



**Republic v Nyaga (Criminal Case E014 of 2023)
[2024] KEHC 16265 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E014 OF 2023
LM NJUGUNA, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

FELIX MURITHI 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 charge are that on the night of 05th/06th August 2023 at Meka village, Mbita sub-location in Mbeere South sub-county in Embu County, the accused murdered Harrison Kithinji Nyaga.
2. The accused took a plea of not guilty and the same was duly entered. The case proceeded to trial and the prosecution called Nine (9) witnesses and then rested its case.
3. PW1, Dr. Rosemary Wangari who testified on behalf of Dr. Njiru who conducted an autopsy on the body of the deceased, stated that there was a stab wound on the right neck region and it had gone through the lung causing massive bleeding in the right lung cavity. Dr. Njiru formed the opinion that the cause of death was cardiopulmonary arrest with right massive hemothorax causing pulmonary insufficiency and she produced the postmortem report as evidence. On cross-examination, she stated that the doctor did not measure the depth of the wound but the distance between the supra clavicular and the upper lung is less than 3cm. That there was only one stab wound on the neck at the supra clavicular region. That the depth of the injury depends on the length of the object used to stab.
4. PW2 was Emily Muthoni Githimu who stated that the accused is his stepson while the deceased is her lastborn son. She stated that her daughter Doris Wawira called and told her that the deceased was dead. That she was not at home at the time and that she was living in a different place because the accused did not like her children. That at the time, the deceased was living with his father at Mecca but PW2



had relocated to Kiambere and she did not know who had killed her son. That she found the body of the deceased at Embu Level 5 Hospital and Doris told her that the deceased was murdered on 5th August 2023.

5. PW3 was Nicholas Nthiga who stated that on the night of the incident at around 1am, he was called on phone by his son Dickson Kiamwali and he informed him that the deceased had been killed. That some people had told his son that the accused was the one who murdered the deceased by stabbing him with a knife. That he called the sub-chief, one Mr. Njiru who told him to go to the scene and ascertain the allegations. That at first, he was hesitant but later he went and found 3 people there; Muriithi, Murimi and Kiambati and the deceased appeared dead.
6. He stated that he reported to the sub-chief what he had seen and then gave his phone to Muriithi to talk to the sub-chief. That the deceased had a stab wound on the neck and there was a bloodstained knife where the body of the deceased was lying. On cross-examination, he stated that there were people at the scene but they were a distance away. That the police came to the scene later to collect the body of the deceased, which was about 5 meters away from the accused's gate.
7. PW4 was Benjamin Murimi Nyaga. The court noted that this witness was seated in court when PW1 was testifying. He stated that the accused is his step brother while the deceased was his biological brother. He stated that on the fateful night, he was in his house with his wife Karen Wangari, when at around 1:30am, he was awoken by the accused who told him that the deceased had been stabbed. That he went to the scene where he found the deceased already dead. That he went to the home of PW3 who went to the scene with his wife and his son Dickson. That they called the police who took the body to Embu Level 5 Hospital mortuary and he accompanied them. He identified the knife that was at the scene, in court.
8. On cross-examination, he stated that earlier that night, the deceased was at his farm alongside 5 other people to pick miraa. That when the work was finished, he took the miraa to Mecca to sell it and that is where he paid the deceased his wages. That after the deceased received his wages, he entered Garissa club and he was with him but he left him there drinking alcohol. That by the time he left the deceased, Racheal Wawira was the only other person in the club and she was the attendant. That the club usually closes at 11.00 p.m but the time can be extended if there are customers. That the accused is the one who called to tell him that the deceased had been stabbed and he asked for help to take the deceased to hospital. That the accused had called James Kariuki to help take the deceased to hospital in his motor vehicle before the police vehicle arrived.
9. PW5 was Purity Nyaguthii, a neighbor, who stated that she learned on the morning after the incident that Felix Nyaga had tried to call her to inform her about the incident but he was not able to pick the call since she was sleeping. That she later spoke to Felix who told her that the deceased had tried to call him the previous night but by the time he went to see him, he was already stabbed with a knife. She stated that she did not find the deceased at the scene but there was blood at the scene when she arrived there.
10. PW6 was Samuel Mwangi Nyaga, a neighbor and PW5's father, who stated that she heard the accused calling PW5 on the night of the incident but she did not pick the call. On cross-examination, he stated that his wife told PW5 not to pick the call because it was late but they had not slept.
11. PW7 was Racheal Wawira who stated that the deceased was her customer at Garissa bar. That on the night of the incident, the deceased went to the bar with 2 other customers. One of whom was Murimi, his brother and she sold some alcoholic drinks to them. That the owner of the bar instructed her to close the bar at exactly 11pm and she did so, by which time, the deceased and his companions were still in the bar with her but his brother had left earlier. The following day, she heard about the death of the deceased.



12. On cross-examination, he stated that by the time she needed to close the bar, the deceased had not finished his drink and so he carried it with him as he left. That they left the bar together after she closed but she did not know which way the deceased went. That she did not know the other 2 people who were with the deceased and that they paid for their drinks in cash.
13. PW8 was James Kariuki who stated that he was called by the accused to go and assist with taking the deceased to hospital. That when he looked at the deceased, he noticed that he was unresponsive and so he refused to take him to hospital. That there was a knife where the deceased was lying and he identified the knife in court.
14. PW9 was Paul Kivuti, the deceased's uncle, who stated that he identified the body of the deceased for purposes of postmortem at Embu Level 5 Hospital mortuary.
15. PW10 was Cpl. Joseph Ngari who stated that he was assigned the case by the DCIO and he proceeded to the scene in the company of other police officers and scenes of crime personnel. He stated that at the scene, they found the body of the deceased lying along a footpath leading to the accused's house. That the accused and PW4 were there together with other villagers and next to the body, there was a knife and a torch. That the accused told the police that he returned home at 10:30pm and he went to sleep. That at around 1am, he was awoken by the deceased's call for help outside his home.
16. That he went to see what was happening and tried seeking for help as best as he could since the deceased had been stabbed on the neck and there was nobody else at the scene. The accused said he took the deceased and escorted him to the place where he collapsed. He stated that the police visited the deceased's house where he was living alone. The body of the deceased was removed and taken to Embu Level 5 Hospital Mortuary and photographs of the scene were taken. That the accused was arrested in connection with the incident and he was arraigned because the witnesses told police that there was bad blood between him and the deceased because they were not biological brothers. The foldable knife, sketch plan of the scene and photographs were produced as evidence.
17. On cross-examination, he stated that the knife found at the scene was not dusted for fingerprints and the torch belonged to PW4. That the scene had not been tampered with and that his opinion was that the deceased had been dragged to that point, a distance of about 10 meters. That the deceased was not carried because if he was, there would be blood stains on the accused person's clothes, but no blood-stained clothes were found in his house. There was no information to show that the accused changed his clothes. He testified that the deceased was at Garissa bar with PW4 and 2 unknown people who were never traced. That he did not request for mobile data from the provider but the phone numbers of the 2 unknown people were missing, so it would have been a futile exercise.
18. When it was put to him that the 2 unknown people could have been the ones who killed the deceased, he stated that the distance between the bar and the deceased's house is far and he didn't think the 2 people followed the deceased all that way and, in any event, the deceased had not quarreled with any of them. That he sought a medical opinion from the pathologist who stated that the injuries were too severe for the deceased to have walked any distance more than 2 meters after he was stabbed. That when they searched the deceased's house, they found rice cooking on a stove. That no personal items, ID or phone were found on the body of the deceased.
19. 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.
20. DW1, the accused person, stated that he spent the whole day with the deceased working until evening. That when they parted ways, he went home and slept and at around 12:30 a.m, he heard distress calls and he woke up and went to the gate to check. That he saw the deceased who was calling out and he



- signaled to him that he had been stabbed on the neck. That he went to help him to walk to hospital but after a few meters, the deceased was unable to walk and he fell at the gate leading to the accused's home.
21. He stated that he went to PW4's house and told him about what had happened and they returned to the scene together and called PW8, a taxi driver but he refused to take the deceased to hospital. That some people had gathered at the scene and they called the police. That when the police arrived, he told them that he found a torch, a jacket, a cap and a knife at the scene and he told the police as much. That the police did not interrogate who the owners of the other items at the scene were. He stated that he related well with the deceased and on that night, he simply went to rescue his brother.
 22. He denied any wrongdoing or involvement in the deceased's death. On cross-examination, he stated that he did not chase the deceased's mother away from the property. He denied allegations that he had threatened to kill the deceased in 2017. That the deceased lived in the same compound with him but a little further.
 23. DW2 was Robert Rutere Nyaga who stated that he was with the deceased earlier that night at Makuti bar drinking alcohol. That the deceased left him there and he did not know where he went afterwards. That the following day, he was informed of the death of the deceased. On cross-examination, he stated that he was at the bar with one Kamore who is the person that left with the deceased. That the accused was not in their company that night. He did not know the whereabouts of the accused that night and though the deceased and the accused were brothers, he could not tell how they used to relate.
 24. After the close of the defense case, the parties filed their written submissions.
 25. In its submissions, the prosecution relied on the case of Anthony Ndegwa Ngari v. Republic (2014) eKLR, Article 26 of *the Constitution* on the right to life and the provisions of section 203 of the Penal Code. It argued that there is no justifiable defense for the deceased's death and he relied on the case of Gusambizi Wesonga v Republic [1948] 15 EACA 65. That even though there are no witnesses placing the accused at the scene, there is plenty of circumstantial evidence pointing at the accused as the perpetrator of the offence and it relied on the cases of Abanga alias Onyango v Republic Cr Appeal No 32 of 1990 and Rex v Kipkering Arap Koske & Another (1949) 16 EACA 135. It also relied on sections 111(1) and 119 of the *Evidence Act*. It argued that the accused bore malice aforethought at the time of the offence and that the court ought to find as such. Further reliance was placed on section 206 of the Penal Code and the case of Joseph Kimani Njau v. Republic (2014) eKLR. That the manner in which the injuries were inflicted speaks to the intention to commit the offence.
 26. The accused submitted that from the testimony of the investigating officer, it appeared that the deceased left his house shortly before being killed since some rice was found boiling in his house. That it was possible that he was killed by a guest he might have brought home with him. That it was unusual that the deceased did not have any personal items on him that night. He argued that the matter was not investigated properly and that the evidence adduced does not prove that the accused is responsible for the death of the deceased.
 27. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
 28. 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:

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

29. 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.”

30. The first element is death and cause of death. PW1 testified that the cause of death was cardiopulmonary arrest with right massive hemothorax causing pulmonary insufficiency and she produced the postmortem report as evidence. That the deceased had sustained one stab wound on the neck and it had penetrated to the lungs.
31. The second thing is to prove that the accused is responsible for inflicting the fatal injuries upon the deceased. PW4 testified that he was with the deceased that night and that he left him at Garissa bar where PW7 works as a bar attendant. PW4 stated that by the time he left the bar, only PW7 and the deceased were left there. PW7's version is different. She stated that the deceased who was a customer at the bar walked in with PW4 and 2 other men whom she did not know. That the 2 men paid for their drinks in cash and when it was time to close the bar, the deceased and the 2 men left together but she didn't see where they went to.
32. PW10 testified that when the police arrived at the scene, they went to the deceased's house where they found rice cooking on the stove. It was submitted that this meant that the accused got home that night and he was preparing food before he met his death. PW10 also stated that the 2 men that were with the deceased at Garissa bar were not found as they paid for their drinks in cash and PW7 was not familiar with them. That the knife that was found at the scene was not dusted for fingerprints to ascertain that it was the accused who stabbed the deceased.
33. In his defense, the accused stated that he had spent the whole day with the deceased and they were working. That he went home and slept and at about midnight, he heard the deceased calling for help near his house. That he woke up and the deceased showed him the stab wound. That he led the deceased and tried to help him to walk before the deceased fell down near the accused's gate. The accused stated that he tried to call PW4 but he didn't pick his call and so he rushed to his house and they returned to the scene together, where a few people had gathered. He stated that when they asked PW8 for help to take the deceased to hospital in his taxi, he refused. That they called the police who arrived at the scene in their motor vehicle which was used to take the body of the deceased away.
34. There is no direct evidence placing the accused at the crime scene. The circumstances surrounding the deceased's death are unclear in terms of the accused's participation. From the available evidence, the deceased was in the company of PW4 and 2 unknown men who were never located by the police. There is a murder weapon on record but the same was not dusted to ascertain that it belonged to or was used by the accused to murder the deceased.
35. PW4, who was among the last people seen with the deceased that night at the bar, was in court when another prosecution witness was testifying. When his time came to testify, he said that besides the



deceased and PW7, no one else was in the bar when the deceased left, yet PW7 said there were 2 other men she did not know. A few hours later, the deceased appeared to have reached home and then left the house again before he met his death. From the foregoing, it is my view, the accused cannot be placed at the crime scene.

36. The standard of proof in criminal cases is high; beyond reasonable doubt. According to Duhaimé'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. It means that it would be an unsafe conviction if the standard of proof has not been met.
37. The element of malice aforethought is therefore immaterial 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.
38. 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.
39. It is so ordered.

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

L. NJUGUNA

JUDGE

..... for the State

..... for the Accused person

