



**Republic v Maina & another (Criminal Case E005 of 2022)
[2024] KEHC 16067 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E005 OF 2022
LM NJUGUNA, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOHN GATHIAKA MAINA 1ST ACCUSED

JOSEPH KIMANI MAINA 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. Particulars of the offence are that on 24th April 2022 at Wandigi village Wachoro location in Mbeere South sub-county within Embu County, the accused persons murdered Joseph Ngwenze Mweu. The accused persons pleaded not guilty and a plea of not guilty was duly entered for each of them before the matter proceeded to full hearing.
2. PW1 was Agnes Wanjiru Maina, the mother of both accused persons who stated that on the night of the incident, the deceased entered her house through the window and she raised alarm and his sons came. That the accused persons did not see anyone in their mother’s house and so they returned to their houses. Shortly afterwards, she realized that the deceased was hiding under her bed and she screamed again and the accused person returned. The deceased asked her sons if they sleep with her. She stated that the accused persons took the deceased outside the house and beat him for a while before they let him go. She did not see the parts of the body where they beat him.
3. She stated that as he went, he told the accused persons that they would see what he would do the following day. That the following day, she found the deceased’s shoes and trouser outside her door and she reported the matter to the police saying that the man that had been beaten by the accused persons had left his trouser and shoes at her house. She identified the trouser and shoes in court. On cross-examination, she stated that the deceased gained access to her house through the window. That



- a crowd had gathered the first time she raised alarm but they went away after the deceased hid under her bed. That she did not witness the accused persons beating the deceased and there were no blood stains outside the house.
4. PW2 was Everlyn Wairimu Wavita who stated that on the night of the 23/4/2022 she was in her house when the 2nd accused person went to her house and asked her to accompany him to PW1's house where they heard voices speaking inside the house. She recognized the voice as that of the deceased and she told the 2nd accused that they should go away and talk to PW1 the following day. She stated that the 2nd accused went away and returned with 5 young men and when the 1st accused asked her what was happening, she explained to him that they had agreed to talk about the matter with PW1, the following day. That the deceased and PW1 were talking in low tones and so she returned to her house and she did not know what happened next. On cross-examination, she stated that when she approached PW1's house, she heard what sounded like the deceased's voice inside the house although she did not see him. That the deceased and PW1 were not husband and wife but were friends and the deceased was not married.
 5. PW3 was Jacob Karungu Mwema who stated that he had taken milk to his sister's home when the 2nd accused went to call them to help his mother. That they hesitated because the 2nd accused did not tell them what the issue was and later he told them that someone had entered his mother's house. That he went with the 2nd accused and they were 5 of them and on reaching PW1's house, they found her standing outside the house with David. They told them that the deceased was inside PW1's house. They asked her if he had entered by force or she had agreed and she told them that she had allowed him in so they went away. He stated that he did not see the 1st accused that night. On cross-examination he stated that when the 2nd accused called for help, he said that his mother was being raped. That when they arrived at PW1's home, it was PW2 who said that all was well.
 6. PW4 was David Mutahi who stated that on the evening before the incident, he was drinking with the 2nd accused person before they went to his home and ate super and then proceeded to the home of the 2nd accused. That while at the 2nd accused's house, they heard voices in PW1's house and they went to ask PW2 what was going on. That PW2 said that the issue needed to be discussed with the elders. That the 2nd accused left them there and went to look for more people to help and they recognized the voice of the deceased inside PW1's house. The following day, PW2 said that he had met with a man who did not have trousers. He stated that he did not see the 1st accused person that day. On cross-examination, he stated that he did not talk to PW1 that night but he talked to PW2. He did not know if PW1 had welcomed the deceased into her house that night and he did not know how the deceased met his death.
 7. PW5 was Samuel Maundu Mweu who stated that his father called to inform him that his youngest brother had died. That he rushed home and found a group of people had gathered. He called the police who told him to secure the scene and he saw the body of the deceased lying on his bed and it had some injuries on the forehead, left hand, neck and leg. He called the police and informed them of what he saw and the police went to the scene the following morning.
 8. That the scene was processed and the body was removed to Kerugoya hospital mortuary. That the accused persons are known to him and that he has no grudge with them. On cross-examination, he stated that their family had a history of hypertension and that the deceased used to drink a lot. That their late father used to enter the deceased's house through the window. That he did not think much of the injuries he saw on the deceased's body because he thought that he might have been injured while climbing into the house through the window which is only 2 feet from the ground.
 9. PW6 was Dr. Ndirangu Karumo of ACK Mt. Kenya Hospital, Kerugoya who conducted postmortem on the body of the deceased at Kerugoya County Hospital mortuary. He noted that the body had



bruises and contusion marks on the face, chest and all the limbs and there was a deformity on the right upper limb. He had multiple rib fractures and there was neck swelling with jaw fractures and bilateral massive hemothorax estimated at 3.5liters. The scalp was swollen and there was bleeding under the surface of the scalp. He concluded that the cause of death was massive internal hemorrhage following blunt force trauma. He produced the postmortem report as evidence.

10. PW7 was Dr. Sheila Shavulimo a psychiatrist at Embu Level 5 Hospital who produced mental assessment reports authored by Dr. Joseph Thuo who conducted a mental assessment on the accused persons, finding them to be mentally fit to stand trial.
11. PW8 was Peterson Maina Mwangi who stated that on the 22/4/2022 at 8.30 p.m, the 2nd accused person called him to go and assist because there was someone fighting his mother. That they found PW2 who told them that it was the deceased who was in PW1's house. That they did not interfere because PW1 and the deceased were adults and so he went away. That he saw the 1st accused at PW1's compound that night. On cross-examination, he stated that he did not see the accused person beating the deceased but he was just told that they are the ones who beat him.
12. PW9 was CI Christine Cheptoo who stated that an officer from Wachoro Police station called to inform her that a man had been found dead in his house. That they were directed to the scene where they found the deceased lying on his bed with some injuries on his face and shoulder. That the scene was processed by scenes of crime personnel who documented it. That the police interviewed witnesses and recorded statements and it emerged that the deceased was beaten at a neighbor's house. She stated that PW1 was also interviewed and she said that there had been a misunderstanding between the deceased and her son.
13. That there was a fight and the deceased ended up leaving his trouser and shoes at the home of PW1, which items were produced as exhibits. The suspects were arrested and the body was removed to Kerugoya County Hospital mortuary. That postmortem was conducted and the DCI took over investigations of the matter. On cross-examination, she stated that they had to break down the door to the deceased's house in order to access the scene. That the deceased's clothes did not have blood stains but the police were told that the deceased was at PW1's home that night. That the 2nd accused told the police that the deceased had an affair with PW1.
14. PW10 was Cpl. David Kipchumba who produced the photographs of the scene taken by Cpl. Kiboma, together with the corresponding certificate of photographic evidence.
15. PW11 was Cpl. Joe Ngari of DCI Mbeere South who stated that he took over investigations after the accused persons had been arrested as suspects. That the suspects were arraigned and he sought custodial orders to enable further investigations. He escorted the accused persons for mental assessment and put together witness statements and they were eventually charged with the offence. He produced exhibits which were the deceased's personal belongings that were recovered at his house. From his investigations, he established that the deceased wanted to inherit the accused persons' widowed mother. On cross-examination, he stated that even though PW1 said that the deceased wanted to rape her, the investigations revealed that it was not true and that it was also not true that the accused persons had gone to save their mother.
16. That he visited the scene and found no blood stains. That he did not send the deceased's blood sample to the government chemist for analysis and that he did not think that the deceased sustained the injuries from a fall as he entered PW1's house through the window. He stated that the house of the deceased is about 500meters to that of PW1 and it seemed like the body of the deceased was carried from where he was beaten to where it was found. That the deceased was fought by the accused persons but he did not



fight back. That from the evidence, the deceased and PW1 were dating and that the deceased's clothes produced as exhibits were recovered from the house of PW1.

17. PW12 was PC Sammy Kagiri who was at Wachoro Police Station at the time of the incident. He stated that someone reported that there was a lifeless body outside a certain house. That he informed the officer in charge who called PW9 and they proceeded to the scene together. That he swore an affidavit in support of the investigating officer's request for custodial orders in court. On cross-examination, he stated that he was at the OB when the matter was reported. That he did not visit the scene but he attended the postmortem.
18. After 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.
19. DW1, the 1st accused person, stated that he heard distress calls from PW1's house and he went there with the 2nd accused, his brother. That they found the deceased in PW1's bedroom, hiding under the bed and they forced him out and he went away. That their mother was saying 'kuja muniokoe' ('come and save me'). That they found the deceased wearing only a boxer and they did not beat him at all. That none of the witnesses were there when the deceased was removed from PW1's house. On cross-examination, he stated that it was not the first time for the deceased to enter PW1's house. That PW1 had never said that the deceased tried to rape her but on the day of the incident, PW1 told them that the deceased was holding her neck. That he heard about the death of the deceased the following day.
20. DW2 was the 2nd accused person who stated that on the material night, he responded to a distress call by his mother and he was with DW1. That they found the deceased in PW1's house hiding under her bed and was naked. That they forced him out and he went away. The following day, he heard that the deceased had died. On cross-examination, he stated that they had to break the door in the process of going to help PW1 and they found the deceased hiding under her bed. They removed him and forced him outside the house but they did not beat him.
21. DW3 was Pastor Geoffrey Mugweru who stated that he knows the accused persons who are peace-loving members of the community and their mother is well behaved. On cross-examination, he stated that he was not with the accused persons and he did not know what happened.
22. After the close of the defense case, the parties opted not to file submissions.
23. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
24. 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. Section 203 of the Penal Code provides:
 - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
25. 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.”

26. The first element is death and cause of death. PW6 noted that the body of the deceased had bruises and contusion marks on the face, chest and all the limbs. It had multiple rib fractures and there was neck swelling with jaw fractures and bilateral massive hemothorax estimated at 3.5liters. The scalp was swollen and there was bleeding under the surface of the scalp. He concluded that the cause of death was massive internal hemorrhage following blunt force trauma.
27. The second ingredient is to prove that the accused persons inflicted the fatal injuries upon the deceased. PW1 testified that she raised alarm after the deceased entered her house through the window. That the accused persons who are her sons went to her rescue and they removed the deceased, beat him up and he even left his trouser and shoes behind. That as he went away, the deceased hurled threats at the accused persons, to the effect that they would face consequences. She did not see the parts of the body where the deceased was beaten.
28. PW2 said that after she was called by the 2nd accused person, she heard the deceased talking with PW1 in her house in low tones and according to her, the issue was to be left to the elders. It is PW2 who told the 2nd accused and PW4 that the deceased was inside the house of PW1. PW2 said that the 2nd accused went to look for 5 young men and returned with them in a bid to help PW1. PW3 is one of those young men but when he learned that the deceased and PW1 seemed to be in a relationship, he went away. PW8 also heard distress calls from PW1 and when he went there, he learned that the issue was one to be left alone since the deceased and PW1 were in a relationship. None of these witnesses saw the accused persons beating the deceased.
29. PW9 arrested the accused persons as suspects and then handed over investigations to PW11. On his part, PW11 stated that the injuries sustained by the deceased couldn't have been sustained through a fall as he climbed into the house through the window. In an interesting twist, PW5, the deceased's brother, testified that the deceased used to climb into houses through the window and it was not a surprise when he found him lying on his bed lifeless. He stated that he assumed that the deceased had hurt himself while climbing into the house through the window just like their late father.
30. PW11 stated that it was possible that the deceased was beaten and then carried to the place where he was found. That the investigations revealed that the deceased was trying to inherit PW1 as a wife since she was widowed. PW9 stated that they had to break the door in order to access the body of the deceased. In their defenses, the accused persons stated that they responded to distress calls by their mother PW1. That they went to her house and they found the deceased hiding under her bed, wearing boxers only. DW1 stated that their mother had previously told him that the deceased had tried to rape her on a different occasion. This time, when they heard distress calls and found that it was the deceased, they forced him out of PW1's house.
31. From the totality of the evidence, it is my view that any altercation that happened that night began with a distress call from PW1 who was seemingly in danger. This is according to PW1, PW8, DW1 and DW2. PW1, DW1 and DW2 all testified that the accused persons forced the deceased out of PW1's house and he was hiding under the bed.
32. If circumstantial evidence is considered, the argument is that the deceased was found dead after PW1 saw the accused persons beating him up that night. In the case of *Chiragu & another v Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) the court stated:

“Thus, there was no direct evidence linking the appellants to the death of the deceased. The prosecution case on this aspect therefore hinged on circumstantial evidence. In the



case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, this Court had this to say on circumstantial evidence: “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

33. I do take note that the accused persons had been told by PW1 that the deceased had tried to rape her before. They went to rescue their mother from the hands of the deceased who had attempted to harm her before. According to PW1, the accused persons beat up the deceased and according to the other witnesses, the accused persons forced the deceased out of PW1’s house. Nobody knows how the deceased got home to his bed where he was found dead but circumstantial evidence can be used to infer guilt of the accused persons.
34. As to whether the accused persons had malice aforethought, the evidence available to the Court is that they heard distress calls emanating from their mother’s house and rushed to assist her. There is no evidence that they planned to kill the deceased prior to this incident. This court finds that there was no malice afterthought on their part.
35. From the totality of the evidence that has been adduced before the court, I find that the accused persons are guilty of manslaughter and I find them guilty as such and hereby convict them accordingly.
36. It is so ordered.

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

L. NJUGUNA

JUDGE

..... for the State

..... for the 1st Accused Person

..... for the 2nd Accused Person

