



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Kanyiri (Criminal Case 1 of 2020)  
[2022] KEHC 12319 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12319 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 1 OF 2020**

**A. ONG'INJO, J  
JUNE 23, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**SIMON MWATHI KANYIRI ..... ACCUSED**

**JUDGMENT**

1. The accused Simon Mwathi Kanyiri is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
2. Particulars are that Simion Mwathi Kanyiri on the December 18, 2019 at Tononoka area in Mvita Subcounty within Mombasa County murdered John Munga Kinga.
3. The prosecution's case was that the accused was cohabiting with PW 2 Jackline Eficha Ofusa in Tononoka area as husband and wife since 2015 and they were blessed with one child. PW 2 said she started a relationship with the deceased when the accused moved out of the house after he attempted to stab her daughter and the matter was reported to area chief and village elder.
4. PW 2 testified that when the accused returned on December 9, 2019 claiming he wanted to take his personal effects on meeting was convened on December 16, 2019 and it was attended by the accused, the landlord, village elder, Mzee Nyao & PW 2. That PW 2 was told to vacate the house because her relationship with Mungai. She said she was given 7 days to move out.
5. PW 2 testified that they separated with the accused because their relationship was not good. She said the accused had threatened to pour hot on her daughter. That on the material day – December 16, 2019 at 11.00pm the accused went to where she was selling chips and was pacing up & done until when she left to go to the house. That at 3.40am the accused knocked at her door but she didn't respond. That a neighbour called him to his house and that she heard them talk throughout the night. That



- at 4.30am the neighbour who had accommodated the accused left to go to work and left the accused sleeping in the house.
6. PW 2 said she left to go to work at 5.00am at Buxton hospital where she was to prepare and serve tea to patients at 6.30am and 7.00am respectively. She said that before she could serve tea at 7.00am, she received a phone call from her daughter who told her to go home immediately. The daughter went to meet her at the hospital gate and told her Baba Jose had killed Mungai.
  7. That at 12.00 oon CID Officers went for her from the hospital and she went to record a statement. PW 2 said that her son had stayed at Mungai's place for 3 days as the accused was demanding to go with him.
  8. PW 2 said that the accused and the deceased were friends and used to work together but they differed. She said that the accused didn't know about the relationship between her and the deceased. PW 2 said the accused and deceased differed at their place of work.
  9. PW 1 the Village Elder Dickson Chacha testified that on December 18, 2019 at 6.00am he was still asleep when he heard Salim call at his door saying "Maina ameua". PW 1 woke up and hurriedly got out and followed people who were going to the left side of his house. PW 1 said he saw someone lying on the ground in a pool of blood facing up with an injury on the left side of the neck.
  10. He said the scene was at the junction near Tononoka Police Station. He said he saw the accused standing by and his shirt was blood stained and he was looking shocked. That when members of public started attacking the accused he ran to the police station to seek help. That as PW 1 was leaving the station to go back to scene he saw members of public leading the accused to the station and he had been injured.
  11. That PW 1 led other officers to the scene where the deceased person's body was lying after which he went to report to the area chief. When he returned to scene with a colleague village elder they found officers from Urban Police had arrived. That he later went and recorded a statement.
  12. PW 1 testified further that on December 16, 2019 in the evening the accused reported to him that his step daughter had locked him out of the house and he went and warned the daughter who claimed it was her mother who had keys to the house. That when he authorized the accused to break and enter the house the girl gave out the key.
  13. PW 1 said the accused and his wife had had a long domestic problems and he told the accused he wanted to have a talk with them. PW 1 said the accused suspected his wife had an affair with the deceased. He said he went to the deceased person's house when accused person's wife didn't pick his calls and although the deceased denied that accused person's wife was not there he told him accused suspected that he had an affair with his wife.
  14. PW 1 said the accused and his wife PW 2 had reported differences with the step daughter severally and they had even fought over the daughter. That on December 17, 2019 they went with accused to area chief as he wanted to remove his personal effect from the house. PW 1 said he was present when accused removed his personal effects and left in a Tuktuk.
  15. That at 8.30pm, the accused again come back and wanted to talk with him. Accused person's wife and landlord as well as the Balozi-Susan were called. That the accused complained his wife had an affair with Mungai the deceased but the wife denied. PW 2 decided both the accused and his wife and the deceased should leave all estate. PW 1 testified that there was a time the accused beat the wife badly using an iron rod. That it was the following day that accused murdered the deceased.
  16. PW 1 testified in cross examination that he was woken up at 6.00am and when he went to scene he found Mungai lying down dead and the accused stored at the scene in shock and he had blood



- stained clothes. He said that relationship between the accused and his wife became sour after the wife's daughter came to stay with them and there was a time the accused went to stay upcountry.
17. PW 3 Susan Chacha – Village elder testified that the accused rented a house in Tononoka in 2015 and cohabited with Jackline – PW 2 & they were blessed with one child. She testified that the deceased was also a neighbour and the deceased and the accused were friends. PW 3 testified that on December 17, 2019 the accused went to complain that his wife had an affair with the deceased.
  18. PW 3 reported to PW 1 and that Area chief came and accused removed his personal items from PW 2's house and he carried them using tuktuk. That in the evening at 5.00pm accused went back and demanded to have a meeting but the deceased refused to attend. That the meeting was attended by the accused, his wife – PW 2, landlord (Mathias Rondo) the village elder, Stephen Ashwender Salim Nyale.
  19. That PW 2 denied that she was in a relationship with the deceased. That PW 2 and the deceased were ordered to leave the estate. That on December 18, 2019 in the morning at 6.00am PW 3 heard screams and when she got out she was told someone had been killed. She proceeded to scene and found it was Mungai who had been killed. That at scene she saw members of public beat the accused who had blood stains on his shirt. PW 3 said she heard the accused say at the meeting that he would do something bad if is not heard.
  20. PW 4 Samuel Kibaki testified that he knew the accused and he also knew the deceased. He said he was initially working with both collecting garbage and later the accused opened a barbershop in the same neighbourhood.
  21. PW 4 testified that on December 18, 2019 at about 6.00m he had gone to wait for work when the accused passed by and he, Stingo, Mwanzia and Ken accompanied him. That when they got to Wajir Road at the roundabout the accused told them to wait for him as he walked towards Spark where Mungai the deceased was collecting garbage near a milk supply van. That the accused crossed the road as if he was going to greet the van driver but suddenly produced a knife from his pocket and stabbed Mungai on the neck.
  22. That when accused returned to where they were and told them they should proceed PW 4 told his companions they should not leave him to escape. That they started petting him with stones and he threw the knife across the road and it fell in a ditch that had water. PW 4 identified the knife which he said he retrieved from the ditch. PW 4 identified the knife – EXP 1. PW 4 testified that they were able to apprehend the accused and took him back to where he had committed offence and found police had arrived at the scene from Tononoka police post. That when they returned to scene and found that Mungai had died. Members of public who had gathered started beating the accused but police rescued him and took him to Tononoka police post. PW4 said accused had planned what he did.
  23. PW 5 James Mungai testified that the deceased was son to his aunt. He identified the body of the deceased on December 23, 2019 and postmortem was done at the Coast General Hospital Mortuary. PW 6 Dr Fatma Ahmed produced postmortem report in respect of the death of the deceased in which she was of the opinion cause of death was haemorrhage from stab wound on the neck.
  24. PW 7 Sergeant Benson Ingotsi took photographs at the scene of murder – exhibits 3(a) to ch. He also produced report – Ex P4. PW 8 PC Ruto investigated the murder case.
  25. PW 8 proceeded to scene incompany of colleagues on instructions of their boss Mr Murithi. The scene was at the Wajir/Tononoka round junction. She got information from members of the public that the deceased who was lying in a pool of blood – a garbage collector had been stabbed by the accused herein. PW 8 established that the deceased had an affair with the accused person's wife.



26. She also established the accused and his wife had differed over the wife's daughter and the wife reported but accused disappeared. PW 8 reiterated evidence given by PW 1, PW 2 and PW 3 as to the meeting held on December 17, 2019. PW 8 also said that on the material morning of the murder – PW 2 had left their child with accused in the deceased persons house as she went to work at 5.00am and when the accused stabbed the deceased the house was broken and child rescued. PW 8 produced the knife used by the accused as an exhibit – EX P1.
27. PW 8 said she didn't establish if PW 1 & PW 3 owned barber shop in the area. She said that PW 1 had employed the accused in her barber shop but she was not aware if PW 3 had a barber shop or whether PW 3 had a dispute with the accused. PW 8 said PW 1 & PW 3 were involved in resolving disputes between accused and his wife. He said that Kibaki who witnesses accused stab the deceased had no difference with the accused.
28. When placed on defence accused gave sworn statement and denied having known the deceased. He said that on December 18, 2019 he woke up at 6.00am and went to open his barbershop in Tononoka opposite Dodoma Hotel. That while outside his barbershop some people came from Makupa road direction in a tuktuk and went towards the police station. That the people in the tuktuk said there was an accident at the roundabout about 50metres from his place of work.
29. That in company of the people from carwash they proceeded to go and witness the accident. That before they could reach the roundabout they met a youngman known as Samuel Kayaki who told the crowd that he and the deceased were enemies. That the crowd wanted to beat him but a police officer held him by the hand and led him to Tononoka police station where he was placed in the cells without interrogation. That later the OCS told him the person he had fought with had died. He said he used to see the deceased passby but was not known to him by name. He said that Samuel Kayaki who identified him to the crowd was given a house by the village elder.
30. Accused said he was not at scene and he only went later. He said PW 1 & PW 3 are village elder and member of nyumba kumi respectively. He said that PW 3 wanted him to pay rent to her and yet she was not her landlady and they went to police station over the issue. He said he didn't see PW 1 & PW 3 at the scene when he went there. He said he knew the deceased had an affair with his wife but when PW 1 & PW 3 called a meeting the deceased did not attend.
31. Accused confirmed that on the material night he spend the night at a neighbours place and the next morning he woke up and went to open his business. Accused said that PW 1 & PW 3 didn't like him. Accused persons landlord Mathias Rondo testified and confirmed he had 3 rental rooms in Tononoka opposite Dodoma Hotel and that accused rented his premises in 2016 when he was working for a security firm.
32. He said he differed with accused over rent and they went to police station as accused didn't want to pay rent. The witness said he was not aware of the differences between accused and PW 1 & PW 3. He said accused went home and left his wife in the rental rooms. That he stayed away for one year and when heard accused had returned he went and told the wife they should leave.

### **Analysis and Determination**

33. From the evidence of the 8 prosecution witnesses and accused persons defence and his witnesses evidence the issue for this court's determination as was held in the case of *Anthony Ndegwa Nv Republic* [2014] eKLR is:-
  - a) The fact of death and cause of death



- b) Whether cause of death was an unlawful act and or omission
  - c) Whether the unlawful act and/or omission was committed by the accused
  - d) Whether the unlawful act and/or omission was actuated with malice aforethought.
34. It is not in dispute that John Mungai Kinga died on December 18, 2019 due to bleeding from a stab wound on the neck. Prosecution witnesses attested to that fact and even the accused didn't deny it.
35. The deceased persons cousin James Mutuku Mungai did identify the body as that of John Mungai Kinga and Dr Fatma Ahmed – PW 6 conducted examination to establish cause of death. The fact and cause of death was therefore proved.
36. On whether the cause of death was an unlawful act and or omission. Evidence adduced was that the deceased was stabbed on the neck and therefore the injury was not accidental. It was intentionally inflicted.
37. As to the identity of the assailant, PW 4 was with the accused and others. It would appear they were supposed to go to a drinking place where the accused took another direction, crossed the road to where the deceased was collecting garbage and after greeting the driver of the milk van he produced a knife from his pocket and stabbed the deceased who was bending. Accused was pelted with stones and apprehended and the knife he had thrown into a ditch recovered.
38. Whether the accused was actuated with malice aforethought. PW 2 testified that accused had threatened to burn her daughter with hot oil. PW 2 testified that while at the meeting on December 17, 2019 accused swore that he would do something bad. The accused had earlier been escorted area chief & PW 1 & PW 3 to remove his personal items from PW 2's house and he carried them on a tuktuk and in the evening when a meeting was held it was resolved that accused moves to where he had taken his personal items and PW 2 and the deceased were also given 7 days to move out of the area but in the night accused went back to the area and was pacing up and down while PW 3 was cooking chips. When PW 3 had gone to sleep accused went to knock at her house but she refused to open.
39. Accused slept at a neighbours house on the material night only to attack the deceased the next morning. According to PW 1 the accused was violent and that he had at one time beaten PW 2 badly with an iron rod. Early in 2019 accused had attempted to stab PW 2's daughter with a knife and when the matter was reported to police he escaped and went upcountry. He had just returned when he committed the offence herein.
40. According to his own witness – who was the landlord he had a lot of trouble with the accused who refused to pay rent and the matter was reported to police. When he and the accused had returned after about one year of being away he told PW 2 that they have to move out of his premises.
41. This court finds that accused premeditated his actions and as such he was actuated with malice aforethought. This court finds that the prosecution has established their case beyond all reasonable doubt that accused murdered the deceased John Mungai Kinga and he is found guilty and convicted accordingly under section 324(1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED AT MOMBASA IN OPEN COURT/ONLINE BY MS TEAMS, THIS 23<sup>RD</sup> DAY OF JUNE 2022**

**HON LADY JUSTICE A ONG'INJO**

**JUDGE**

**In the presence of:-**



Ogwel - Court Assistant

Mrs Makuto Advocate for Accused

Mr Ngiri for state\*\*

Accused – Present in person

**Hon Lady Justice A Ong'injo J**

**June 23, 2022**

**Mr Ngiri**

We don't have previous records for accused.

**Mrs Makuto Advocate**

I will mitigate for accused after Victim Impact Statement.

**Order**

Mention – July 7, 2022 for victim impact statement & mitigation.

**HON LADY JUSTICE A ONG'INJO J**

**June 23, 2022**

