



**Republic v Njogu (Criminal Case E001 of 2022)
[2023] KEHC 25621 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E001 OF 2022
LM NJUGUNA, J
NOVEMBER 22, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

STEPHEN MUNYI NJOGU ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The particulars of the offence are that on 09th January 2022 at Embu College Area of Embu Municipality in Embu West Sub-county within Embu County, the accused murdered Johnstone Mwangi Waruinge. Upon arraignment, he pleaded not guilty and a plea of not guilty was entered before the matter proceeded to full hearing.
2. PW1, Irene Wanjiku Kamau, a student at Embu College, stated that on the day of the incident at around 4.00p.m, she was in the company of others at Country View Hotel celebrating her birthday. That at 6PM, the deceased accompanied by another person known to her, joined them and they ordered for and drunk alcoholic and non-alcoholic drinks. That at around 7:30p.m, she and her friends left the hotel but the deceased and his friend who had accompanied him remained. That the following day she was informed by one of her friends that the deceased had been found dead. She identified the clothes that the deceased was wearing, which were produced as exhibits. She stated that she knew the accused as a food vendor who used to operate from the college gate.
3. PW2, Lucky Robinson Maina also a student at Embu College and who was in the company of PW1 stated that on the day of the incident at around 4.00p.m, he was accompanied by three of his friends to PW1's birthday party at the Country View Hotel. That at around 9.00p.m, he left the hotel to go home and he spent the night at the house of one Lewis Kinoti who also went out to join the deceased. That at around 7.00p.m he had met with the deceased in the company of one Vintage and they were going into the hotel. That the deceased was drinking alcohol and appeared to be drunk. That the next



morning, PW2 asked Vintage where the deceased was and he said that he had left him at the club. That he was informed that a dead body had been found outside the school gate and had been taken to the mortuary. That he went to the mortuary and was able to identify the body of the deceased from the clothes he had seen him wearing the previous night. He identified the accused in court and stated that he used to sell eggs and smokies outside the college gate.

4. PW3, Filidi Lugalo Aseka, also known as Vintage, a student at Embu College stated that on the day of the incident, there had been a birthday party for PW1 at the named hotel and the deceased had invited him. That he left the party at around 9:30p.m in the company of others and on the way, they saw the accused selling eggs and smokies. That the deceased ordered eggs from the accused but he did not have money to buy them, neither did they. That the deceased insisted on having the eggs by force and they urged him to go home but he refused. That he told the accused to call the college watchman and he left the deceased there. That the next morning when he tried calling the deceased, he was unreachable and he was later informed that the deceased had died. That the boda-boda riders went to the house of the accused and had him arrested. On cross-examination, he stated that he told the boda-boda riders that he had left the deceased with the accused the previous night. That they had left the club in the company of the deceased and when he saw the eggs, he wanted them by force, so much that they had to hold and restrain him but he refused to heed. That he did not know how the deceased died after they left him with the accused.
5. PW4, Joseph Njuki Ngari, a boda-boda operator stated that on the day of the incident at around 10:20PM, he was around Embu College when he saw the accused quarrelling with the deceased and he tried to separate them after the accused had called out to him to help. That the deceased hit the accused on the side of the head and the accused ran back to his trolley where he picked something, pushed the deceased who fell down and was bleeding from his lower stomach. That the accused called some two people and then closed his business. That he was requested to take the deceased to hospital but he refused as the deceased was bleeding profusely. That the deceased was not armed with any weapon during the incident. on cross-examination, he stated that he did not know the reason why the deceased and the accused were quarrelling. That he had known the accused to be a gentle person and did not know why the deceased picked a fight with him. That the deceased had already hit the accused once and was aiming to hit him a second time when the accused ducked and missed the blow. That the quarrel went on for about 15 minutes.
6. PW5, David Mugendi Jeffew, a boda-boda operator stated that on the day of the incident at around 10:20p.m he was riding from town when he found the deceased fighting with the accused. That the deceased was drunk and was staggering and the accused was continuing with his work. That he did not know why they were fighting and he did not witness the fight itself but he was told about it. On cross-examination, he stated that he used to see the accused but had not interacted with him.
7. PW6 was Dr. Mary Wangari Kamau of Embu Level 5 Hospital who performed postmortem on the body of the deceased. She stated that the clothes of the deceased and his face were blood stained. That there was a penetrating wound on the left upper quadrant part of the abdomen and some bruises on the left side of the face. That there was bilateral hemothorax and there was also blood in the abdominal cavity. That there was a penetrating wound through the gastric wall and a penetrating but not perforating wound on the liver. She formed the opinion that the cause of death was hypovolemic shock due to penetrating abdominal wound. She produced the postmortem report. On cross-examination, she stated that the injuries were recent and that she did not collect blood to test whether the deceased was drunk because the cause of death was firmly established.
8. PW7, Moses Mukundi, a boda-boda operator stated that when he went to work the day after the incident, he noticed blood on the tarmac. That when he inquired, he was told that there had been a



fight between the accused and someone else who had died. That he was informed that after the accused injured the deceased, he started looking for means to take him to hospital. That when he learned that the deceased was a student of Embu College, he reported the matter to the dean. That he, in the company of other boda-boda operators went to the home of the accused to ask what had happened and he saved the accused from being lynched by a mob. He stated that he had known the accused for 3 years before the incident and that he used to sell food outside the college. On cross-examination, he stated that he did not witness the occurrence but had only been told what happened.

9. PW8, Lewis Kinoti, a student at Embu University stated that he went to Embu Town where he was in the company of the deceased, PW3 and others at a hotel. That when he arrived, he found the deceased already drunk and had engaged in a fight with the DJ. That PW3 asked him to take the deceased home and they left, heading towards Embu College using the Kenya Power offices road. That on the way, the deceased kept on disturbing other people and when they reached where the accused was selling food, the deceased asked him to give him a boiled egg but he did not have money to pay. That when the accused refused, a scuffle ensued and he tried to restrain the deceased but he refused.
10. He stated that since his hostel gate closed early, he left the deceased there and told the accused that if the deceased continued being unruly, he should report to the college security guards. That when he left, he was carrying the deceased's jacket. That the next morning, he passed by the house of the deceased to return the jacket but found the house locked and no one knew his whereabouts. He narrated that he met with PW3 who was also looking for the deceased and since he was not at his house, they went to the college to look for him there.
11. That they learned that the deceased had died and they recorded their statements with the police. He said that he left the deceased with the accused and he knew the accused as the food vendor based outside the college. On cross-examination, he stated that it had taken so much effort just to get the deceased up to the accused's food stand and they decided to leave him because he was unruly. That the deceased threatened to break the accused's food stand if he did not give him an egg.
12. PW9, Peter Njue Ngoroi, was a security guard at some rental houses. He stated that on the night of the incident, he was on duty when he heard someone calling out "soldier soldier". That when he went, he found the deceased lying down with blood coming out of the upper left side of the abdomen and the accused was there. That he did not involve himself in the issue and told the accused to settle it with the police. He stated that he knew the accused one month before the occurrence.
13. PW10, Crawford Waruingi Muturi, is the father of the deceased. He stated that he lives in Nairobi and on 12th January 2022, he received a phone call from Embu College informing him that his son had been stabbed with a knife. That he went to Embu DCI office and the officers escorted him to Embu Level 5 Hospital mortuary where he identified the body of the deceased. That the deceased had injuries on abdomen and he does not know who stabbed him.
14. PW11, Dr. Sheila Shavulima conducted mental assessment on the accused. She concluded that the accused was mentally fit to stand trial and produced the mental assessment report.
15. PW12, PC Robert Mwangi of DCI Embu West was the investigating officer in the case. He stated that he was informed of the incident and he proceeded to the scene in the company of other officers. That they found a body lying on the road near Embu College and it had a bleeding stab wound on the abdomen. That the crime scene was processed and the body taken to Embu Level 5 Hospital mortuary. That the following day, the accused was arrested by members of the public and handed over to the police. That he learned that the deceased was a student of Embu College and was part of a group of students who had attended a birthday party in town the previous night. That he was informed that the deceased had engaged in a fight with the club DJ and two of his friends were forced to escort him home.



- That on the way home, the deceased got into a fight with the accused who rushed to his trolley, took something and returned then the deceased fell down and started bleeding. That the murder weapon was not recovered because the accused had already washed the utensils he uses for his business. He produced the clothes that the deceased was wearing at the time of the incident. On cross-examination, he stated that he arrived at the scene after the OCS between 11.00p.m. and midnight. That he rearrested the accused after he had been arrested by members of the public. That two knives were taken from the home of the accused.
16. PW13, Inspector Sarah Bokosh the officer in charge of crime investigations in Embu testified on behalf of her colleague Corporal Henry Kiboma who took the photographs of the scene. She produced the photographs as evidence together with the certificate of photographic evidence.
 17. At the end of the prosecution's case, the court found that the accused had a case to answer and was placed on his defense. He gave sworn testimony and did not call any witnesses.
 18. DW1, the accused person stated that he was also a student at Embu College and produced a school ID as evidence. That he was a boda-boda operator and he was also a food vendor outside Embu College. That on the night of the incident, he had set up his trolley and was doing his business as usual when at around 10:30p.m, the deceased came in the company of two others. That he demanded for an egg but did not have money to pay. That he refused to give him the egg and his two friends urged him (the deceased) to stop demanding from the accused. That the deceased started hitting his trolley and became violent until his friends tried to hold him back but he kicked them.
 19. That his friends gave up and left him there hitting the accused's food trolley. That the accused took out his phone to make a call but the deceased hit it away and it fell. That the deceased hit him and he fell down and on rising up, he ran towards his trolley but the deceased followed him and continued hitting the trolley. It was his testimony that he picked his knife from the trolley and used it to defend himself after which he noticed that the deceased was bleeding. That he called out to PW4 to help him take the deceased to hospital but he declined. That he stopped three motorists and asked for help but nobody was willing to help. That everybody left and went away and he was left alone. That he had no choice but to also go home, leaving the deceased lying by the roadside.
 20. He stated that the next morning, some boda-boda operators asked him about the incident and he told them his version of the story. That he was taken to Embu College where a mob was threatening to lynch him but the school staff defended him until he was arrested by police. He stated that he felt threatened by the deceased through continuous provocation and he reacted out of fear in self-defense. On re-examination, he stated that the deceased was wearing an abnormally bid ring which had a rough surface, which he used to hit him three times. He regretted what had happened that night.
 21. The defense counsel stated that they will not be filing written submissions. The prosecution filed their written submissions in which they urged the court to consider the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR where the elements of murder were outlined. It relied on the case of *Republic v Stephen Sila Wambua* (2017) eKLR and stated that PW1-PW5 placed the accused person at the scene of the crime. That in light of the limitations to the right to life as stated under Article 26(1) of the *Constitution*, there is no justifiable cause for the deceased's life to be taken away. On the argument on malice aforethought, it relied on the provisions of Section 206 of the *Penal Code* and the case of *Joseph Kimani Njau v. Republic* (2014) eKLR and stated that malice aforethought was proved by the prosecution and that the accused was rightly charged with murder.
 22. It is now upon this court to determine whether the offence has been proved beyond reasonable doubt.



23. 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.”
24. In the case of *Republic v W.O.O.* [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, being guided by the Court of Appeal in the case of *Anthony Ndegwa Ngari v 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.”
25. On the first element of death and cause of death, PW6 produced a postmortem report showing that in her opinion, the cause of death was hypovolemic shock due to penetrating abdominal wound. She further observed that there was bilateral hemothorax and blood in the abdominal cavity, about two liters. That there was a penetrating wound through the gastric wall and a penetrating but not perforating wound on the liver. The body of the deceased was identified by PW10 who is the father of the deceased.
26. 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 PW3 and PW8, they were walking home with the deceased and when they reached the accused’s food stand, the deceased demanded for an egg from the accused but had no money to pay for it. They both testified that the deceased became rowdy and unruly and they left him there with the accused. PW4 was an eye-witness to the crime. He testified that he witnessed the scuffle between the accused and the deceased and saw the accused pick something from his food trolley and then pushed the deceased who fell down and was bleeding. He stated that he did not see what the accused pulled from the trolley. PW5 testified that he saw the accused and the deceased fighting and noticed that the deceased was drunk. He stated that he did not know why they were fighting.
27. There is overwhelming evidence to show that the accused indeed was at the crime scene. It is also very clear that the deceased and the accused were fighting and during the commotion the deceased fell down and died. According to PW3 and PW8, the deceased was last seen with the accused and according to PW4 and PW5, the accused and the deceased fought each other. There is no doubt that the accused was indeed at the crime scene and participated in causing the death of the deceased. In his defence, the accused admitted to having committed the offence but contended that he did it in self defence after the deceased threatened his life.



28. 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.”

29. Further, the court in [Republic v Njeru & 3 others](#) (Criminal Case 2 of 2019) [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another v 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 v 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 v 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.....”

30. According to PW4, it was the deceased who first attacked the accused person. He stated that the accused called out for him to help when the deceased had overwhelmed him, but PW4 could not stop the deceased and he retreated. PW3 and PW8 testified that the deceased started the confrontation with the accused when he demanded for an egg but did not have money to pay for it. They stated that when the deceased started attacking the accused, they tried to hold him back but he was too strong for them and they left him.



31. PW4 further stated that the deceased hit the accused on the side of the head before the accused ran to his trolley to get something which he didn't see. In his defense, the accused stated that the deceased hit him on the side of his head severally before he ran to his trolley, pulled out a knife and used it to defend himself against the deceased who was still pursuing him. He stated that after the incident, he tried to stop 3 motorists to help him take the deceased to hospital but none of them was willing. That even PW4 refused to carry the deceased on his motor cycle. That he abandoned the deceased when he realized that he had been left alone.
32. From the evidence adduced, it is clear that the accused was provoked and acted in self-defense. In his defense, he stated that he drew a knife from his food trolley and used it to defend himself against the attack by the deceased. In the case of *Lucy Mueni Mutava v Republic* [2019] eKLR, the Court of Appeal held thus:
- “Provocation is a defence available to a person who by his/her actions causes the death of another and is faced with a charge of murder. Provocation was succinctly defined in the case of *Duffy* [1949] I ALL ER 932 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 ...”
33. In the same case, the superior court fortified its decision using the case of *Victor Nthiga Kiruthu & another v R* [2017] eKLR where it was held:
- “The principles that have emerged from these and other authorities are as follows:-
- (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
 - (ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
 - (iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.
 - (iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
 - (v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.”
34. In my view, the element of malice aforethought is not proved and the accused person acted in self-defense but his actions caused the death of the deceased. His acts remain unlawful and therefore the



offence of manslaughter has been proved beyond reasonable doubt in accordance with Sections 202 and 205 of the Penal Code. These sections provide as follows:

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“202. Manslaughter

- (1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.
- (2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

205. Punishment of manslaughter

Any person who commits the felony of manslaughter is liable to imprisonment for life.”

35. In conclusion and having considered the evidence on record and the relevant caselaw, it is my finding that the prosecution has proved the offence of manslaughter beyond reasonable doubt and therefore I find him guilty and convict him accordingly.

36. It so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the State

.....for the Accused Person

