



**Republic v Damiano (Criminal Case E008 of 2023)
[2024] KEHC 16171 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E008 OF 2023
LM NJUGUNA, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL MWANIKI DAMIANO 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 charge are that on 21st February 2023 at Kyeni North location in Embu East sub-county within Embu County, jointly with others not before court, the accused murdered Alice Kaguna Symon. Upon arraignment in Court, he pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. PW1, Joseline Mbaka who is the deceased’s niece, stated that her other aunt known as Lucy Mwendu told her that the 70-year-old deceased had been killed on allegations that she was bewitching the accused. That it was alleged that the deceased lit a fire at the accused person’s gate, boiled water and burned the accused with it. That the deceased was also burning underwear at the entrance of the accused’s home. She stated that she went to the place where the fire was allegedly lit but she did not see any indication that a fire had been lit there.
3. Later, she went to the deceased’s home where she found that the roof and doors to the deceased’s house had been removed. By that time, the deceased’s body had been taken to the mortuary where she identified the deceased. She observed that the deceased was seriously burned and had injuries on her head. On cross-examination, she stated that she arrived at the scene after everything had happened. It was put to her that the state in which she found the deceased’s house was not put in her initial witness statement.



4. PW2 was Hilda Wawira Njeri who stated that at about 3am on the day of the incident, she heard noises of people saying “mchawi” (witch) and the deceased was saying “mimi sio mchawi” (“I am not a witch”). She also heard some people saying “Mrefu, toka uone mchawi ako kwako” (“Mrefu, come out and see a witch is at your place”). The noise continued and she heard Mrefu (the accused) asking the deceased what she was doing at his compound that night but she did not respond. She stated that she heard people saying that Mrefu had been burned with hot water and his vehicle was seen driving away from his compound.
5. That people started throwing stones at the deceased’s house and then a group of people removed the deceased from her house while beating her, took her to the road and threatened to set her on fire. After this, she did not hear any more noise and she went to sleep. The next morning, she found the deceased’s body outside her house near the road. She recorded her witness statement and stated that on that night, she was able to recognize and identify the voices of the deceased and the accused. On cross-examination, she stated that she was in her house all through and she did not see anything happening. That by the time the deceased was accosted by people, the accused had already left his house.
6. PW3 was Martin Fundi who stated that on the day of the incident at around 10am, he saw that the deceased’s house had been burned and pulled down. That the body of the deceased was also there and it had been partly burned. That he went for his grandmother’s burial and on the way back, he found that the body of the deceased had been removed. 2 days later, the police called him to record his statement. On cross-examination, he stated that he did not have any evidence that the accused was involved in the death of the deceased.
7. PW4 was Robert Mugendi, a driver by profession, who stated that on the night of the incident, one Muthini woke him up to help take the accused to hospital since he had sustained hot water burns on his hand. That they went and took the accused to Runyenjes Police Station and then to hospital. While they were waiting for the accused to be treated, his wife who was waiting in the car told him that the person who had assaulted the accused had been burned to death.
8. He stated that when the accused returned, he told him that the deceased had been burned to death. That they returned home and while on the way, they saw the body of the deceased lying on the road and the accused said that it was the deceased who had burned him with hot water. On cross-examination, he stated that he did not witness the incident.
9. PW5 was Ruth Wanjira Nyaga, the deceased’s daughter who stated that her niece Christine Wanja called to inform her that the deceased had been killed. That she immediately went to the home of the deceased where she found her body lying in a pool of blood by the road leading to her house, which had been partly demolished. That the police arrived at the scene and she introduced herself as the daughter of the deceased.
10. That they went to the accused’s house and he told them that he had reported to the police that the deceased had burned him with hot water. She stated that between 2016-2018, the accused had approached the deceased to sell to him a piece of land but the deceased refused. After that the accused used to threaten the deceased with death. She attended the postmortem of the deceased. On cross-examination, she stated that she did not witness the accused killing the deceased.
11. PW6 was Richard Muriuki, the deceased’s son, who stated that someone called him at around 6am asking if he had heard about what happened to the deceased and he hang up the phone. That PW5 went to him crying and told him their mother was dead. He asked her to go ahead and he would follow later since he was feeding the cows. That he took a motorcycle and went to the deceased’s place where he found the police who had covered the body of the deceased with a blanket and it was on the way



- to her house. He stated that he saw the body of the deceased covered in soil and with injuries on the chest and it was partly burned.
12. That the deceased's house was partly demolished and her bed and doors were thrown outside. That there were police officers at the accused's compound and the accused told them that the deceased had burned him with hot water and that the deceased was a witch. That the accused said that the deceased lit a fire near his home and used it to heat the water he used to burn him but the place where the fire was allegedly lit was a very small place. He later attended postmortem. On cross-examination, he stated that he did not witness the events that led to his mother's death.
 13. PW7 was Dr. Moses Maina who performed postmortem on the body of the deceased. He observed that the deceased had a deep cut on the parietal region of her head caused by a sharp object. She had 50% 3rd degree burns on the neck, head and front part of the body and bruises on the upper and lower limbs. In his opinion, the cause of death was the 3rd degree burns and he produced the postmortem report as evidence.
 14. PW8 was Dr. Sheila Shavulimo, a psychiatrist who conducted a mental assessment on the body of the deceased. He was found mentally fit to plead and she produced the mental assessment report as evidence.
 15. PW9 was Corporal Michael Njagi of DCI Embu East who stated that he visited the scene with his colleagues and they found the body of an old lady lying on the road, 20 meters from her house. That the body was covered with burns and there were ashes around it. He stated that they interrogated some people at the scene and the main suspect was the accused and the body of the deceased was taken to Kyeni Hospital mortuary. The accused person was arraigned at Runyenjes Law Courts where the police requested for more time to investigate. The accused was then taken to Embu Level 5 Hospital for mental assessment. A postmortem was conducted on the body of the deceased in the presence of family members.
 16. He stated that the accused told the police that he was at the hospital on the night of the incident since the deceased had burned him with hot water but from investigations, the accused was at the deceased's home that night. On cross-examination, he stated that he did not take any photographs of the scene and no murder weapons were found in the house of the accused. That he found the accused to be a suspect because the previous night at about 4:20am, he had gone to the police station to report that he had been burned with hot water. That PW2 did not name the accused person as the perpetrator but he was mentioned by other witnesses. That he was not able to apprehend the other suspects of the offence and it was put to him that when the incident occurred, the accused was at the police station making his report.
 17. After the close of the prosecution's case, the court found that the accused person had a case to answer and was placed on his defense.
 18. DW1, the accused person, stated that on the night of the incident, his wife woke him up and told him that she had heard some noises outside but he brushed her off saying that it could be drunkards. That the noises continued and his wife went to check to find out and she saw people at their gate. That he went to check and he found 8 people and the deceased holding a tin in her hand. When he asked what was happening, the deceased threw the tin to him and it felt like hot water. He told the 8 men that the lady was her neighbor and the deceased walked away throwing her hands in the air. He stated that he went back to the house where his wife administered first aid and then PW4 used his (DW1's) motor vehicle and took him to hospital through the police station where the incident was reported.



19. That he was at Runyenjes Level 4 Hospital with his wife, PW4, one Mutwiri where he paid Kshs.50/= and he produced proof of this. According to the M-pesa statement, he paid the money to the hospital at 4:33am from his Safaricom number. On cross-examination, he stated that he did not know why the deceased burned him with hot water in a tin. That the incident happened outside his gate where the 8 young men were making noise. That the distance between his house and that of the deceased is about 15 meters and that he could not identify the young men he saw that night. That PW2 is a neighbor whom he knows very well. The he did not know where the tin the deceased used to carry the hot water went to and he did not see any of the young men beating the deceased.
20. DW2 was Robert Gitonga Nyaga, a neighbor who stated that he heard some noises coming from the accused's gate, people calling out his name and he went to see what was happening. That he found the noise had died down and he knocked the door of the accused and when he opened, he was holding his hand and asked him for help in reaching PW2 to take him to hospital. That when PW2 arrived, he took the accused to hospital using his own car and they reported the incident at Runyenjes Police Station. On cross-examination, he said that he did not know how the accused and the deceased related but he said that according to him, there was no dispute between them. That when he went to the accused's gate, he did not find anyone there.
21. DW3 was David Mugendi Njeru who stated that his father had died and was being buried on the 21/02/2023 and that they had hired some people to dig the grave. That after the burial, he heard that the deceased had been killed. On cross-examination, he stated that he did not know how the deceased met her death.
22. After the close of the defense case, the parties filed their written submissions.
23. The prosecution submitted relying on section 203 of the Penal Code and the case of Anthony Ndegwa Ngari v. Republic (2014) eKLR. It was its submission that the death of the deceased was proved through the evidence of PW1, PW2, PW3, PW5, PW6 PW8 and PW9. Further reliance was placed on the case of Republic v. Stephen Sila Wambua (2017) eKLR and it argued that the accused did not plead any reasonable defense. That the chain of circumstantial evidence is strong and it implies the deceased as the perpetrator and it relied on the cases of Republic v. Richard Itweka Wahiti (2020) eKLR and David Munyi Chiragu & another v. Republic (2021) KECA 342 KLR.
24. It also urged the court to apply the doctrine of last seen as discussed in the cases of Stephen Haruna v. The Attorney-General of The Federation (2010) 1 iLAW/CA/A/86/C/2009 and Republic v. EKK (2018) eKLR. That the burden of proof has been discharged according to section 111(1) and 119 of the *Evidence Act*. It argued that the element of malice aforethought was not proved beyond reasonable doubt and it urged the court to find the accused guilty of murder and relied on the case of Republic v. Richard Mbaabu (2014) eKLR.
25. The accused submitted that he provided an alibi defense which was corroborated by PW2, PW4 and DW2 and he relied on the cases of Erick Otieno Meda v. Republic (2019) eKLR and Mhlungu v S. (AR 300/13) (2014) ZAKZPHC 27. He relied on the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR and urged that circumstantial evidence must be firmly established for it to be used to infer guilt upon the accused. That in this case, the circumstantial evidence does not form a strong chain of evidence to be relied upon and it creates reasonable doubt. Further reliance was placed on the cases of Republic v. Kipkering Arap Koskei (1949) 16 EACA 135 and Simon Musoke v. Uganda (1958) EA 715. He urged that there is no malice aforethought and that the court should acquit him.
26. The issue for determination 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 person herein faces the charge of murder under sections 203 as read together with 204 of the Penal Code. It is upon the prosecution to prove beyond reasonable doubt, that the accused murdered the deceased. 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.”
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. On the first element of death and cause of death, PW7 testified that he conducted postmortem on the body of the deceased and concluded that she died of 50% 3rd degree burns. He also detailed the injuries that were on the body of the deceased.
30. The second element to be proved is the unlawful act of the accused that caused the death of the deceased. In other words, it is required that the prosecution proves that the accused was indeed at the scene of crime and he caused the death of the deceased. PW1 stated that she heard about the incident and its details from other people who alleged that the deceased was bewitching the accused and that she had burned him with hot water. By the time she arrived at the scene, the deceased was already dead.
31. PW2 stated that she heard the voices of people telling the accused to get out of the house to see a witch at his gate. Soon afterwards, she heard the accused asking the deceased what she was doing there but the deceased did not respond. She stated that she then heard the accused’s vehicle driving away and the following morning the deceased was found dead. PW3 passed by the scene on his way to a burial and saw the body of the deceased but he did not know how the deceased met her death. PW4 took the accused to hospital after he was called to assist since he was a driver by profession. He stated that he drove the accused to the police station and then to hospital and he had sustained some burns on his hand. The accused told him that the deceased had burned him with hot water. PW5 and PW6 are the deceased’s children who arrived at the scene after the incident and they, too, did not know how the deceased met his death.
32. In his defense, the accused stated that the deceased was outside his gate and when he went to ask her what she was doing there, she poured hot water that she had in a tin, on him. That there were some 8 men outside his gate at that time and they were the ones making the noise that awoke him in the first place. He said that he sought the services of PW4 to take him to hospital for the burns he sustained and, on the way, he reported the assault at the police station. He produced his M-pesa statement showing that he paid Ksh.50 at Runyenjes hospital at 4:33am. On the way back from the hospital, he saw the body of the deceased lying outside her house.
33. According to the prosecution witnesses, the incident occurred at around 4am in the morning. The testimonies of PW2, PW4 and DW2 corroborate that of the accused person who stated that when the accused person died, he was not at home. From the evidence, by the time the accused talked to the



deceased outside his gate and returned to his house, he stated that he left the deceased with the 8 men whom he saw. PW2 testified that she was awoken by the noises of people who were urging the accused to wake up as there was a witch at his compound.

34. From the available evidence, it is my view that the accused person was not at the scene when the deceased died. It is possible that the accused and the deceased did not have a good relationship but the evidence before this court does not place him at the scene at the time of the incident. None of the prosecution witnesses placed the accused at the scene but they stated that the accused was in his home and he confronted the deceased outside his gate. The accused said that he retreated back to his house and by then the deceased was alive and then he went to hospital. While on the way back home after being treated, he saw the body of the deceased lying outside her house.
35. The prosecution evidence does not prove beyond reasonable doubt that the accused was responsible for the death of the deceased. It is possible that the deceased was killed by other people that night because the witnesses who were neighbours of the accused and deceased stated that they heard noises of people calling the deceased a witch. It is unfortunate that the deceased died in the manner revealed. However, it is my view that the actual perpetrators got away. I therefore find reasonable doubt as to the accused's involvement in the offence. According to Duhaime's Criminal Law Dictionary, reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.
36. The element of malice aforethought is therefore impermeable in this case because the prosecution has not proved beyond reasonable doubt that the accused murdered the deceased. This court, therefore, need not go further into the evidence to ascertain malice aforethought as the same would be immaterial in the face of reasonable doubt, which should be adjudged in favour of the accused person.
37. In the end, having considered the evidence and relevant laws, it is my finding that the prosecution has failed to prove the offence of murder beyond reasonable doubt. The accused is therefore found not guilty of the offence of murder contrary to section 203 of the Penal Code and is hereby acquitted accordingly.
38. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE

