



**Republic v Kinuthia (Criminal Case 31 of 2019)
[2023] KEHC 25567 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 25567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 31 OF 2019
SM GITHINJI, J
OCTOBER 26, 2023**

BETWEEN

REPUBLIC STATE

AND

NAFTALI NJAMI KINUTHIA ACCUSED

JUDGMENT

1. Naftali Njami Kinuthia is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of this offence are that on 9th day of April, 2019 at around 10.30am at Moi Teaching and Referral Hospital in Eldoret Sub-County, within Uasin Gishu County, the accused murdered Ivy Wangechi.
3. The Prosecution case is that the deceased in this case was born on 10th April, 1994. According to her mother who gave evidence as Pw-2, she schooled at Joyland Academy in Gatanga from 1988 up to 2003 when the family shifted to Thika. The accused in this case is older than the deceased and schooled with her at the said academy though the accused was two or three classes ahead of her. Her mother knew the accused at the time but knew of no relationship between him and the deceased.
4. The deceased must have passed her Kenya Certificate of Primary Education(KCPE) impressively to earn a place in the ever competitive National School, Alliance High. She schooled there from 2008 and had one close friend who is Pw-10 in this case. In her evidence she said they were close, like sisters. She met the accused in 2017 through the deceased. By then they had completed High School successfully as Pw-10 joined Kenyatta University College and the deceased Moi University College in Eldoret. The accused who was at the time an Engineer in Software was in touch with the deceased, and was operating a shop at Jamia Mall within Nairobi Central Business District (CBD). The deceased and Pw-10, despite



their colleges being about 322.3Kms apart or about 6 hours drive apart, still kept glued together as dear friends. According to this witness, the deceased and accused were friends but never lovers.

5. On 10th of April, 2018 Ivy was to celebrate her birthday. She visited Pw-10 in her home at Lang'ata. The Birthday was to be celebrated in Westlands. They arranged to go to the accused's shop in town and change clothes before heading for the Birthday. When they got to the place the accused inquired about the Birthday party from Pw-10. The deceased had not invited him. Pw-10 told him where the party will be and indicated to him that he could pass by. The accused attended the party. After it was over there was extended celebrations at Bar Bristro. The accused met their entire bills for the party. Pw-10 left at about 2am and the following day the deceased told her that accused invited her to spend the night in his house and but she declined.
6. The accused is said by the witness to had always craved for a love relationship with deceased but the deceased was firmly adamant. He generously showered her with lunch offers and gifts towards the endeavor.
7. Pw -13 opened a whatsapp group known as "Ciku" in 2018 which had three (3) members; herself, the deceased and Pw-10 in this case, all ex-Alliance High School close friends. In the group they shared a lot. Some concerned views on messages about deceased and the accused relationship. The accused had Pw-10's number and could call her and send her messages concerning his relationship with the deceased. In most of the said messages he was complaining about the deceased. There is a time the deceased felt bothered by him and blocked his number. He then could only reach her through Pw-10 to whom he sent messages to pass to the deceased. Some were just lamentations on how the deceased was treating him. Pw-10 used to respond to him, trying to comfort him. She felt sorry for him. Some messages from him however amounted to threats. There is a time he said only death would end what he was going through with Ivy (deceased). He complained of the gifts he had given to her and was getting nothing in exchange. He said he wanted all that back. He had made some calculation of the amount owed in what he had spent on her, and it totaled to Kshs. 200,000/=. He threatened to demand payment from the deceased's mother. The deceased herself had expressed willingness to pay him back.
8. Pw-13 on her part informed the court that the accused prior to the death of the deceased, for a period of about 2 years had made efforts to get into an intimate relationship with the deceased, to which the deceased always shunned. Pw-13 is an advocate and for the time the deceased was schooling in Eldoret, she was in Nairobi. She however kept close touch with her. In December, 2018 the deceased who felt bothered by the accused bought a new line to avoid him.
9. On 3/4/2019 the deceased shared in their "Ciku" group how the accused appeared uninvited and suddenly, at the student hostels in Eldoret. She saw him at the gate and he welcomed her to his car. She was shocked. She lied to him to let her drop her robe and books and then meet him. She went and did not keep the promise. Pw-10 and Pw-13 advised her not to leave the hostel and to walk in company of a male friend to circumvent a possible attack. On 4/4/2019 Pw-10 told them that the accused had reached out to her praying for a chance to meet the deceased. The deceased was adamant to meet him and instructed Pw-10 to tell him to leave Eldoret.
10. Pw-11 was a friend of the deceased at the medical school. She knew the accused as the deceased spoke of him. She also met him a few times. In 2017 she met him at Narok Hospital. At the time they also visited Limuru Forest with the deceased. At 8.00Pm the deceased suggested they be accommodated for the night by the accused. The accused was called and he accepted. They went to his house. Pw-11 and the deceased shared a bed while the accused slept on a seat in the house. When the accused bought a vehicle in 2018 he travelled to Eldoret. He wanted to pick them up. The deceased protested but the accused insisted. They gave in. He picked them at 5.00Pm and took them to Ruppa Mall. After dinner



he dropped them back in the hostel. He insisted on talking to the deceased. Pw-11 got out of the vehicle and the deceased requested her to wait for her. The two spoke as Pw-11 waited outside. When deceased left she was furious, emotional and upset. She told Pw-11 that accused requested her to go with him to the hotel and she declined. She alleged they were friends but the accused wanted more and when she declined he insulted her. Pw-11 consoled her as they went to the hostel. The deceased said accused was sending her unfriendly messages and had blocked him.

11. The following morning the deceased was to go to Nairobi. The accused called Pw-11. He said he wanted to travel with deceased to Nairobi as he had visited all the way from Nairobi and did not wish to travel back alone. He apologized and urged Pw-11 to convince the deceased on his request. Pw-11 who was also to travel to Nairobi managed to convince the deceased. Pw-11 sat in the co-driver's seat and the deceased back left. All along the journey it's Pw-11 who was talking to them but the deceased and the accused never spoke to each other. They got to Nairobi at 9.00Pm and were dropped where each was going. The same week the accused called Pw-11. The deceased had blocked him. He alleged he had reported the deceased at the police station and she should report there or else there will be consequences. He alleged Pw-11 was a witness. Pw-11 asked a witness about what, and he said the deceased had insulted him and he had sued her. Pw-11 told deceased about it. The deceased consulted her lawyer friends who told her it must be lie as there were no legal basis for such. Pw-11 called the accused who confirmed that it was actually a lie. He apologized for it.
12. Before the deceased met her death, one morning she told Pw-11 that the previous day accused stormed at her unexpectedly. He urged her to get into his car, but she declined as she was scared of him. She lied to him that she could drop the items she had and join him. She appeared scared and Pw-11 advised her to involve family members and the police. She further indicated to the deceased that the matter was getting out of hand. The deceased down played it saying he could not harm her.
13. The deceased met her death on 9th of April, 2019, a day prior to her 25th year birthday. That day as was narrated by Pw-3 her then classmate at Moi University, at about 10.30am they were from student hostels. He met deceased at the stairway to the hostel. They walked together going for a class. The class was at Moi University Mental Health Department. They were along a footpath adjacent to the hospital. They walked side by side as they deliberated. At medical conference center as he talked to her, he saw someone behind who had lifted something up ready to strike her. He saw the assailant from the side of his eye and the vision was not clear. He tried to reach out for whatever the man was holding to safe her but it was late. She was struck. She fell on the side and Pw-3 jumped aside. The assailant raised the weapon once more and Pw-3 noted it was an axe. He again tried to reach for it. The assailant turned against him. Pw-3 turned to face the hostel direction and took on to his heels. He tripped ahead and fell down. While down he faced the scene. He saw the deceased on the ground. The assailant went around her. He held her hand, lifted it up and struck her on the head with the axe. He then walked away from the body. People shouted saying "*don't let him escape!*" They converged towards him. He swung the axe to scare them. The crowd obstructed Pw-3 who stood and escaped to the hospital. The axe had a metal head and handle. It was about a metre long. The assailant was in a grey cap, blue shirt and grey coat.
14. Pw-4 is the other eye witness to the incident. He stated that on 9/4/2019 in the morning he had gone to St Luke's Hospital to consult a doctor. On his way back to town, along Nandi road, he witnessed a scuffle. Someone attacked another from behind. The attacker was a slim man in a cap and a jacket. He cut the victim with an axe. He then ran towards Pw-4 and Pw-4 avoided him. The assailant attacked the victim again on the neck. The axe was all metal. They shouted for help as they hurled stones at him in an effort to save the victim from further attack. The boda boda operators joined in the help. The assailant had a long knife or a dagger. Pw-4 decided to escape. Boda boda operators were able to subdue him.



15. Pw-7 a security supervisor at Moi University witnessed part of the incident. At the material time he was on duty and heard people screaming. He went to where the screams were emanating from. There was a person on the ground in a white robe. The crowd was running away. He noted presence of another person who was armed with an axe. This person went back to where the person in a white robe was lying. He lifted up the axe and struck the person with it. People screamed loudly. The assailant scared them with the axe. He then drew out a knife from his clothes. He was armed with a knife in one hand and an axe in the other. Bodaboda people intervened. They threw stones at the assailant. Pw-7 approached where the victim was. There were many students screaming saying, "Ivy has been killed." She had a cut on the neck and head. An ambulance appeared and carried her body. The axe the assailant had, had a metal handle and had been sharpened using a grinder. The knife was longer than a kitchen knife.
16. Pw-6, a doctor at Moi Teaching and Referral Hospital got to the scene immediately after the incident. She recognized the victim as Ivy Wangechi. She was in a laboratory coat. She organized for a wheelchair and ambulance to rush her to the hospital. At the casualty she was pronounced dead.
17. Pw-8, a security officer at Moi Teaching and Referral Hospital also got to the scene soon after the incident. The mob was attacking on the suspect. He called the police on patrol using a radio call. They got to the scene and rescued the suspect. He had been injured and was rushed to the hospital.
18. Pw-9 is the officer who arrested the suspect. The suspect was armed in one hand with an axe and the other a knife. The officer drew out a pistol and ordered him to stop. He was as well ordered to drop the weapons. He did not drop the weapons. He was hit with stones. A huge stone landed on his head and sent him to the ground. The officer stepped on him and recovered the weapons he had. The axe had blood stains at its tip. The officer called for reinforcement. A police vehicle was availed which rushed him to the hospital.
19. The suspect was searched. He had car keys. He said the motor vehicle was Registration No.KCB 836B of which was outside the hospital gates. Officers from DCI took the vehicle. The suspect was in a brown leather jacket, blue jeans, blue sport shoes, white socks and a blue shirt.
20. On 10/4/2019 at 5.00Pm, Pw-5 who is an uncle to the deceased identified her body for postmortem. Pw-1, a pathologist at Moi Teaching and Referral hospital carried out the postmortem. It was noted that she was 25 years old. She had a bandage around the head, blood soaked. She had her clothes on of which included a white laboratory coat. They were soaked in blood. External examination revealed an 18cm C-shaped cut wound involving the left side of the head, temporal region. It was extending to the parietal region. The deep wound had caused a fracture of parietal bone on the left side. The covering of the brain had been exposed from the fracture. There was a second-deep cut wound measuring 12cm. This was a straight cut wound starting from upper part of the left side of the neck, extending to the left cheek and to the left eye. It was extending upward. The said wound had severed the main blood nerves of the neck on the left side (carotid nerves). It had had extended to cause a fracture of the left mandible and maxilla bones. The wound was gaping and exposing the muscles. Other systems were normal save for that the organs appeared pale due to loss of blood. The head was opened and there was bleeding into the brain, both left and right sides. The pathologist was of the opinion that the cause of the death was hypovolemic shock due to excessive bleeding, due to deep penetrating cut wounds on the left side of the neck. He issued a burial permit No.1235490. He took blood samples of which together with the victim's clothes, gave to the investigating officer. He filled and signed the postmortem report.
21. Pw-16 investigated the case. He found the suspect who had been attacked by the mob, in the hospital. The victim was in the mortuary.



22. On 11/4/2019 samples of blood for the victim and the suspect and the blood stained axe and clothes were forwarded to Government Chemist. Pw-4 examined them and found that DNA profile of blood stains on the axe matched that of the deceased and DNA profile of blood stains on the shirt matched that of the accused person, Naftaly Njami Kinuthia. Accused phone was got and was subjected to investigations through Safaricom Office and Cyber Crime Office. Pw-17 from Cyber Crime Office was able to retrieve some messages sent and received using the gadget. The messages show how the relationship between the accused and the deceased was prior to her death.
23. The accused gave sworn evidence in his defence. He stated that he schooled with Ivy in the primary school; that is at Joyland Academy where she joined in 1998 in Nursery. At the time he was in class 2. He knew her home and family as they were his neighbours. Ivy left the school in 2004 while the accused studied there up to class 8. At the time Ivy was like his younger sister. They were using a bus to get to school and he could secure a seat for her in the bus which was mostly congested. During meals in school, he could help her easily get her ratio by jumping the queue. Ivy's mother was teaching at Chomo Primary School. The accused's father operated a book shop in Thika Town. The mother of Ivy and accused's father could interact in purchase of school books. When Ivy joined Bishop Gatimu School in Thika, they were still in touch. They could mostly meet in Thika whenever the accused was at his father's bookshop. Ivy completed class 8 and joined Alliance Girls High School. The accused was in Nyandarua High School. He completed fourth form in 2008 and Ivy in the year 2011. They were still in touch. They could meet in Thika. Accused joined Jomo Kenyatta University where he pursued Computer Technology degree course from 2009 to 2013 when he graduated.
24. At the time Ivy was at Moi University doing medicine. After he graduated their communication intensified. They were in touch through phones, and physically. The accused started working in April, 2014 and moved from Juja to Nairobi. Ivy was still in Eldoret. They could meet oftenly. They were close but the relationship was not yet intimate. In 2017 the relationship became intimate. Ivy was then in her 4th year at the University. Around April, 2019 they were in deep intimate relationship. He was emotionally connected to her in love. At times their relationship was blissful and at other times sour or sorrowful. He even knew her close friends who includes those who gave evidence in this case as Pw-10 and Pw-11.
25. Ivy's birthday was on 10th of April and she used to take her birthdays seriously. Prior to her death she was arranging to celebrate her 25th birthday. The accused felt it was important he got involved in the arrangements. He communicated to her through the phone. She said she wanted to have a big party and had a budget of 28,000/=. She requested the accused to support her financially. The accused accepted to fund her. As he did not have the entire sum, he sent her 14,000/= and promised to avail the balance a day before the birthday on 9/4/2019. On 3/4/2019 he visited her. At the time they were not in good terms and she had blocked him. He got to Eldoret at 6.30Pm. He had his vehicle Registration No. KCB 836P, a Honda Civic.
26. As accused drove along the road to the hostels he spotted her crossing the road. She had her apron on and a few books. He parked the vehicle and approached her. He requested her to spare him a moment for a talk. She was surprised to see him. She requested to drop the apron and books and then join him. She went and did not return. The accused eventually booked a hotel to stay overnight, hoping to meet her the following day.
27. The following day on 4/4/2019 he was not able to reach her. He spoke to Maryanne to urge her (Ivy) to see him before he returned to Nairobi. He sent Maryanne text messages. Maryanne responded that she was not able to convince Ivy to see him. She was reluctant to see him and had lecture classes the whole day. The accused was convinced as he had visited without notice. However, that was the first



time he had visited her in Eldoret and returned to Nairobi without seeing her. He got back to Nairobi. He told Maryanne that they will be good.

28. 8th April, 2019 was on a Monday. The accused noted on Tuesday he was free. He decided in the evening to travel to Eldoret to give Ivy the balance of Kshs. 14,000/= for her birthday party and also wish her a Happy Birthday physically. He got to Eldoret at around 9.00am. He had told Maryanne about his visit and purpose. He had his breakfast in Eldoret and drove to hostels at about 9.30am. He parked the car opposite the Emergency section of Moi Teaching and Referral Hospital. He sat alone in the vehicle. He tried to call Ivy through the phone. He was still blocked. He sent a message to Ivy. He alighted after 30 minutes looking for a place to attend to a short call. He found a place and relieved himself. On his way back to the vehicle he bumped into Ivy. He told her about the call he had made. He also informed her that he was there for her birthday arrangements and to give her the balance of 14,000/= but due to time constraints won't be able to attend her Birthday the following day. Ivy told him in response that her new boyfriend will take care of the birthday arrangements. She told him that he was not invited and could not attend. She then said that he could keep the balance and leave. That was the first time she had made it clear to him that she was no longer interested in their relationship. The accused did not respond. To him, she had burnt all the bridges and knew their relationship had come to an end. He then realized that on 3/4/2019 she had intentionally ignored him and wanted nothing to do with him. He felt hopeless as a loser. He was full of rage. He felt that a relationship he had nurtured since 1998 had come to a dead end. At that time, he retreated back to his car. He told himself he will never talk to her again. He was to drive to Nairobi for work the following day. Before he got into the vehicle, he faced back and saw Ivy hugging and holding hands with a male friend. He felt that was done on purpose by Ivy. She was not in the habit of behaving that way in public. He felt she was rubbing it on his face. The person she hugged was Pw-2 in this case. The accused lost control of himself. He was irate and not in the right mind frame to reason fairly. He could not comprehend how he decided to pick the axe which was in the boot of his car for security purposes. From that moment he could not recall the events that took place. He found himself in hospital and a nurse told him that Ivy was dead.
29. He could however recall that there was commotion that ensued and he did not let go the axe. He tried to use it to defend himself from the attack by the mob. They were hurling all manner of weapons at him. He suffered head injuries. He was rescued by police officers who scared off the attackers. One member of the public made him hold the axe and a knife. He never had the knife himself. He had the axe in the vehicle since June, 2018 for security purposes. He had bought it in Nairobi.
30. He alleged that he never intended to kill Ivy. His concerns were about their relationship and intended to have things work for them. He had not threatened her directly. When he heard of her death he regretted his action. He will live with the regret forever. She was innocent and it should have been different. What he did is unacceptable to the society and has led to his seclusion. His father died and it's painful on his part.
31. The parties in this matter filed their submissions.

Murder as a felony is defined under section 203 of the *Penal Code* as follows; -

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

The crucial ingredients for the offence are; -

1. Occurrence of death of the victim.
2. That the death was as a result of unlawful act or omission on the part of the accused.



3. That the said unlawful act or omission was committed with malice aforethought.
32. In this case, most of the facts in the prosecution case were acknowledged and accepted by the accused in his defence.
33. It is not in dispute at all that Ivy Wangechi, who was a 6th year medical student at Moi University was attacked by the accused person with an axe on 9th of April, 2019, a day prior to her 25th Birthday, in broad day light at about 10.30am, an attack which led to her death almost instantly. What this court need consider is whether the said attack was unlawful and was with malice aforethought.
34. The accused single defence is of provocation which made him act at the heat of passion.
35. Provocation is a recognized defence in law under section 207 and 208 of the penal code cap 63 Laws of Kenya, though not absolute for if successful can only lead to reduction of the offence of murder to Manslaughter and not to an acquittal. Section 207 reads; -

“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.”

36. Section 203 defines Provocation; -

“to mean and include any wrongful act or insult of such 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 conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of the self-control and to induce him to commit an assault of the kind which the persons charged committed upon the person by whom the act or insult is done or offered.

- 2)
- 3) A lawful act is not provocation to any person for an assault

37. The accused defence on facts that relates to provocation is that he had nurtured his relationship with the deceased for many years since they were children in primary school, till the time she met her death on 9/4/2019; that in the said relationship he had invested considerable time and money; that the deceased was not fair to him for the period preceding her death as she had blocked him, refused to meet him and talk to him, and eventually told him on his face after he had travelled all the way from Nairobi to Eldoret twice purposely to see her on 3/4/2019 and 8/4/2019, that their relationship was over and she had a boyfriend. This was on 9/4/2019 and was shortly followed by a physical demonstration of the same as she openly hugged a male friend (Pw-2) and held his hands as he watched.
38. The question is whether the foregoing in law amounts to “provocation”. The prosecution case is that the accused and the deceased were just friends. They had no sexual relationship at any given time. The deceased was clear on that to her friends and had demonstrated it to them when she slept in the accused house and whenever they met the accused. She was no willing to share a bed with him. Though the accused stated their relationship was initially of friendship and claimed they later became intimate, he never indicated they ever made love. The exchanged messages between them do not support a deep intimate relationship which the accused claimed they at one time had. The evidence reveals the accused pursued her for such a relationship, using all means within his disposal, but Ivy still took him as a friend.



39. Pw-2 the man he claimed hugged and held Ivy hands making him irate and lose his fair judgment, was not questioned on such during cross-examination. Cross-examination in this case were intense, widely spread and well exploited; and if the case was as accused alleged, they would not have missed it. The allegation was just an afterthought. Even if the allegation was true, the accused and Ivy were not lovers; and they were not married. They were just good old friends. Such action is not unlawful and under section 208 (3) of the penal code, a lawful act is not provocation to any person for an assault.
40. Accused had malice aforethought. He used a lethal dangerous weapon, an axe. He alleges he had not carried it purposely but had been in his vehicle since 2018 for security reasons. I do not agree with him. I saw the axe in court. It is the kind used in rural areas to split firewood or to cut trees. It was new, newly sharpened using a grinder and had a metal tube as a handle. It is not the kind reasonable people ordinarily carry for security in their vehicles, and save for this act, the accused appeared to me reasonable in other aspects of life and in his judgment. There are other axes, smaller in size and with wooden handle, which are in the market and used normally for security. The accused also had a knife. There is believable evidence to that effect and it's laughable when he alleges in his defence that a member of the public handed him the knife. Who would have wanted to lose his knife for no purpose? His allegation is not true. If he had no intention to kill, he had the opportunity to attack the victim using his bare fists of which he did not. He even never used a knife which would have probably given her a chance to survive, but used an axe, striking her not only once but twice and on the head, which in my view left her with no chance to survive. The act was of a person who intended to kill, and he executed that intention. If the accused lost self-control, the circumstances of the matter are that a reasonable person subjected to the same circumstances, would not have had cause to lose self-control. In the case of Peter King'ori Mwangi and 2 others-vs-Republic [2014] eKLR, it was held that for provocation to subsist as a defence, two conditions must be established; -
- i. The subjective condition that the accused was actually provoked so as to lose his self-control.
 - ii. The objective condition that a reasonable man would have been so provoked.
41. The provocation claimed by the accused is only subjective and not objective. It therefore fails the test.
42. The accused stated that he regrets the incident. He acknowledges the subjective nature of the provocation and lack of the objective nature when he said it should have been different, and that Ivy did not deserve to die. However, this realization has come too late in the day, and after the fact, of which cannot avail him any legal benefit, save for as a mitigating factor. The bottom line is that the offence of murder of Ivy Wangechi is established by the prosecution beyond reasonable doubt, and the accused stands convicted of it.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF OCTOBER, 2023

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Limo for Prosecution
2. Mr Kiroko Ndegwa for Deceased's family
3. Mr Mathenge for the Accused

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S.M. GITHINJI

JUDGE

26/10/2023

Prosecutor; - We have no record. He is a first offender. A young life was lost for an upcoming doctor. We pray for the maximum sentence of death.

Mr Kiroko Ndegwa;-I appreciate the profound judgment. As prosecutor has urged the court we pray for a death sentence, an eye for an eye and a tooth for a tooth. He deserves the harshest sentence possible. My client lost an innocent child, a future doctor who would have been of help to the Nation. There has never been an apology. He deserves the death sentence.

Mr Mathenge in Mitigation; -We pray for the court's judgment. I also need to consult on proper mitigations. We pray for another date.

Court; -We can have another date for mitigation and sentence. Meanwhile we can also have the pre-sentence report made by the probation officer and filed. Hearing on 22/11/2023.

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S.M. GITHINJI

JUDGE

26/10/2023

