Accused had malice aforethought.

30. Further in the case of Republic Versus Andrew Omwenga (2009) eKLR the court held as follows:-

“It is clear from this definition that for an Accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission - there are therefore three ingredients of murder 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 the 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”.

31. On burden of proof the court of appeal in the case of Joseph Kimani Njau V Republic [2014] eKLR stated as follows:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution”

(a)The death of the deceased

32. From evidence adduced by the prosecution witnesses, there is no doubt that the deceased died. The accused in his defence confirmed that the deceased died on the night of 19th September, 2019. Their evidence was corroborated by evidence of PW8 Dr. John Mathaiya, the County Pathologist Kiambu County and a Consultant Pathologist in Thika Level 5 who conducted postmortem on the body of the deceased on 24th September, 2019 at 11.00hrs at their affiliate funeral home General Kago Funeral Home and formed the opinion that the cause of death was strangulation and head injury due to blunt force trauma to the head.

(b) That the Accused committed the unlawful act which caused the death of the deceased

33. From evidence adduced, Pw2 and Pw3 children who were in the house with the accused and the deceased did not enter their parents' bedroom but they heard their mother saying she was being killed. I therefore wish to consider whether there is strong circumstantial evidence linking the accused to the offence. The evidence must be strong and should go beyond mere suspicion. In the case of ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR), the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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.”

34. Further, In SAWE –V- REP [2003] KLR 364 the Court of Appeal held.

- “ 1. 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 hypotheses than that of his guilt.
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
- 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.
- 4.
- 5... ..
- 6.
- 7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

35. From evidence adduced, the accused and the deceased were in their bedroom with a young child on the material night. The bigger children who were sleeping in the sitting room heard the accused and deceased quarrel and shortly after, the deceased called for help saying she was being killed and thereafter there was silence. The accused did not allow the children to enter their bedroom. PW3 opened the main door and shouted for help but no one responded. Accused then asked Pw3 to close the main door. Later the accused led police to the house and into the bedroom where the deceased was found dead. In his defence, accused admitted quarrelling with the deceased over money which she had asked accused to go look for but did not get as he did not work that day. Accused confirmed altercation and recorded confession which was recorded before a magistrate and produced in court. In view of the above, there is proof beyond reasonable doubt that it is the accused who unlawfully caused the death of the deceased.

36. Further to the above, the accused confessed to killing the deceased. Sections 25A and 26 of the Evidence Act provides as follows: -

- 1. “A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.



37. From evidence adduced the accused was taken before a magistrate who recorded the confession. The accused did not challenge the confession in court. The same was therefore admitted as evidence.

(c) Whether there was malice aforethought

38. Under Section 206 of the Penal Code, 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.

39. In *Dickson Mwangi Munene & another v Republic* [2014] eKLR, the Court of Appeal stated as follows:

As stated, either of these acts, intentional or reckless, constitutes malice aforethought under Section 206 of the Penal Code which is the mens rea of the crime of murder.

In a charge of murder, it must be shown that the accused's conduct caused the death. This burden is always with the prosecution to prove that the accused caused the death and that there was malice aforethought. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the absence of malice aforethought the unlawful killing is termed as manslaughter.

40. From evidence adduced herein and from my findings above, there is no doubt that the accused did not premeditate and planned to kill his wife. From children's evidence the accused and deceased had been quarrelling and on the material night, the accused did not have the money his wife expected him to give her as he had failed to get work for the day. Evidence adduced by children confirm that the murder weapon which was a hammer was a tool of trade for the accused. The children said he carried it every morning as he left the house and he used to keep it under the bed. He had not therefore planned to use it to kill his wife. From the foregoing, I find that malice aforethought was not proved beyond reasonable doubt and proceed to find accused guilty for the offence of manslaughter contrary to section 202 as read with section 205 of the penal code

41. Final orders: -

- 1. Accused is hereby convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.
- 2. Right of appeal 14 days

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 22ND DAY OF NOVEMBER 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

* CA Elvis

* Mr. Gacharia for state

* Mr. Mathenge for accused

* Accused present

