



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Nyamu & another (Criminal Case 20 of 2018)  
[2025] KEHC 4599 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4599 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL CASE 20 OF 2018**

**LW GITARI, J**

**MARCH 7, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AULENCIA KATHAMBI NYAMU ..... 1<sup>ST</sup> ACCUSED**

**DENNIS KIBAKI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused person Aulencia Kathambi Nyamu and Dennis Kibaki are charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It was alleged that on 23/09/2018 at Makambani Village Kamuka Sub-location Mutino location within Tharaka Nithi County murdered Johana Kathuri. This is vide information dated 17/1/2019. The accused persons denied the charge.
2. The brief facts of the case are that the two accused are a mother and her son. on 23/9/2018 at about midnight the two jointly ganged up and assaulted the deceased. The assault took place at the home of the first accused. After being assaulted, the deceased found his way to his home which was nearby and informed his wife that the two accused had assaulted him. The deceased was rushed to Chuka Hospital for medical treatment.
3. Unfortunately, on 29/09/2018 the deceased succumbed to the injuries. The matter was reported to the Police. A postmortem was done on the body of the deceased and the doctor formed the opinion that the cause of death was severe head injury due to blunt head trauma. The accused were then arrested and charged with the murder of the deceased.

**The Prosecution's Case**

4. PW1 – Timothy Gikundi Gathuru (PW1) is the biological son of the deceased. The accused are known to him as they are his immediate neighbors. On 22/9/2018 he was in his house asleep when he heard



noises from the neighbor's house. That neighbor is the 1<sup>st</sup> accused Aulencia Kathambi. PW1 then heard the first accused saying, "Gathuru, I said I will kill you..." PW1 realized that the deceased was referring to his father. PW1 testified that on that day he had seen the deceased and the first accused together at 5.00pm going towards Kanjiki where they used to go as they had a lover relationship for about five years. He went outside, then went back to sleep as they used to quarrel.

5. Later he was woken up by his sister who was reporting to him that the deceased had gone and had collapsed. He enquired and his mother informed him that the deceased had alleged that the 1<sup>st</sup> accused had stabbed him. The deceased was bleeding profusely from a stab wound on the right side of the head. They took the deceased to hospital. On 28/9/2018 the deceased passed away.
6. According to PW1 when he heard noises in the house of the accused, she was demanding money from the deceased saying that he had refused to give her what she was entitled to as of right. According to PW1 the deceased had sold all his plots and that is why the 1<sup>st</sup> accused was demanding money. PW1 testified that he heard the accused telling the deceased that even if he goes away he will not survive (make it).
7. PW2 testified that on that material night he never heard the second accused talking nor did he see him.
8. PW2 – Doctor Nicholas Nkonge testified that he is a medical doctor at Chuka Hospital. He holds a bachelors degree in Medicine and Surgery from Charles University Czech Republic. He testified that the doctor who performed the postmortem on the body of he deceased, that is doctor Kitili, passed away. He had worked with him and was familiar with his had writing and signature. The doctor had performed postmortem on the body of the deceased Johana Kathuri on 3/10/2018. He testified that the body had a deep cut on the frontal region of the head. There were also bruises on the right and left temporal region. There were also bruises on the left shoulder. Internally there were fractures with sub-dural haema-toma on the frontal lobe and left temporal lobes. The doctor formed the opinion that the cause of death was severe head injury due to blunt head trauma. He produced the postmortem form on behalf of doctor Kitili as exhibit 1.
9. In cross-examination, the doctor told the court that the cause of death was blunt force trauma on the head. That there was a deep cut wound and it was contradictory in a way.
10. Peninah Kathira (PW3) testified that the deceased is her husband. She told the court that on 22/9/2018 the deceased left home early in the morning. At 11.00am he spotted the deceased in the company of the 1<sup>st</sup> accused. Later at 9.00pm he received a report that her husband was assaulted. The person who gave her the report was Simeon Njeru who she said is now deceased, that is at the time she testified. She told the court that the deceased went to her house and he was covered with blood.
11. On asking the deceased what had happened, he told her that he had been assaulted by the 1<sup>st</sup> accused and her son the 2<sup>nd</sup> accused. The deceased then collapsed. They looked for a vehicle and rushed the deceased to hospital. The deceased passed away while in the ward at Chuka Hospital. PW3 testified that the deceased had an injury on the left side of the head. He told the court that the deceased was living with the 1<sup>st</sup> accused as husband and wife. PW3 went on to tell the court that the deceased and first accused had disagreed after the deceased sold a plot and the 1<sup>st</sup> accused stole the proceeds of sale.
12. PW4 – Corporal Geoffrey Nyaora testified that on 27/09/2018 he was at Chuka Police Station when the OCS C.I.P instructed him to attend to three ladies who had reported a case of assault. He took up the matter and went to Chuka Hospital to confirm their report as they said their father was hospitalized there.



13. He confirmed that the deceased was admitted in hospital with visible injuries on the head. He went back to the station and informed the O.C.S. Investigations commenced. After twenty-four hours the deceased passed away. The matter was taken over by the D.C.I. the told the court that the 1<sup>st</sup> & 2<sup>nd</sup> accused were the suspects.
14. Maurice Okinda Ogutu, (PW5) testified that he took over investigations. The first accused surrendered at Katwana A.P Police camp and alleged that the villagers were looking for her and wanted to lynch her. After interviewing witnesses, he found that the deceased was attacked by the 1<sup>st</sup> accused and her son Kibaki who was armed with a hammer and a panga. The investigating officer found that before the deceased became unconscious he informed his wife that he was attacked by the 1<sup>st</sup> accused who was his girlfriend. The deceased succumbed to injuries and a postmortem was performed on the body. The accused were then charged.

### **Defence Case**

15. The first accused gave her defence on oath. She told the court that the deceased was her friend and on the material day they had drinks then parted at 6.00pm. That after they parted she did not know what happened. She told that she was arrested because they were friends but she was not involved in his death.
16. The second accused Denis kibaki gave his defence on oath and told the court that he was involved in the death of the deceased.

### **Analysis and Determination**

17. The accused are charged with murder contrary to Section 203 of the [Penal Code](#) which provides as follows:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
18. The section defines the offence of murder and requires proof of the following elements beyond any reasonable doubts;
  - a. Proof of death.
  - b. The cause of that death.
  - c. Proof that the death was due to an unlawful act or omission and that the unlawful act or omission was committed by the accused with malice aforethought.
19. Below is the analysis of the above elements of the offence of murder. On the proof of death, there is no dispute that the deceased died. PW2 produced the postmortem form and confirmed that the cause of death deceased was due to severe head injury due to blunt head trauma. Witnesses also confirmed that they saw the dead body of the deceased, this was as testified by PW1 the deceased’s son and PW3 the wife of deceased. The prosecution discharged the burden of proof that the deceased died.



20. The second issue whether the death was caused by an unlawful act or omission. Every person has a constitutional right to life. Article 26(1)(2)(3) of *the Constitution* guarantees this right and provides as follows:

“Every person has the right to life. The right of a person begins at conception. A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution.”

21. The Postmortem Form exhibit 1 which was produced by PW2 showed that the deceased had sustained injuries on his body involving a deep cut on the head – frontal scalp, 3cm long, bruises on the lemporal and parietal bone. Bruises on the left shoulder. The cause of death was severe head injury. Although the defence had suggested that there was a contradiction on the cause of death, the postmortem form shows that there was a deep out wound which was coupled with other severe injuries caused by blunt force. The cut wound was not independently the cause of death, there was also blunt trauma. The doctor formed his opinion that the cause of death was head injury due to blunt trauma. I find that the prosecution proved the cause of death was as a result of unlawful acts.

22. The third issue is whether the accused are the ones who caused the death of the deceased with malice aforethought. The prosecution called PW1 who testified that he heard the 1<sup>st</sup> accused and the deceased quarrelling in the house of the deceased. He testified that the 1<sup>st</sup> accused was threatening to kill the deceased.

23. PW1 testified that he did not see 1<sup>st</sup> accused and deceased but he clearly heard their voices and realized that they were quarreling. PW1 testified that he heard the 1<sup>st</sup> accused saying as follows, “Gathuru I said I will kill you.” That I will kill you.” That he was referring to Gaturu the deceased in this case who is his father. This evidence by Pw1 was not disputed. The 1<sup>st</sup> accused in her defene merely denied that she caused the death. I have no reason to doubt the testimony of PW1 was called by her sister who informed her that the deceased had gone home having sustained injuries and had collapsed.

24. I find no reason to doubt the testimony of PW1. The same was corroborated by the dying declarations made by the deceased. According to PW2 testified the deceased went home at night and was covered with blood. She asked him what happened and he told her that he was assaulted by Kathambi and Kibaki. None of the witnesses testified on how the injuries were sustained. The testimony of PW1 is circumstantial evidence. In *Ahamad Abulfathi Mohamed & Another -vs- Republic* (2018) eKLR the court of Appeal stated as follows:

“However, it is truism that the fault 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- Jaycor weaver and Donouan* (1928) Cr. Apl. 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”.



25. The court of Appeal considered the test to be applied in considering whether the circumstantial evidence relied on can support a conviction. The court stated;

“Before circumstantial evidence can form a basis of a conviction it must satisfy several conditions, which are designed to ensure that it unerringly points to the subject person and to no other person as the perpetrator of the offence. In *Abang alias Onyango -vs- R*, CR No. 32/1990 this court set the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests:

- i. The circumstance on which an inference of guilt is sought to be drawn must be cogently and firmly established,
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the subject,
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

26. PW1 heard the 1<sup>st</sup> accused threatening the deceased. This testimony was not controverted. Soon after that the deceased reached home and told PW3 that the deceased had injured him. It is trite law that dying declarations are admissible to prove the cause of death. Section 33(1) of the *Evidence Act* provides as follows:

“relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted Evidence in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question...”

27. The 1<sup>st</sup> accused was the last person to be seen with the deceased. The 1<sup>st</sup> accused admitted that he was with the deceased the whole day. Her defence that she left deceased behind is not true as PW1 heard the 1<sup>st</sup> accused and deceased quarrelling. 1<sup>st</sup> accused was at the place where the deceased was before he appeared in his wife’s house with fatal injuries. The accused was required to offer an explanation on how the deceased met her death.

28. Section 111(1) of the *Evidence Act* provides as follows:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the



prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

29. The 1<sup>st</sup> accused gave a defence which is a mere denial and failed to offer any explanation as to how the deceased might have met his death. I find that the prosecution offered credible circumstantial evidence to prove that the 1<sup>st</sup> accused caused the death of deceased. The court was informed that the 1<sup>st</sup> accused escaped and only resurfaced when she surrendered to the police when an irate mob attacked her on allegation that she killed the deceased. She had no reason to escape if she had not committed the offence.
30. Finally, the last issue is whether the 1<sup>st</sup> accused had malice aforethought. Section 206 of the [Penal Code](#) defines malice aforethought. It provides:

“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.”

31. The Court of Appeal in *Joseph Kimani Njau -vs- Republic* (2014) eKLR CR held as follows:

“Before an act can be made, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test which is always subjective to the actual subject;

- i. Intention to cause death.
- ii. The intention to cause grievous bodily harm.
- iii. Where the accused knows that there is a serious risk that death or grievous will ensue from his acts and commits those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than one succumbed...”

32. The deceased in this case died as a result of severe head injury. The 1<sup>st</sup> accused had threatened to kill the deceased. The nature of the injury and the part of the body where it was inflicted shows beyond any reason doubt that the intention of the 1<sup>st</sup> accused was to cause the death of deceased or grievous harm.
33. I find that the prosecution has proved the charge of murder against 1<sup>st</sup> accused beyond any reasonable doubts that as against the 2<sup>nd</sup> accused, the evidence tendered is by PW3 who told the court that the deceased told her that it is Kathambi and Kibaki who beat him. The deceased did not say more as he collapsed as saying those words. This was a dying declaration.



34. Under the *Evidence Act* Cap 80 Laws of Kenya, Section 22(a) provides as follows:

“when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question...”

35. A dying declaration which is defined as a statement made by someone who is about to die on the cause of his death. It is admissible in court as evidence as an exception to the hearsay rule which prohibits the use of hearsay in evidence. The law on dying declarations in Kenya was laid down in the case of Pius Jasunga s/o A Kumu -vs- Republic (1954) 21 E.A.C.A 33 which was cited in the case of Okale -vs- Republic 1965 E.A 556 it was held that:

“A trial Judge should approach the evidence of dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in absence of an accused and not subjected to cross-examination unless there is satisfactory corroboration.”

36. The court while considering Section 33(a) of the *Evidence Act* (Supra) stated that:

“Under that provision statements of admissible facts, oral or written made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements... while it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe”.

37. The circumstance under which the dying altercation was made to PW3 by the deceased was that he went home and he was covered with blood. PW3 asked the deceased what happened and that is when he said that he was beaten by Kathambi and Kibaki. After that he collapsed and did not talk again. The deceased was known to the two accused as he was living in the house of 1<sup>st</sup> accused who was his lover. The deceased could not have mistaken the accused who were well known to him. PW3 testified that he believed the deceased because he had seen the deceased with 1<sup>st</sup> accused earlier in the day and the 1<sup>st</sup> accused disappeared from home after the incident and after deceased died PW5 who took over the investigations when the matter graduated to murder told the court that the suspect was at large. The 1<sup>st</sup> accused surrendered at Kathwana AP Police Camp and alleged that villagers wanted to lynch her. PW5 testified that investigations revealed that the deceased was beaten by 1<sup>st</sup> accused and her son.

38. I find that the deceased could not have mistaken the people who beat him as they were well known to him. The deceased could not have implicated the accused falsely. Evidence of PW1 corroborates the dying declarations as he had heard the two, that is 1<sup>st</sup> accused and deceased quarrelling. The 2<sup>nd</sup> accused denied that he assaulted the deceased.

39. I find that the defence was a mere denial. The PW1 told the court that the day the deceased was assaulted was on a Saturday. This is not denied and is not in dispute. The defence of the accused person was a



mere denial. I find that this is a case where the court will presume that what the deceased stated in his dying declarations is actually what happened in the absence of any explanation.

Section 119 of the [Evidence Act](#) (Cap 80 Law of Kenya) provides as follows:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

40. The Court of Appeal in the case of David Langat Kipkoech Simon Kibet Korir & Another (2009) eKLR while interpreting Section 119 of the [Evidence Act](#) stated as follows:

“...Since he did not offer any explanation, the rebuttable presumption in law is raised, based on the provision of Section 119 of the [Evidence Act](#)...It is a presumption of fact which courts often refer to...”

41. The prosecution has adduced evidence which shows that the deceased died from injuries which were inflicted on the deceased. The prosecution proved beyond any reasonable doubts that the unlawful acts were committed by the two accused. The nature of the injury sustained and the place where it was inflicted shows that the intention was to cause the death of the deceased.

42. I find that the two accused caused the death of the deceased through unlawful acts with malice aforethought. I therefore find the accused person guilty of the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) and convict him under Section 322(1) & (2) of the [Criminal Procedure Code](#).

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 7<sup>TH</sup> DAY OF MARCH 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

