



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Republic (Criminal Case 13 of 2017)  
[2023] KEHC 20984 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 13 OF 2017**

**HM NYAGA, J  
JULY 27, 2023**

**BETWEEN**

**SAMUEL NDIRANGU KARIUKI ALIAS SAMMY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The accused Samuel Ndirangu Kariuki alias Sammy, was charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*.
2. The Particulars of the offence were that on the 31<sup>st</sup> January, 2017 at Kikapu Village in Njoro Sub-County within Nakuru County he murdered Pauline Wangare Githu.
3. On 24<sup>th</sup> May, 2017, the charge was read to the accused and he pleaded not guilty and thereafter the trial ensued, with the Prosecution calling a total of seven (7) witnesses in support of its case.

**Prosecution's Case**

4. PW1, was Willy Gitu. He was a brother of the deceased. He knew the accused as his neighbour. He testified that on 31<sup>st</sup> January, 2017 at around 7p.m. he went with his friends Samwel and Nancy to a bar. They took alcohol until 10:30 p.m. Thereafter they went back home with the deceased. On reaching Wakarige Junction, a person emerged from a bush and started beating the deceased with fists and kicks. He said it was dark but he was able to recognize that it was the accused through his voice. He said the accused was hitting the deceased on the head while saying “*ulinifanyaje*” and that the deceased had insulted his mother. He ran home and appraised his mother and nephew about the incident. He said the accused person called a boda boda rider who came to the scene and took the deceased home. It was his further evidence that the deceased was critically injured and she had blood all over her head. The following day he learned that the deceased passed away at night.



5. In cross examination, he confirmed that in his written statement he did not indicate that he recognized the accused by voice but that he saw him. He confirmed that after reporting the incident to his mother and nephew he did not accompany them back to the scene as he was drunk.
6. PW2, was Nancy Waithera, a childhood friend of the deceased. She knew the accused as the deceased's boyfriend. It was her testimony that on 30<sup>th</sup> January, 2017 she was taking alcohol at a bar in Gichobo near Kikapu together with Samuel Kamau, PW1 and the deceased. She said at around 10:30 p.m. they walked back home. On the way, she saw the accused emerge from a thicket then ordered the deceased to stop. She said there was sufficient light for her to recognize the accused and that she also recognized him by his voice. She said after the deceased stopped, the accused started dragging her. Thereafter she left with her brother Samwel for their home. The following day she learnt of the deceased's demise.
7. In cross examination she confirmed that in her written statement she did not indicate that she recognized the accused through his voice. She also stated that she neither witnessed the accused beat the deceased nor heard him say that the deceased had insulted his mother.
8. PW3, was Samuel Kamau. He said the deceased was his sister's friend and he had known her for 3 years. He also stated that he knew the accused and he identified him at the dock. He corroborated the evidence of PW1 and PW2 that on the aforesaid material date he was with them taking alcohol and that they left the bar at 10.30 pm. It was his evidence that he saw the accused emerge from a thicket at Karibe Junction and started beating the deceased. He said there was moonlight and he was able to see the accused clearly. He also recognized him through his voice. He said the accused threatened to beat anyone who would attempt to intervene and since he knew the accused and the deceased as lovers he chose not to get involved and he left with PW2 for their home.
9. In cross examination, he said that they took alcohol between 7-10:30 p.m. He confirmed that in his written statement he did not mention that there was moonlight and that he recognized the accused by voice.
10. In re-examination, he said that they left PW1, the accused and the deceased at the scene.
11. PW4 was Rachel Wairimu Gitu, mother of the deceased. She testified that on the material date PW1 woke her up saying that the accused was beating the deceased. She immediately woke up the deceased's son one Henry Njoroge and proceeded to the scene. On their way to the scene, the accused called her through the deceased's phone claiming that he had found the deceased lying on the ground injured. Upon arrival at the scene, they found the deceased lying on the ground with no visible injuries. She said the deceased was unresponsive and she told the accused who was also there to look for means to take the deceased to the hospital since he was the one who had injured her, and the accused complied by procuring a boda boda operator who came to the scene and took the deceased home. It was her testimony that on reaching home, the accused insisted on remaining with the deceased and she left them and went to sleep. The next day she found the deceased lying on her bed half dressed. That her underpants and trouser were only on one leg and the accused was nowhere to be seen. She stated that she was not able to speak with the deceased on the material date as she was unresponsive. She reported the matter to Mzee wa Nyumba Kumi.
12. PW5 was Henry Njoroge, a son of the Deceased. He confirmed he visited the scene with PW4 and stated that he saw the deceased lying on the ground with blood oozing from her mouth while the accused was standing next to her. He said the deceased could not speak. He contradicted PW4 by stating that he was the one who looked for a boda boda rider who took the deceased home. He also stated that the accused accompanied them to their home and declined to leave. That he slept there. The following day in the morning he learnt of the deceased's death.



13. PW6 was DR. Titus Ngulungu a pathologist at Nakuru Level 5 hospital. His testimony was that post mortem examination was conducted on the deceased body on 8<sup>th</sup> February, 2017 at Egerton University Funeral Home. He said externally the deceased body; Had swelling on the eyes, cheeks, lips and the forehead. Had multiple bruises distributed over the fore head, cheeks and lips.  
  
Internally;  
Uterus was swollen with surface bruises Swollen scalp with bruises Massive subdural hematoma on the skull and brain contusion.
14. He formed an opinion that the cause of death was severe brain injury attended by massive subdural hematoma due to multiple blunt force trauma in keeping with fatal assault in a body with gravid uterus. He produced the post mortem report as Exhibit 1.
15. PW7, was P.C Alex Muinde. It was his testimony that on 1<sup>st</sup> February, 2017 at around 9:45 a.m. he was in the DCIO's office when PW1 reported that on the material date while he was going home in company of the deceased, PW2 and PW3, the accused emerged from the bush and attacked the deceased. That based on this information, he visited the scene with his colleagues where they found the deceased lying dead on her bed with blood oozing from her mouth. He noted the deceased body had injuries all over. He said while there he was told that the deceased had been raped and he called Dr. Kipngetich Cheruiyot who came to the scene and collected specimens for testing. He said the results revealed that no spermatozoa and organism was seen. He produced the report by the said doctor as Exhibit 2. It was his further testimony that during the course of investigation they recorded several witness statements and after the post mortem examination was conducted they charged the accused with the present offence.

#### **Defence Case**

16. The accused testified that the deceased was his girlfriend for 4 years. He told court that on 31<sup>st</sup> January, 2017 the deceased called him and requested to meet him at the Junction. He went there and found the deceased. The deceased started hurling insults at him calling him a dog and his mum a prostitute. He stated that in the heat of the moment he slapped her and she fell on the ground and hit a stone. He panicked and called her mother who rushed to the scene in company of her son. He called a boda boda operator who came and ferried him and the deceased to her home while deceased's mother and son followed them on foot. He said upon reaching the deceased's home he placed her on the seat and left. He said at the time the deceased was not talking. The next day he learned that the deceased had passed away.
17. In cross examination, he confirmed he was with the deceased. He did not know what killed her. He said he did not intend to kill her.
18. At the close of the defence case, only the Accused elected to file written submissions. He filed the same on 16<sup>th</sup> May, 2023.

#### **Accused Person's Submissions**

19. The Counsel for the accused submitted that the deceased called the accused a dog and his mother "satan" and a prostitute. He contended that this provoked the accused who lost his cool and slapped the deceased.
20. He urged this court to find that the prosecution has not proved the charge of murder but rather the offence of Manslaughter.



21. In support of his submissions he referred the court to provisions of Section 207 of the *Penal Code* and the cases of *Henry Okello Dambe v Republic* [2016] eKLR; *Republic v John Mururu Kubai* [2018] eKLR & *Republic v Hussein s/o Mohamed* [1942] EACA 66.
22. The Prosecutor did not submit and chose to rely on the evidence adduced.

### **Analysis and Findings**

23. For Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, these ingredients were listed as follows: -
  - (a) the death of the deceased occurred;
  - (b) that the accused committed the unlawful act which caused the death of the deceased; and
  - (c) that the accused had malice aforethought.

### **The death of the deceased**

24. In this case, the cause of death is not in doubt. The post-mortem produced shows that the deceased died as a result of severe brain injury attended by massive subdural hematoma due to multiple blunt force trauma in keeping with fatal assault in a body with gravid uterus.

### **Proof that accused committed the unlawful act which caused the death of the deceased**

25. Causing death is defined under section 213 of the *Penal Code* as follows;

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—

  - (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
  - (b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
  - (c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;
  - (d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;



- (e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons."
26. Accused has conceded that he assaulted the deceased but said that it was an act out of provocation, after the deceased insulted his mother. From the evidence of the Prosecution witnesses, the accused did not merely slap the deceased. He is said to have assaulted the deceased several times. Even though Nancy said that she only saw him dragging the deceased, the other witnesses at the scene clearly saw the accused assault the deceased several times.
27. The post mortem report's finding was that the deceased's death was caused by severe brain injury attended by massive subdural haematoma due to multiple blunt force trauma. These findings are in agreement with the evidence of the eye witnesses, who saw the accused assault the deceased.
28. I find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased, which constitutes the 'actus reus' of the offence.

### **Proof that deceased had malice afterthought**

29. The court must determine whether accused, with malice aforethought, inflicted the injuries that resulted in the death of the deceased. This is what distinguishes the offence of murder from manslaughter.
30. Malice aforethought was defined in the following cases;
- (a) *Nzuki v Republic* [1993] KLR 171 where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused; Intention to cause death; Intention to cause grievous bodily harm; Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
- (b) In the case of *Daniel Muthee v Republic* Criminal Appeal No. 218 of 2005 (UR) cited in the case of *Republic v Lawrence Mukaria & Another* [2014] eKLR, Bosire, O'kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:
- “When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*.”
31. The Accused raised the issue of provocation saying that the deceased insulted him calling him a dog and his mother a prostitute.
32. The *Penal Code* makes provision for provocation under Sections 207 & 208 as follows:
- “207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.



- (1). The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”
- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.”

33. In *Peter King’ori Mwangi & 2 others v Republic* [2014] eKLR, this Court addressing the defence of provocation stated as follows:

“We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of *Duffy* (1949) 1 ALL ER 932; provocation was defined as;

“some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind....”

Inherent in this definition at common law, is the requirement of two conditions to be satisfied for the defence to be made out, namely:-

“The “subjective” condition that the accused was actually provoked so as to lose his self-control; and the “objective” condition that a reasonable man would have done so.”

34. In deciding a similar situation on provocation the Court of Appeal in the case of *Elphas Fwambatok v Republic* [2009] eKLR held thus:

“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”



35. In addition, not every act of provocation will reduce the act of murder to manslaughter. In the case of *Tei s/o Kabaya v R* [1961] EA, the Court of Appeal for East Africa, outlined the circumstances which a court should consider in deciding whether certain provocation is sufficient for purposes of Section 207 of the *Penal Code*, to reduce a charge of murder to manslaughter. The Court stated:
- “In considering whether provocation was sufficient to reduce the offence to manslaughter, it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used.”
36. The question that arises is whether the circumstances in which the appellant committed the offence, and the relationship between the appellant and the deceased, were such as to justify the appellant being incensed to the point of losing his self-control, so as to bring in the defence of provocation as defined in sections 207 and 208 of the *Penal Code*.
37. The Accused stated that the accused insulted him by calling him a dog and his mother a prostitute. PW1, and PW3 who were with the deceased on the material date all confirmed that the deceased emerged from a bush and started beating the deceased. They confirmed that while beating the deceased the accused was saying that the deceased had insulted his mother. PW2 also confirmed the accused emerged from the bush and started dragging the deceased. The evidence of these prosecution witnesses was watertight. They were consistent in their testimony all through and it is clear therefore that the deceased if at all had insulted the accused then it was not at that particular moment. There is no reason to doubt their evidence.
38. Even if I was to hold that had been insulted by the deceased then the accused had sufficient time to cool off between the time deceased was out with the above witnesses and the time he met the her on her way home.
39. I also find the evidence of the accused unconvincing. He stated that he lost his cool and slapped the deceased once and she fell on the ground and hit a stone. Going by the grievous injuries sustained by the deceased that led to her death, it was highly unlikely to have been caused by a fall as there were multiple injuries. The deceased sustained multiple injuries distributed over her fore head, cheeks and lips. She also sustained severe internal injuries in her skull and uterus. This cannot be from a fall.
40. For the above reasons, I hereby find that the defence of provocation is not available to the accused.
41. It is evident that the accused was waiting for the deceased, while hiding in a bush. When she got near him, he emerged and confronted her. It was at that moment that he descended upon her, assaulting her. To me these were premeditated actions by the accused and not a spur of the moment thing.
42. For the foregoing reasons, I come to the conclusion that the accused killed the deceased with malice aforethought as established under Section 206 of the *Penal Code*.
43. Consequently, I find that the state proved its case beyond reasonable doubt. Accused is found guilty of the offence of murder and he is accordingly convicted on the said offence.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF JULY, 2023.**

**HESTON M. NYAGA**

**JUDGE**

In the presence of:

C/A Jeniffer



Ms. Murunga for State

Accused present

