



**Republic v Ndungu & another (Criminal Case 7 of 2019)
[2023] KEHC 26228 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 7 OF 2019
LM NJUGUNA, J
NOVEMBER 29, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PATRICK NJUGUNA NDUNGU 1ST ACCUSED

MARY WANJA KOMU 2ND ACCUSED

JUDGMENT

1. The accused persons were charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on 25th December 2018 at about 2.00p.m. at one stop bar at Makutano Market in Mbeere South Sub-County within Embu County, the accused persons jointly murdered Isaac Kiama. 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, Wilson Mwangi Irungu was a friend of the deceased. He stated that on the material day, he saw the 2nd accused with the deceased who were colleagues at the bar and they were holding hands. That when he inquired as to what was happening, the 2nd accused told him that her phone was missing and they were suspecting the deceased had stolen it, then they went into the bar. That when he followed up, he found the 2nd accused had locked the deceased in a store and when she opened for him to go, she had poured paraffin on him and set him ablaze. That the 1st accused was helping the 2nd accused in all of this.
3. Upon cross-examination, he stated that the incident occurred at about 4.00p.m. and that the deceased was led to that room by the 2nd accused and that someone else told him that the 1st accused, who was a customer at the bar, was also involved. That by the time the room was opened for the deceased to get out, he was already burning but nobody was offering first aid except him. That at the time when the deceased was being led to the room, there was a crowd of people who had gathered and some of them were customers who were waiting for the bar to open. That after the incident, the 1st accused went



- to Makutano Police Station and he had a burn on his hand. That about twenty minutes had passed between the time when he first saw the 2nd accused holding the hand of the deceased and when he went to look for him. He stated that he did not see the accused persons setting the deceased on fire. That he was present when the room was opened and he saw the deceased coming out while he was on fire.
4. PW2, Geoffrey Wahome Waithondu, the father of the deceased stated that on 07th February 2019, he received a phone call from Kenyatta National Hospital informing him that his son had passed away. That the body of the deceased was preserved at City Mortuary and he identified the body to the pathologist. He stated that he did not know how the deceased met his death.
 5. PW3. CPL Elithas Muriithi formerly of Makutano Police Station was the investigating officer in the case. He stated that on 25th December 2018, the 1st accused was taken to the station by members of the public for allegedly torturing and pouring paraffin on the deceased who was a child aged 16 years for allegedly stealing a phone. That the deceased was also taken to the station by members of the public with wounds on the stomach, chest and hands and at the time he was talking. That he recorded his statement saying that he had been assaulted by the accused persons. That he took him to Kimbimbi Sub-county Hospital where he was admitted for burn injuries. That the deceased was referred to Kenyatta National Hospital but he died while undergoing treatment.
 6. He stated that the 2nd accused person had been arrested on 31st December 2018 and the two accused persons were charged with the offence of causing grievous harm but when the deceased died, they were charged with murder. That the crime scene was processed by the relevant officers and he recorded the statements by witnesses. He stated that the 1st accused had sustained burns on his hands while preventing the deceased from escaping. On cross-examination, he said that he interviewed the deceased and recorded the statement. That when they visited the crime scene three days after the incident, it had been interfered with and there were no traces of evidence.
 7. He further stated that he tried to access the bar on the day of the incident but the 2nd accused had locked it and therefore, he was unable to secure the crime scene. That when he interviewed the deceased, he named the 1st accused only but the 2nd accused was escorted to the station by members of the public. That he did not prepare the investigation diary and it was signed by another officer and the information about the deceased being set on fire was given to him by the deceased while he was escorting him to hospital. That he prepared two statements, one when the accused persons were charged with the offence of grievous harm and the other when the deceased died. That further investigations showed that the deceased had been burned with paraffin and not plastic.
 8. PW4, Moses Kamau stated that on the day of the incident, he saw the 2nd accused holding the deceased by his hands and she claimed that he had taken her phone. That they went away but he and another person followed them and they found the 1st accused at the gate of One Stop Bar and they heard people screaming. That the door was opened and the deceased ran outside while in flames saying “hawa watu wanataka kuniua” (these people want to kill me), but he did not say the names of those people. That he, and his companion helped the deceased and they walked to the police station where the 1st accused came and tried to beat the deceased but he was prevented by police officers. That the deceased was then taken to hospital and later on he received news that the deceased had died. On cross-examination, it was his testimony that the bar belongs to the 2nd accused but it is located in a building owned by the family of the 1st accused. That the noises that were heard from the bar were from people telling the 2nd accused to open the door and when the door was opened, the deceased ran outside while burning. That he was at the back door and when he was denied entry, he left and that is when he heard people shouting from the front side of the bar. That he could not tell whether there were people inside the



- bar and he did not see who opened the door but when the door was opened the deceased ran out while burning around his chest area. That he did not know who started the fire.
9. PW5 Dr. Joseph Ndungu, a pathologist at Kenyatta National Hospital conducted the postmortem on the body of the deceased. He observed that the deceased had septic/ infected burns on the upper limbs, head and trunk up to 63% of the body surface. That the lungs were heavy, firm and congested but all the other systems were essentially normal. He formed the opinion that the cause of death was complications due to septic burns covering 63% of the body surface area. He produced the postmortem form at evidence. He also produced the accused persons' mental assessment reports prepared by Dr. Thuo on his behalf. The conclusions from both reports were that the accused persons are mentally fit to stand trial. On cross-examination, he stated that in his opinion, 63% septic burns would have been difficult to manage in any medical facility and it is possible that the infection emanated from the medical facility. He stated that he did not treat the deceased while in the hospital but from his conclusion, the infections on the burn wounds made the conditions much worse for the deceased. That even though he noted that the deceased was in poor nutritional state at the time of the postmortem, malnutrition was ruled out as the cause of death.
 10. 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.
 11. DW1, the 1st accused person stated that on the day of the incident, he had gone to the One Stop bar to meet the 2nd accused who borrowed his phone. That later when he returned to take his phone, the 2nd accused told him that the phone couldn't be found but she had a suspect in mind and he went away. That later on he heard people making noise by the gate near the 2nd accused's room and when he went to check, the 2nd accused opened the room and the deceased came out while in flames and that the deceased was the suspect that the 2nd accused was talking about. That he held the deceased and removed his shirt which was on fire and in the process his hand got burned. That he went to the police station and while there, the deceased came in the company of other people to report the incident. That he was arrested and the police did not record his statement. He stated that he did not see kerosene or a matchbox in the bar on that day. That the 2nd accused was a tenant in the building and her room was next to the bar. That on the day of the incident, he did not go into the house of the 2nd accused and that he was painting the building at the time and he did not use turpentine on that day. That he was informed by the 2nd accused that the deceased had stolen the phone and he was annoyed.
 12. DW2 was Dr. Peter Olyam of Kimbimbi Hospital produced hospital records to show that the 1st accused was treated at the hospital for burns. That the names recorded in the patients register differs from the names as captured on the patient's tracer card and the date of treatment shows that he is the same person. He produced the treatment records and the copy of the patient's register as evidence and confirms that the 1st accused was treated for burns covering 3% of his body surface. He stated that the registration record did not have many of the details required because the patient was escorted by police and in that case, his fees were waived, meaning that he went straight to the treatment room and was not fully registered before treatment was administered.
 13. DW3 was the 2nd accused. She stated that the deceased went to her bar and asked for a cleaning job and she told him that there is someone who does that. That the deceased asked her for fare and she sent him away saying that she did not have money right then but she asked him to return later and he left. That she had borrowed PW1's phone and then put it in the bar to charge. That when the phone went missing, she suspected the deceased because he was the only person who had come in before the bar opened as it was a public holiday. That the deceased returned later and when asked about the phone, he said that he took it but someone else had snatched it from him. That she got some money and



- headed to the shopping center to buy another phone for the 1st accused who was the owner of the phone and on returning, she found the deceased on fire and he was with the 1st accused.
14. That she told the 1st accused to go and report the matter to the police. That she noticed a mob outside the bar and she hurriedly closed the bar and took off. That later when she returned to collect her ID, the police took her away to the station and arrested her. That she later learnt that the deceased had been set on fire by a customer called Ndwiga Njuguna. On cross-examination, she stated that when she went to buy the phone, she was away for about 30 minutes and she did not buy it because it was a holiday and shops were closed. That when she came back, she found the clothes of both the deceased and the 1st accused burning and she did not record the same in her statement even though she was warned that she would be called to testify.
 15. DW4 Maurice Ndwiga stated that he had entered the bar as a client and he paid the 2nd accused who was attending in cash. That the 2nd accused closed the counter and went out and while she was away, he heard noises from the back side of the bar and someone saying “niache njuguna”. That the 2nd accused returned using the back door and found the deceased’s clothes on fire and the 1st accused’s hands on fire. He stated that it is not the 2nd accused who set the deceased on fire and he did not know who did it. On cross-examination, he stated that he had known the 2nd accused for some time and he was in the bar waiting for a matatu to take him home. That when the 2nd accused left, she did not tell him where she was going and that he did not report the incident to the police because he was new in the area.
 16. At the end of the defense case, the court directed the parties to file their submissions. They all complied except the 2nd accused person.
 17. The 1st accused person submitted that the testimony of PW1 was based on hearsay. That PW4 stated that the deceased said “hawa watu wanataka kuniuwa” (these people want to kill me). That he also said that he did not see the 1st accused opening the door and that he was informed that the 1st accused opened the door. That PW3 said that PW4 escorted the deceased to the police station but in his statement, PW4 did not say that. That the police officer who signed the investigation diary did not testify. He stated that he is the one who offered help to the deceased and even removed his burning shirt and in the process, he burned his hands but he did not tell the police this part. That he promptly reported the matter to the police station. Reliance was placed on the case of *Bukenya & Others Vs. Uganda* (1972) EA 549. He stated that there were many contradictions in the testimonies of the prosecution witnesses. He urged the court to ignore the testimony of DW4 as he did not record any statements with police and he merely did a dock identification of the 1st accused.
 18. The prosecution filed its 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, 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. It was its argument that PW1 and PW3 placed the accused persons at the scene of crime. Reliance was placed on Section 21 of the Penal Code and the cases of *Njoroge Vs. Republic* (1983) eKLR, *Dickson Mwangi Munene & Another Vs. Republic* (2014) eKLR and *Otieno Evans Oduor Vs. Republic* (2017) eKLR.
 19. 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 accused was rightly charged for murder.



20. It is now upon this court to determine whether the offence of murder has been proved beyond reasonable doubt.
21. 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 and 204 of the Penal Code. It is the duty of the prosecution to prove beyond reasonable doubt, that the accused 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.”
22. 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 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.”
23. On the first element of death and cause of death, PW5 produced a postmortem report showing that in his opinion, the cause of death was complications due to septic burns covering 63% of the body surface area. The body of the deceased was identified by PW2 who is the father of the deceased.
24. On the element of unlawful act which caused the death of the deceased, the prosecution is tasked with proving that the accused persons were linked to the death of the deceased. PW1, PW4, DW1, DW3 and DW4 all placed the accused persons at the scene of the crime. PW1 stated that he had seen the 2nd accused person holding the deceased by the hand on allegation that he had stolen her phone. That later on, he found out that the deceased had been set on fire and that the 2nd accused person is the one who opened the door to the room where the deceased was being held. That at the time when the door opened, the deceased’s clothes were burning and the 1st accused was holding him so that he does not escape.
25. PW4 also saw the deceased being accosted by the 2nd accused person and soon after, the deceased was let out of a room and his clothes were on fire. That he was also among the people who took the deceased to the police station. DW1 and DW3, the accused persons, were also at the scene of the crime as they themselves testified. DW3 stated that she left to go and buy a phone for DW1 but when she returned, she found the deceased’s clothes burning and DW1’s hands were also burned. DW4 corroborated the testimony of DW3 even though he did not record a statement with police.
26. In my view, both accused persons were at the scene and were involved in causing the death of the deceased. In this reasoning, I am aided by the provisions of Section 21 of the Penal Code which essentially provide that when two or more people collude in the intention to commit a crime, both of them are equally guilty. The courts have also pronounced themselves previously on this subject in the cases of Njoroge Vs. Republic (1983) eKLR, Dickson Mwangi Munene & Another Vs. Republic (2014) eKLR and Otieno Evans Oduor Vs. Republic (2017) eKLR as rightly cited by the prosecution. Even though none of the witnesses saw the accused persons set the deceased on fire, the series of events leading to the point where the deceased was burned form a strong chain of evidence that cannot be



distorted. In relying on this circumstantial evidence, I am guided by the case of Ahamad Abolfathi Mohammed and Another Vs Republic [2018] eKLR, where the court had this to say on circumstantial evidence:

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

27. 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.”

28. Further, the court in 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.....”

29. Based on the evidence adduced, the accused persons were implicated as having had a disagreement with the deceased about a lost phone. DW1 stated that he was very annoyed about the actions of the deceased while DW3 was the one who initially accosted the deceased and was seen doing so. In my view, the acts of the accused persons were premeditated. If the 2nd accused did not suspect the deceased and in fact accost him, the 2nd accused would not have reacted, but again, the lost phone belonged to him. To me, malice aforethought has been sufficiently established.
30. In conclusion and having considered the evidence herein, and the relevant caselaw, 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 them guilty and convict them accordingly.
31. 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

