



**Republic v Njuguna (Criminal Case 5 of 2018)
[2025] KEHC 3203 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 3203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 5 OF 2018
GL NZIOKA, J
JANUARY 21, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

DAVID KIMANI NJUGUNA ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on the night of 5th to 6th February 2007, at Mutonyora village in Nyandarua District within Central Province he murdered Mary Wamaitha Waithera.
2. The accused pleaded not guilty to the charges and the case proceeded to full hearing where upon by a judgment dated 15th July 2010, the court found him guilty of the offence, convicted him and sentenced him to serve a death sentence.
3. However, being aggrieved by the decision, the accused appealed against it vide Appeal No. 294 of 2010 in the Court of Appeal at Nakuru and upon hearing the appeal the Court of Appeal ordered for a re-trial and consequently, this matter arises from that order.
4. Be that as it were, the accused maintained a plea of not guilty when the matter commenced afresh and once more the case proceeded to full hearing. The prosecution case in a nutshell is that, the accused was married to (PW1) Sarah Waithera from the year 2004 to 2007. Apparently when they got married, she already had a child known as Mary Wamaitha Waithera (herein “the deceased”).
5. That the marriage between the two was coupled with disagreement and there were several occasions the couple would be involved in physical confrontation. However, PW1 described the disagreements as normal despite occasional arguments. She stated that the accused would quarrel and argue a lot when drunk, but even then his relationship with the deceased was okay.



6. That on 5th February 2007, the accused returned at about 6.30pm with cooking oil, wheat flour and meat and inquired from PW1 Waithera whether there was charcoal in the house. That she answered in the negative where upon the accused gave her Kshs 50 and sent her to purchase ½ litre of milk, cigarettes and charcoal. That PW1 left for the shops leaving the accused in the house with the deceased.
7. PW1 Waithera testified on return she heard the deceased screaming and the accused saying “shut up shetani nyamaza, leo nitakuuwa”. That she crept back and reached the door and when she entered the house, she noticed that the accused was standing behind a table, holding the deceased on the leg and hand and banging her against a wooden table.
8. That she asked the accused what the deceased had done and he got angry grabbed her on the neck and started beating her. That at that time the deceased was standing and requested to urinate and when the accused released PW1 she assisted the deceased to go out to urinate as she was in great pain and needed help.
9. PW1 Waithera further stated that she took her other child called Joseph and deceased to the neighbour and handed over the deceased to the neighbour and left with Joseph to seek refuge. That the accused followed her and grabbed her, hit her and dragged her back to the house. Further that he threw her against a chair, banged the door which had not been shut and left the house.
10. That, she untied Joseph from her back and went to hide behind the toilet but she saw the accused returning to the house carrying the deceased then he entered the house and banged the door. PW1 left to go and find a place to sleep. That she slept at the neighbour’s place about one (1) kilometre away.
11. That the following morning PW1 went to the police station at Magumu to seek for help and was accompanied by a police officer to return home. PW1 stated that as they approached the house, she realized there were many people running in and out of the house. That, the officer in her company inquired as to what had happened and she learnt that the child she left in the house had been killed and was lying on the ground.
12. That subsequently the report of the incident was made at Magumu Police Patrol base, whereupon corporal Oyamo directed (PW5) No 67204 corporal Bethwel Kibet to visit the scene. PW5 corporal Kibet testified that when he visited the scene in the company of PC Maina, and PW1 Waithera they found a crowd of people at the scene. That he learnt that a child had been killed and thrown out of the house and noted the left eye was swollen and had a dark spot.
13. That upon entering the house, the officers observed that things were scattered all over the house and the accused was not there. The accused was held as a suspect and traced at Njabini and arrested. In the meantime the body of the deceased was taken to the mortuary.
14. The post mortem was conducted on 14th February 2007, by Dr. Philip Kamau who established that the deceased was about three (3) years old and in good nutrition state. That she had a fracture on the head. The doctor concluded that the cause of death was direct brain injury; secondary to fatal head injury resulting from assault head hit onto blunt surface.
15. Upon conclusion of investigations the accused was charged accordingly.
16. At the conclusion of the prosecution case, the accused was placed on his defence. He testified that on 6th February 2007, he left home at 6.00am to deliver posts at Njabini near central bank. That at 10.00 a.m. he received a call from the father who wanted to know where he was and at the same time (PW4) Karumba called him also enquiring as to where he was and wanted to establish what was happening at his home.



17. That PW4 Karumba told him there was a crowd of people outside his house and did not know the reason thereof. However, he worked for two (2) hours and went to the D.O and told him that there was someone looking for him. At the same time, he called the sister. Beatrice who told him that the deceased Mary Wamaitha Kimani had died.
18. That he went to Njabini police station as they were looking for him and while there, his wife identified him and he was arrested and placed in the cells and later the wife Waithera (PW1) was also locked up in the cells but he pleaded that she be released as she had a small child. However, he was later charged. The accused denied killing the deceased but stated that he did not know who killed her.
19. At the conclusion of the formal hearing of the case, the prosecution chose to rely on the evidence adduced. The accused in submissions dated 1st August 2024 argued that, the prosecution cases was grounded on the evidence of (PW1) Waithera as the evidence of the other prosecution witnesses did not demonstrate his involvement in the death of the deceased but was merely hearsay and innuendos and therefore had no probative value.
20. He submitted that, the evidence of PW1 was uncorroborated and was full of inconsistencies. That in cross-examination (PW1) Waithera admitted that she did not witness him assault and/or kill the deceased. Further, PW1 Waithera claimed to have left the deceased with a neighbour, Veronica while alive, yet claimed that the accused had killed her.
21. Furthermore, PW1 waithera did not know the name of neighbour she went to spent a night at. Additionally, that despite the commotion and screaming none of the neighbours living in the same compound heard the screams.
22. The accused faulted the prosecution for failing to call Veronica and the neighbour where PW1 Waithera spent the night who were crucial witnesses who would have provided crucial evidence to assist the court arrive at a correct and just decision.
23. The accused submitted that, the investigations did not reveal circumstances under which the deceased died and the culprit that caused the death, and that the weight of the evidence was such that it cannot secure a conviction. That, the prosecution failed to discharge its duty and urged the court to acquit her.
24. At the conclusion of the case, I note that offence the accused is charged with is provided for under section 203 of the [Penal Code](#) which states: -

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder’.
25. Pursuant thereto the ingredients of the offence of murder have been settled vide several court’s decision including the Court of Appeal decision in Joseph Githua Njuguna vs Republic (2016) eKLR, where the ingredients are stated as: a) proof of occurrence and cause of death, b) whether the death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.
26. In the instant matter, there is no dispute that the death of the deceased occurred on the night of; 5th and 6th February 2007. The prosecution witnesses, (PW1) Wamaitha, the mother of the deceased, (PW4) Karumba and (PW5) Corporal Kibet all confirmed they saw the child dead. Similarly the accused has testified that, he was informed by the sister Beatrice that, the child who is the deceased herein had died. He does not dispute the occurrence of the death.
27. In the same vein, the cause of death is not in dispute. The evidence of (PW6) Dr. Philip Kamau who conducted the post mortem on the body of the child, noted the following injuries: -



1. External appearance:
 - a. maleedly swollen scalp with frontal contusion measuring 10 x 8 cm;
 - b. Swollen right eye with haemorrhage superisently;
 - c. dislocated right knee
 2. Internal appearance
 - a. Head-fracture along lone surgical suture with extensionally to right orbital bones and parietal bones bilaterally,
 - b. massive intra and extra cranial haemorrhage.
 - c. Flattened guysial and sulei of the brain
28. The doctor observed that the deceased suffered fatal injury to the head resulting in a fracture along the surgical suture with extension to the orbital bones (RT) and parietal bone resulting intra and extracranial haemorrhage. As a result, Dr. Kamau concluded that, the cause of death was “direct brain injury secondary to fatal head injury resulting from assault hit onto blunt surface.” The subject finding herein as per the post mortem report produced by Dr. Kamau is not in dispute.
 29. However, the key questions to determine is whether it is the accused is the one who killed the deceased and whether if he did so, he had malice aforethought. In answering the subject question I note that (PW1) Mary Waithera testified that, on the 5th day of February 2007, she left the accused with the deceased in the house as she went to buy milk, cigarettes and charcoal.
 30. Notably while testifying in defence the accused did not rebut this evidence of PW1 and indeed her evidence as to the entire events of 5th February 2007 having chosen to speak on the events of 6th February 2007. In that regard, he did not rebut the evidence of how he allegedly beat up the deceased, banged her on the wooden table, and even called her “shetani” and threatened to kill her.
 31. Furthermore, he did not rebut the evidence of him assaulting PW1 Waithera as she tried to rescue the deceased and how he even went to fetch the deceased from the neighbour, one Veronica where (PW1) Waithera had taken her for safety.
 32. Furthermore, the evidence of (PW4) Joel Karumba implicates the accused in the commission of the offence. (PW4) Karumba testified that, on 5th February 2007, the accused went to his house at 11:30 pm when he was asleep and requested to be assisted with a bag. From this evidence two observation arise, one, what was the accused doing outside his house at 11:30 pm when in normal circumstances most people are asleep.
 33. Secondly, what did he want the bag for? Is it too far fetched to conclude that, he wanted the bag for disposal of the body of the deceased. Again notably, the accused has not in his defence evidence denied and/or rebutted the evidence that, he went to PW4’s house to ask for the bag.
 34. In fact, PW4 clearly states that, he was suspicious as to why the accused wanted the bag in the night and decided to go to the accused’s home to find why. That he found a child crying and locked inside the house. At this point it suffices to note that, PW1 Mary Waithera testified that, when she escaped she left her younger child Joseph in the house together with the deceased and in the company of the accused. It therefore follows that, the child who was crying was Joseph and not the deceased.
 35. Be that as it were PW4’s further evidence is that, after he left accused’s house, the accused called him and told him to go to his house to check on what was going on. That it was around 10.00 am and when



- PW4 returned to the accused's house in the company of a friend Mucheru they found the child still crying and as (W4 went around accused's home, his friend saw a child lying down near the neighbour's fence and a closer look at the child revealed that, the child was dead, with flies all over the face.
36. Pursuant to the afore evidence again two issue arise; one, what does the presence of the flies on the face of the deceased mean. Is it an indication that the deceased had been lying on the ground for quite some time? Is it possible at the time when the accused was seeking for a bag, the deceased had been killed? Secondly why was accused calling (PW4) Karumba to go to his house, and check on what was going on. Why didn't he go himself?
 37. The evidence of PW4 Karumba is that, when he inquired from one Veronica a neighbour of the accused, she told him that, she heard noises in the accused's house in the night. It is the finding of the court that the evidence of noise in the night corroborates the evidence of (PW1) Mary Waithera that, there was disagreement in her house the day before and that, the accused caused chaos, banging doors. This evidence is also corroborated by the evidence of the officer who visited the house and found things scattered all over.
 38. Further the evidence of (PW2) Henry K. Kiharo, the father of (PW1) Mary Waithera stated that, the disagreement between the accused and PW1 was because the accused was using bhang and after used it he could cause chaos. That, there was a time, he burnt the child, using a cigarette, and therefore did not want the deceased child.
 39. Furthermore PW3 Peter Itotia testified that, he accompanied PW1 Mary Waithera to Njabini to look for the accused and when they traced him he tried to run away but he was arrested.
 40. Its noteworthy that the evidence of this witness controverts the accused's evidence that, he took himself to the police station but corroborates PW1 Mary Waithera's evidence that, when the accused was arrested she was at Njabini shopping centre and that she even screamed saying; "Woooooi" that is the man who killed my baby and escaped." That, the accused shouted back and said; "Mwachilie ndio nimuue vizuri."
 41. That, the accused was arrested and taken to the DC's place at a police station at Njabini. Finally PW5 No. 67204 corporal Bethwel Kibet also testified that the accused was arrested at Njabini shopping centre contrary to the defence that he took himself to the police station.
 42. An analysis of the defence is that, the accused testified that when he was called by the father and PW4, he asked PW4 to go and establish what had happened at home. That, after he received the first call he worked for a further two (2) hours. Several questions arise from this evidence; why didn't the accused find it important and urgent to go home after he was called? Why was he sending PW4 to go and find out what was going on? Why did he (if at all) opt to go to the police station after he learnt they were looking for him when all along he was aware the deceased had been found dead? It also suffices to note that, even then, the accused confirmed that he cannot not tell who killed the deceased.
 43. It is also noteworthy that, the accused and the wife PW1 Mary Waithera were the only people who were with the deceased before her death and that, the accused was not at home when the child was found dead. Further, if the accused did not kill the deceased, then it can only have been the wife, yet he states that, when both were allegedly arrested he pleaded that PW1 Mary Waithera be released to go back home. Even then from the entire evidence herein none indicates that PW1 Mary Waithera could have murdered the deceased.
 44. In my considered opinion, the death of the deceased can only have been caused by the accused who is said to have been drunk and violent at the time of offence, and banged the deceased head on the table.



45. The last question to answer is whether the accused had malice aforethought at the time he committed the offence. The provisions of section 206 of the *Penal Code* gives the circumstances when malice aforethought is deemed to exist and states that: -

“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.”

46. The Court of Appeal in *Odio v Republic* [2024] KECA 1544 (KLR) stated that: -

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“20. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought. In *Nzuki vs. Republic* [1993] eKLR, this Court defined malice aforethought as: ...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers*, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman*, [1950] 2 KB 237.”

47. Furthermore, in the case of; *Tubere s/o Ochen* {1945} 12 EACA 63 the court in considering whether there was malice aforethought, stated that the trial court should look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also *Dafasi-Magayi v Uganda* {1965} 1 EA 667).



48. In the instant, matter the evidence reveals that the deceased was not a biological child of the deceased, that on the night of 5th February 2007, the accused was rough on the deceased and alleged called her “shetani” and swore to kill her. That even after the deceased was allegedly taken to the house of Veronica for security that, the accused still went for her. If the child was already beaten up and could not even walk to go to urinate, why was the accused going for her instead of assisting her. What was the intention.
49. In my considered opinion, he was determined to ensure that, the child did not survive. If that is the case, doesn't it mean that, the accused had malice afterthought.
50. Consequently it is clear that the accused had malice aforethought and accomplished it by killing the deceased. Consequently, I find him guilty as charged of the offence of murder and I consequently convict him accordingly.
51. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 21ST DAY OF JANUARY 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Chepkonga for the State

Mr. Karanja for the accused

Accused present virtually

Mr. Komen: court assistant

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