



**Republic v Nthiga & another (Criminal Case E014 of 2021)  
[2023] KEHC 26203 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26203 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E014 OF 2021  
LM NJUGUNA, J  
NOVEMBER 29, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BENJAMIN GITONGA NTHIGA ..... 1<sup>ST</sup> ACCUSED**

**JOSPHAT NJIRU GITONGA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on 07<sup>th</sup> February 2021 at Kigwambiti Village in Nthambu sub-location in Mbeere North sub-county within Embu County, the accused persons murdered Benson Mugendi Gitere. Upon arraignment, they pleaded not guilty and a plea of not guilty was entered for each of them before the matter proceeded to full hearing.
2. PW1, Jessica Mbula Njeru, cousin of the deceased stated that on the day of the incident, the 1<sup>st</sup> accused person and the deceased went to her shop to buy cigarettes and peanuts. That she did not see the direction they went to, and she did not recall the time as her phone had gone off but it was in the evening. That she later heard the mother of the deceased screaming after finding the deceased lying on the road. That she went to see what was happening and found the deceased lying there with injuries on his hands but she does not know what caused his death. On cross-examination, she stated that when they 1<sup>st</sup> accused and the deceased went to her shop, she couldn't tell whether the 2<sup>nd</sup> had a disagreement. She stated that she did not know the 2<sup>nd</sup> accused and he was not at the scene when she went there.
3. PW2, Faith Muthoni stated that she knew the deceased. She is a sister-in-law of the 1<sup>st</sup> accused and a neighbor of the 2<sup>nd</sup> accused. She stated that on the material day she saw the 2<sup>nd</sup> accused person with the deceased and they went to PW1's kiosk. That the two passed by her place carrying alcohol and they were drunk but they were not quarrelling. That PW1 later informed her that the deceased had



- been found dead beside the road. On cross-examination, she stated that she saw the 2<sup>nd</sup> accused and the deceased passing by her house while carrying two cups and a jerrycan that contained alcohol. That the three of them entered PW1's shop but the 2<sup>nd</sup> accused left them behind and did not go with them.
4. PW3, Eustance Ireri Njeru, assistant chief of the area stated that on the material day, he received a phone call from a village elder informing him that a body had been found within the area. That he went to the scene and confirmed that it was the body of the deceased and he called the police to report the matter. That the left hand of the deceased had injuries. That the 1<sup>st</sup> accused person was arrested first and the 2<sup>nd</sup> accused was arrested later. He stated that he recorded his statement the same evening and he did not know the connection between the accused persons and the deceased.
  5. PW4, Patricio Njuki Njagi stated that on that day, he was at the home of PW2 feeding her child when he saw the 1<sup>st</sup> accused and the deceased passing by. That he was later informed by PW2 that a body had been found lying besides the road. That when he went to check, he found it was the deceased and he recognized him by his clothes which he had seen him wearing earlier that day. That he asked his uncle to tell the parents of the deceased what had happened and they also went to the scene. That he did not know how the accused persons were connected to the death of the deceased. On cross-examination, he stated that he did not see the 2<sup>nd</sup> accused person with the deceased on that day but the accused persons were friends with the deceased.
  6. PW5, Paulino Namu stated that he knew the deceased. He stated that on the day of the incident, he was informed that the deceased had fallen on the road. That he went and informed the deceased's mother who left and went to the scene and started screaming, thereby attracting a crowd. That he did not see any injuries on the body of the deceased and the body was taken away by the police. On cross-examination, he stated that the crime scene was not far from his home and he did not know what happened to the deceased. That the deceased looked drunk.
  7. PW6, Nicholas Njagi Ndwiga stated that on the material day, he was on the way from the farm when he saw someone lying besides the road. That he proceeded home and told his wife that he had seen someone lying on the road. That later on, they heard people screaming from the place where he had seen the deceased. That he knew the 1<sup>st</sup> accused because they come from the same area and he did not know why he was arrested. That the 2<sup>nd</sup> accused also comes from their area. That the deceased's hands looked like they had been scalded with hot water. On cross-examination, he stated that he did not see the accused persons killing the deceased. That where the body of the deceased lay there were stones and that it was possible that he could have fallen. That he saw the 1<sup>st</sup> accused person at the scene but he did not see the 2<sup>nd</sup> accused and the police did not say why the 1<sup>st</sup> accused was arrested.
  8. PW7, Julius Kinyua Njeru stated that on the day of the incident, the accused persons and the deceased were all at his house. That the deceased left and then he was followed by the two accused persons about ten minutes after he had left. That the deceased related well with the accused persons and that on that day, it is only the accused persons who followed him. On cross-examination, he stated that he had been at his house with the accused persons and the deceased for about 3 hours and there were also other people in his house.
  9. PW8 was Dr. Job Mwaniki who performed the postmortem on the body of the deceased at Mbeere Level 4 Hospital. He noted blue discoloration caused by inadequate breathing, bruising on the right frontal region of the scalp with cephalohematoma and there was a wound on the back of the head. He formed the opinion that the cause of death was cardiopulmonary failure due to acute occipital hematoma secondary to blunt force trauma on the head. He stated that he collected samples from under the nails and sent them to government chemist for analysis. He produced the death certificate.



- On cross-examination, he stated that the wound at the back of the head was caused by blunt force trauma, probably from a stone and he stated that it is possible that it could have been as a result of a fall.
10. PW9, Ruth Wangari Kahiu, an analyst at the government's chemist stated that they received a request from an officer at DCI Mbeere. She produced the exhibits they received from the DCI being the accused persons' clothing, a buccal swab samples for each of the accused persons and a blood sample belonging to the deceased in a vacutainer. It was her conclusion that the blood on the accused persons' clothing matched the DNA profile generated from the buccal swab samples from the deceased. That in the case of the 1<sup>st</sup> accused, the probability of a random match was 1 in 2.1 raised to the power of 29. In the case of the 2<sup>nd</sup> accused, the probability of a random match 1 in  $4.1 \times 10$  raised to the power of 31.
  11. PW10, Andrew Njagi stated that he had engaged the 1<sup>st</sup> accused on some masonry work. That on the day of the incident, he received a call from the 1<sup>st</sup> accused, asking whether he could join him at a bar. That he agreed and asked him to come over for a drink but soon after, someone passed-by selling rabbit meat and he (PW10) opted to buy the meat. That he told the 1<sup>st</sup> accused that he could not afford to buy him beer and also buy the meat. That while he was transacting on his phone, the 1<sup>st</sup> accused received a phone call and he left while running. He stated that he did not see what clothes the 1<sup>st</sup> accused was wearing and he did not see him again after this. That later, the area chief requested him to write a statement and he heard that the 1<sup>st</sup> accused had been arrested. On cross-examination he stated that he did not know the deceased or the 2<sup>nd</sup> accused person.
  12. PW11, Martin Macharia stated that on the material day, he went to the home of one Tom Kariuki and they ate lunch together. That afterwards, they heard that the deceased's body was lying along the road and they went to see. That there was a crowd of about twenty people at the scene and the police were called. That he later heard that the 1<sup>st</sup> accused had been arrested and he recorded his statement at Ishiara Police Station. He stated that he did not know the 1<sup>st</sup> accused very well and he did not see either of them at the scene.
  13. PW12, Sgt. Stephen Simba formerly of Ishiara Police Station, stated that on the material day at around 3:55p.m, he was at the station when the OCS received a call informing him that someone had been killed. That he, in the company of the OCS and another officer went to the scene and found the body lying on the road. That they arrested the accused persons who had blood stains on their clothes. That they were interrogated but could not explain how the blood got onto their clothes. He stated that the blood-stained clothes were confiscated and kept as evidence which he produced in court. On cross-examination he stated that the deceased and the accused were together that morning and the accused were unable to explain how the blood got onto their clothes.
  14. PW13, PC Thomas Kiplimo was the investigating officer in the case. He stated that he was called to Ishiara Police Station where he found the accused persons and some witnesses. That he recorded statements and then took the accused to DCI Mbeere for further investigations. That the accused persons were escorted to Meru Teaching and Referral Hospital for mental assessment and collected the samples for forwarding to the government chemist. He stated that the accused persons were arrested because they were the last people to be seen with the deceased alive. On cross-examination, he stated that he did not know what the other witnesses stated and that he was not aware of the contents of the government chemist analysis results.
  15. At the end of the prosecution's case, the court found that the accused persons had a case to answer and were placed on their defense. They gave sworn testimonies and did not call any witnesses.
  16. DW1, the 1<sup>st</sup> accused person stated that on the day of the incident, he was with the 2<sup>nd</sup> accused person and the deceased at the home of one Julius who had invited them to drink traditional brew as a reward



- for the good work they had done the previous day. That he left at around 9.00 a.m. in the company of the deceased and the 2<sup>nd</sup> accused and headed towards the junction where they bought cigarettes and peanuts and then parted ways. That he returned home and stayed there until around 1.00p.m. when he went to meet a friend at Kamuthigo at a pub where they stayed until around 2:30p.m. That he later received a call from a police officer asking him to go to the road where the deceased had been found and he was questioned then arrested.
17. He stated that the police officers did not inform him of his rights when they arrested him and that they took his clothes by force. He stated that his clothes did not have any blood when they were removed from his body. That he was arraigned in court four days after he was arrested. On cross-examination, he stated that he parted ways with the deceased at 9AM and did not see him again and that he cannot have been the last person that was seen with the deceased before his death. That he did not have anything to do with the death of the deceased.
  18. DW2, the 2<sup>nd</sup> accused person stated that on the day of the incident, he was at the home of Benson Mugendi who had invited him and others whom he did not know, for some local brew as a reward for the good work they had done levelling his compound the previous day. That the previous day, he had fallen and hurt his face and had bled on the t-shirt he was wearing. That on the day of the incident, after taking the brew, he went to PW1's shop where he met the deceased and the 1<sup>st</sup> accused who left together. That when he left PW1's shop, he went for another job before returning home where he was until evening. That at around 6.00 p.m, the area chief went to his house and arrested him in connection with the death of the deceased. That he was arraigned four days after he was arrested. On cross-examination, he stated that on the material day, he was in the company of the deceased and 1<sup>st</sup> accused but the two left together and he did not know where they went. He stated that there was blood on his clothes but it was from an injury he had sustained.
  19. At the end of the defense case, all the parties filed their written submissions. The 1<sup>st</sup> accused person submitted that the prosecution failed to prove their case against him beyond reasonable doubt. That none of the prosecution witnesses placed the 1<sup>st</sup> accused at the scene of the crime and the investigating officer indicated that the only reason they arrested the 2<sup>nd</sup> accused was because he was seen with the deceased that morning. That none of the witnesses saw the 1<sup>st</sup> accused person actually killing the deceased. It was his argument that the prosecution relied on the postmortem report and that the examining doctor stated that the deceased died from blunt force trauma that could also have been a fall. That PW3, PW4, PW5, PW6 and PW7 all stated that the place where the deceased was found was rocky and slippery and that one could easily fall. He argued that the investigating officer could not account for the period between when the deceased was found dead and when he was last seen with the deceased.
  20. The 2<sup>nd</sup> accused submitted in the same terms as the 1<sup>st</sup> accused person and stated that the prosecution did not prove the case against him beyond reasonable doubt.
  21. The prosecution filed its written submissions in which they urged the court to consider the case of Anthony Ndegwa Ngari Vs Republic [2014] eKLR where the elements of murder were outlined as regards section 203 of the Penal Code. It stated that on the element of proof of death, the death and cause of death were ascertained by PW8. It relied on the cases of Republic Vs. Stephen Sila Wambua (2017) eKLR and Guzambizi Wesonga Vs. Republic (1948) 15 EACA 63 for the argument that Article 26(1) of *the Constitution* accorded everyone the right to life and that there is no justifiable cause for the deceased's life to be taken away. On the issue of whether the accused persons caused the death of the deceased, it was its argument that in the circumstances herein, the court has to rely on circumstantial evidence.



22. It urged the court to consider the cases of Abanga alias Onyango Vs. Republic CRA No. 32 of 1990 (UR) and Republic Vs. Kipkering Arap Koske & Another (1949) EACA 135. That the testimony of PW2 was corroborated by PW1 who stated that the accused persons were with the deceased on that day and so the doctrine of “last seen” applies in this case. For this argument, reliance was placed on the case of R. Vs. FOO (2021) eKLR where the court relied on the case of Stephen Haruna Vs. The Attorney General of the Federation (2010) 1 iLAW/CA/A/86/C/2009. Further reliance was placed on sections 111(1) and 119 of the *Evidence Act*. On its argument on malice aforethought, it relied on Section 206 of the Penal Code and the case of Joseph Kimani Njau Vs. Republic (2014) eKLR and stated that malice aforethought was proved by the prosecution and that the two accused persons were rightly charged with murder.
23. It is now upon this court to determine whether 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. The accused person herein faces the charge of murder under Sections 203 as read together with 204 of the Penal Code. It is the duty of the prosecution to prove beyond reasonable doubt, that the accused persons murdered the deceased. These provisions of the Penal Code provide the elements of the offence as follows:
- “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
204. Any person who is convicted of murder shall be sentenced to death.”
25. In the case of Republic Vs W.O.O. [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, being guided by the Court of Appeal in the case of Anthony Ndegwa Ngari Vss 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. On the first element of death and cause of death, PW8 produced a postmortem report showing that in his opinion, the cause of death was cardiopulmonary failure due to acute occipital hematoma secondary to blunt force trauma. He noted that there was bruising on the right front part of the scalp and a wound at the back of the head. He stated that the body of the deceased was identified by Andrew Njiru and Tiberius Mutua Njeru.
27. On the element of unlawful act which caused the death of the deceased, the prosecution is tasked with proving that the accused was linked to the death of the deceased. According to PW1, the 1<sup>st</sup> accused and the deceased went to her shop to buy cigarettes and went away then they returned to buy peanuts and she did not see where they went to after that. PW2 said that she saw the two accused persons passing near her house carrying alcohol and they were drunk. That they didn’t look like they were quarrelling. That she did not witness the accused persons killing the deceased.
28. PW3 went to the scene after she had been informed that a body had been found lying by the roadside. That the police arrested the 1<sup>st</sup> accused at the scene and ordered that the 2<sup>nd</sup> accused be arrested. PW4 said that he was at the house of PW2 when he saw the deceased passing near the house and he recognized his clothes when he went to the scene. He said that he did not know how the accused persons were



connected to the death of the deceased. PW5 was informed by one Nicholas Mwaniki that the deceased was lying along the road and he went to call the mother of the deceased.

29. PW6 stated that he passed by that road and saw the deceased lying down but he proceeded with his journey and later on, he heard people screaming from the scene. PW7 was with the deceased and the accused persons at his home and the three left together and nobody else followed them. PW10 was in the company of the deceased at an unnamed bar and they parted ways after about one hour and then he heard about the death of the deceased. PW11 said that he had been informed about the body of the deceased that was found lying on the road.
30. From the evidence on record, it is evident that none of the prosecution's witnesses witnessed the accused persons killing the deceased. PW12 and PW13 arrested the accused persons but did not recover any murder weapon, in as much as PW8 said that the injuries were caused by blunt force trauma. It was also the testimony of PW8 on cross examination that the blunt force trauma could have been as a result of a fall. Only PW1, PW2 and PW4 saw the deceased in the company of the accused persons before his death.
31. In his defense, the 1<sup>st</sup> accused person stated that they parted ways with the deceased at around 9.00a.m. and then he returned to his house until he went to meet a friend at around 1.00p.m. That by the time he was being arrested, there were no blood stains on his clothes. There were no witnesses to corroborate this testimony. The 2<sup>nd</sup> accused person defended himself by stating that the blood on his clothes was his own and that he had injured himself while working and he wiped the wound with his t-shirt. That on the material day, the 1<sup>st</sup> accused and the deceased were the first to leave after the three of them had drunk some alcohol. No other witnesses saw the deceased in the company of another person before his death.
32. Going by the evidence before me, the accused persons were the last ones seen with the deceased alive and the defense witnesses did not give a satisfactory explanation to the contrary. In the Nigerian case *Stephen Haruna Vs. The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death.

Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

33. PW9 testified that the DNA profile generated from the clothes of the accused persons were a match to the DNA profile generated from the deceased's blood sample. The defense by the accused persons did not do much to fill up the gap in time after they parted ways with the deceased that morning. In addition to the fact that the accused persons were last seen with the deceased, I am persuaded by the testimony of PW9 that the accused persons were indeed with the deceased prior to his death.
34. On the element of malice aforethought, a murder is only such if the perpetrator had the intent to kill the deceased. Malice aforethought is defined and well explained under Section 206 of the Penal Code as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—



- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

35. In this case, I am inclined to examine circumstantial evidence in order to make a finding on malice aforethought. Malice aforethought according to Section 206 of the Penal Code is guilty mind of the accused person or the intent to commit the offence and the same can be inferred from circumstantial evidence where there is no direct evidence in that regard. In the case of *Republic Vs Njeru & 3 others* (Criminal Case 2 of 2019) [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another Vs Republic* [2015] eKLR stated as follows on the prove of malice aforethought; -“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit Vs Uganda*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex Vs Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue: It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”

36. Even though none of the accused persons were seen having an altercation with the deceased, PW8 stated that the deceased suffered acute blunt force trauma to the head. Considering the seriousness of the injuries, the accused persons had the intention to cause death to the deceased and which they did. Additionally, even though he stated that it is possible that the injuries would have been sustained from falling, the testimony of PW9 points towards the accused persons as the blood of the deceased was found on their clothes. Given the extent of the injuries sustained by the deceased, coupled with the fact that the accused persons were last seen with the deceased and his blood was found on their clothes, I am persuaded that the prosecution has proved beyond reasonable doubt that the accused persons indeed committed the offence.

37. In conclusion and having considered the evidence herein and, the relevant law, it is my finding that the prosecution has proved the offence of murder contrary to Section 203 of the Penal Code against the accused persons beyond reasonable doubt and therefore I find each of the accused persons guilty and convict them accordingly.

38. It is so ordered.



**DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF NOVEMBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....**for the State**

.....for the 1st Accused Person\*\*

.....**for the 2nd Accused Person**

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