



**Republic v Njoroge alias Jangili & another (Criminal Case E001 of 2024) [2025] KEHC 5953 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDAMA RAVINE  
CRIMINAL CASE E001 OF 2024**

**RB NGETICH, J**

**MAY 8, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER NJOROGE ALIAS JANGILI ..... 1<sup>ST</sup> ACCUSED**

**DIANA AWUOR ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons Peter Njoroge Alias Jangili and Diana Awuor have been jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge were that the accused persons between the 20<sup>th</sup> and 21<sup>st</sup> December, 2023 at Maji Mazuri area, in Koibatek Sub- County within Baringo County, jointly murdered Mary Njeri.
2. The accused persons denied the charges and the matter to full trial with Prosecution availing a total of 9 witnesses in support of the charges against the accusing persons.

**Prosecution Evidence**

3. PW1 Jackline Awino Mbuya testified that on the 20<sup>th</sup> December, 2023 at around 7:00p.m, she was selling food outside her mother-in-law's house when the deceased Njeri wife to Jangili asked her give for Mokimo and shortly after, her husband Jangili arrived with Kshs 10/= and requested her to give him Mukimo for Kshs 10/= but she informed him that they sell at 50 shillings but insisted to be given a little on his hand.
4. She said after that, she went behind the shop with Njeri and after about 15 minutes, Njeri left the compound leaving Jangili in the dark on the kitchen side. She said that Njeri went back with her sister-in-law the 2<sup>nd</sup> accused herein Diana Awuor who was carrying a child on the back. She said Njeri went to where her husband was and the 2<sup>nd</sup> accused Awuor greeted her mother saying "Nango" meaning



- habari who responded mzuri then Njeri came and asked for her bucket. That she informed her to ask Nyamoita who was working in the kitchen and Nyamoita brought her a bucket.
5. She said after that, the 2<sup>nd</sup> accused Awuor went to sit at the door carrying a child and the 1<sup>st</sup> accused Jangili went to where she was seated. Pw1 said accused 1 inquired from her what issue she had with Accused 2 and then showed her a panga on his waist [on the right] and asked her “how about this panga she has bought for me to kill you with”.
  6. Pw1 said she asked accused 1 to inform her mother-in-law and Accused 1 went with the panga telling pw1 that he was going to tell truth later. PW1 said her mother-in-law called Accused 2 and asked her about what accused 1 said. She said the deceased Njeri said Accused 2 Awuor gave her husband Accused 1 kshs 5,000/= so that he could cut her with the panga and Accused 2 was to pay Accused 2 additional 5,000/= after completing the work.
  7. Pw1 stated that her mother in-law ordered them to leave saying she did not want arguments in her compound and Accused 2 told the deceased Njeri, “you are airing my issues, you will come to respect me”. She said the next morning her mother in-law advised her to report the matter to police and she decided to call Accused 1 to inquire the truth and shortly a young man went and told them Njeri had been found dead in Korogocho and Nyamoita went to check and confirmed that it was true. She said Accused 2’s child Odongo aged 13 years went and told them that her mother Accused 2 did not go back to the house after going with Njeri. Pw1 said Njeri left with Accused 2 Awuor as A2 was insisting that she wanted her panga. Pw1 said she had known Accused1 for about 3 years and she knew the deceased Njeri as husband and wife. She further stated that Accused 2’s child Odongo told them that Accused 2 left with the deceased in the morning of 20<sup>th</sup> December,2023 and Accused 2 had not returned to her house.
  8. PW2 Peris Akinyi Onaro, testified that on 20<sup>th</sup> December 2023 at around 7:30 p.m. The deceased Njeri went to her home and requested for Mokimo and she asked her daughter in law pw1 to give her and she gave her on her hand then she left while eating. She said that she was with her daughter in-law Jackline Pw1 and Nyamoita Pw3.
  9. She said shortly, the deceased Njeri went with her daughter Diana Awuor[Accused 2] and Accused 2 sat at the door. She said that Njoroge also called Jangili who is Accused 1 passed and went towards the toilet and went back and requested PW1 to give him mokimo for 10/= but PW1 informed him that they don’t sell for 10/=. Shortly, she said she heard PW1 asking them why they were speaking in low tones. She said Accused 1 said accused 2 purchased the panga for him [Accused1] to kill PW1 and Accused 2 heard and went to inquire from the deceased Njeri why she was exposing her. Pw2 said she ordered them to leave her compound and then got people to escort Pw1 to her house. She said in the morning, she called Pw1 and she advised her to report the issue of the panga to police but Pw1 said she was not to reporting as she had reported accused 2 severally and nothing was being done to her.
  10. Pw2 said shortly before she called Acused 1, a person went and informed her that Njeri had died. She said she asked Nyamoita to go and confirm what had happened and shortly accused 2’s child went and told them accused 2 had not returned home. Pw2 said she has not seen accused 2 upto the time she attended court and she was only informed that she was arrested in February 2024. She confirmed that there were always conflicts between accused 2 and PW1 and after confirming that Njeri had died, they looked for accused 2 but they did not find her. She said accused 2 is her 6<sup>th</sup> born daughter.
  11. PW3 Naomy Nyamoita testified that she has been working for PW2 since December 2023 and on 20<sup>th</sup> December, 2023 at around 8P.M, accused 2 went with the deceased Njeri to pw2’s house and accused 2 then requested her to collect a basin from behind then a customer sent her to the shop and when she returned, she did not find them. She said PW1 informed her that Accused 1 had been tasked to kill



- her. She said she escorted pw1 with two old men then went back and slept in pw2's home. She further stated that she was sent to check if Diana [Accused 2] was in her house, but she did not find her and Accused 1 was called from his house in the morning.
12. PW4 John Mukina Wahome testified that Mary Njeri was his niece and on 21<sup>st</sup> December, 2023 at 9:30a.m he was at Eldama Ravine when he received a call that Mary Njeri had been found dead. He said Postmortem was done on 27<sup>th</sup> December 2024 at Eldama Ravine Sub-County hospital in his presence together with his grandmother and uncle while Margaret represented accused's family. He said he saw a bruise on her face and on the head. He said that he witnessed postmortem and later recorded statement. He said accused 1 and deceased were living together; that they had family issues before which they resolved and they lived peacefully.
  13. PW5 Daniel Mburu a chief at Maji Mazuri testified that on 21<sup>st</sup> December, 2023 at around 7:00a.m, he was called from Maji Mazuri and informed that a body of a lady called Njeri had been found. He said that he went with inspector Opicho of Maji Mazuri post and PC Karuri and found a crowd and the body of the deceased, lying with head facing up. He said that there were bruises on the face and that he knew the deceased as Mary Njeri whom he has known for over 10 years.
  14. He said the body was found near the forest and there was a structure of a house near the body and that her home was about 200 meters away. He said that he did not know how the deceased died and that he knew accused 1 as husband of the deceased and they lived together. He said he did not hear of any conflict between them. He also said that he knows accused 2 Diana as resident of Maji Mazuri.
  15. PW6 number 235350, Inspector Michael Opicho based at Maji Mazuri Police Station testified that on 21<sup>st</sup> December 2023, at about 7:45, he received a phone call from area chief [pw5] who informed him that the body of the deceased Mary was found besides a structure at Maji Mazuri forest and about 8:10 hours, together with Cpl Kirui and area Chief proceeded to the scene where they found the body of the deceased lying face upward with bruises on the face. He informed Sub-County police commander who advised him to preserve the scene which he did and called for assistance of DCI who sent his officer who went to the scene and took over the matter. He said the body was taken to Eldama Ravine Sub County Hospital. He said they found so many people at the scene and the scene seemed to have been interfered but from the appearance of the scene it seemed the body was killed elsewhere and brought to where they found it.
  16. PW7 number 56572, PC Philip Mahichi attached to DCI Koibatek performing criminal investigations testified that on 21<sup>st</sup> December 2023, he was instructed by his deputy, Madam Agnes, to proceed to Maji Mazuri where he was informed that there was a body lying in the area. At the scene, he found a dead body covered with white sheets. He said Inspector Opicho who had reached the scene first, uncovered the body and he saw bruises on the face and the neck was a bit swollen. He said the body was dressed in kitenge dress and sweater and had handkerchief placed on the stomach.
  17. He said that he inquired about the death from the crowd but no one responded and he looked for weapon but did not find. They took the body to Eldama Ravine mortuary for preservation and postmortem. That on 22<sup>nd</sup> December 2023, the DCIO Mr. Nzioka, PC Elkanah and him, went Back to the scene to look for murder weapon but they did not recover any weapon. They were led to the deceased's house which was 250 meters away by IP Opicho where they found deceased's husband who interrogated by DCIO, inspector Nzioka and he was required to visit DCI office Koibatek the next day. He said the DCI instructed PC Elkanah to take over the matter.
  18. PW8 Doctor Philip Kamau testified that he worked at Eldama Ravine from the year 2020 to 2024 and on 27<sup>th</sup> December 2023 he did postmortem examination on the body of Mary Njeri which



was under escort of PC Elkanah, and identified by John Wongombe and Margaret Washo Kimani. On examination, there were Bruises on the head measuring 3 by 6 centimeters, 6 by 7 cm, 3 by 4 cm, Occipital head and neck slightly swollen and Bruises on left shoulder. On internal appearance, Intrascapular and intermuscular bleeding on occipital of the head and neck, Occipital back of the head was fractured with born measuring 3 by 0.5cm pierced through Medulla Oblongata. He formed opinion that cause of death was injury to the brain after assault on the head. He produced postmortem report in Court which was marked EXB1.

19. PW9 No APC Elkanah Omoyo, attached to DCI Koibatek performing general investigations testified that on 22<sup>nd</sup> December, 2023 he was in Koibatek DCI office when he was called by DCI Joseph Muriuki to accompany him together PC Philip Mahichi [Pw8] to Maji Mazuri where there was a murder incident which was reported to have occurred on 20<sup>th</sup> December, 2023.
20. He said they proceeded there and upon reaching Maji Mazuri police station, they were joined by IP Opicho whom together they proceeded to the scene of crime at Korogocho area where the body of Mary Njeri had been found. He said the body had been removed and taken to Mortuary and they were to look for murder weapon, but they did not recover. They proceeded to deceased's home about 300M away as directed by the relatives and found deceased's husband Peter Njoroge sleeping inside the wooden house. They inquired from Njoroge what happened, but he was only saying "Awuor killed my wife". He said they asked him who was Awuor and he said that Awuor was a daughter to Peris Akinyi and who was nowhere to be seen.
21. He said Accused 1 looked exhausted and they asked him to report to DCI Koibatek the next day. He said they searched Accused 1's house for murder weapon but they did not find; they went back to Koibatek where the DCI requested him to take over the matter from PC Mahichu [pw8]. That on 23<sup>rd</sup> December, 2023 about 1600 hours, he visited Eldama Ravine sub county Hospital Morgue and witnessed the body of the deceased. He noticed she had an injury behind her head.
22. That on December 23<sup>rd</sup>, December, 2023, Njoroge had not gone to their office and they presumed he was mourning his wife and he continued to carry out investigations on the death of deceased where he was informed that Njoroge and Awuor were main suspects of deceased.
23. On 27<sup>th</sup> December 2023, he proceeded to Maji Mazuri police post and with the help of police officers, they managed to arrest Njoroge with pw3 Naomi Nyamoita whom, they were informed was with Njoroge at the scene. They escorted the two to Eldama Ravine Police Station and on the same day, he witnessed postmortem of deceased, that's when they found that the deceased was murdered.
24. Further that they went ahead and summoned Peris Akinyi, who is the mother to Diana Awuor and also summoned Diana Awuor's sister-in-law Jackline Awuor. They interrogated the two but Accused Diana was on the run. That from information, on the night of 20<sup>th</sup> December 2023, accused 1 Peter Njoroge alias Jangili, accused 2 Diana Awuor and deceased were at Peris Akinyi's Homestead and Peter Njoroge revealed information to Jackline Akinyi. They recorded statements from pw3 Naomi Nyamoita whom they later released and used her as a witness. He said Accused 1 Peter Njoroge appeared mentally disturbed and even while in custody, he was injuring himself.
25. Upon the close of the Prosecution's case, by ruling delivered on the 19<sup>th</sup> December, 2024, the court found that a prima facie case had been established to warrant the accused persons to be placed on their defence.



## Defence Case

26. DW1 Peter Njoroge alias Jangili gave unsworn statement and stated that he resides at Maji Mazuri. That on 21<sup>st</sup> November, 2023, he went to Korogocho to see his wife Mary Njeri and found her with accused 2. That Accused 2 said that she had gotten money from a group and asked if he could drink alcohol and said she was going to change the child and sent one child for Pampers but the child delayed and arrived at around 7:00 p.m when she then changed the child. That at about 7:20 p.m, they left there and at the time accused 2 had a panga and was with Mary Njeri after coming from mama Riziki. He said they left at 7:20 p.m and entered a homestead of Mary Nyeusi where accused 2 asked for changaa and said the alcohol was not concentrated and asked that they change to her mother's home her mother had concentrated changaa. He said when they left Mary Nyeusi's home, he asked her to give him the panga to carry because he was a man and if they fail to pay alcohol he could give the owner the panga.
27. Accused said his wife entered the home and asked for alcohol and carried alcohol. He said that he left his wife heading to where Accused 2 was at the road. He said pw1 serving her as Accused 2's mother was taking the money. He further stated that his wife went with a cup and informed him that the panga he had been given by accused 2 was meant to be used to cut pw1 and Pw1 heard and inquired what they were discussing with accused 2.
28. He said that she talked to accused 2's mother saying he wanted to cut her with the panga and his wife requested him to take the panga home and he left the place to avoid questions from accused 2's mother. He said he had the panga on the waist which he took to his house and found his form three daughter had cooked.
29. Accuse 1 said on going out, he found a friend who said that he could buy him alcohol in the clubs. He said that he informed him that the club is expensive and requested him if they could go to Akinyi's place and give him the money which would remain. He said after taking alcohol, he went to watch football then went home at about 1200 hours and found his daughter doing homework; he inquired from her if her mother had arrived and she said no and by 5:00 a.m, she had not arrived.
30. He said that he took alcohol and at 6:00 a.m, he went to the road, then went to Ann to drink. That he reached there at 6:45 and while there, someone went to ask if he had been seen and on being told he was there, the man said his wife had died and was at Korogocho. He said he went out to ask for the man one Musa who was asking for him but found he had gone.
31. He went to the scene and found the body of his wife covered and on checking he found it was his wife. He said that he left to her mother [witness sobs] who said accused 2 disagreed with his wife and she said she would kill her. He in return informed her that his wife had already been killed. He then went to the chief and reported that his wife had died and that he had left her at accused 2's home. He said Nyamoita said his wife had gone with Accused 2. He said he went for burial permit and left the rest to the Government.
32. DW2 Diana Awuor Oriero who is accused 2 herein denied the charge against her and stated that on 20<sup>th</sup> December, 2023 she was in her home with her child and at 2:00 p.m, the deceased Mary Njeri went to her and requested her to accompany her so that she could buy alcohol. She said at 2.30 p.m., she bought one cup of alcohol at Riziki's house then proceeded to Colleta's home where she bought a cup of alcohol and before she drunk, her husband arrived and told her "your work is to drink you are not buying anything in the house" and the husband then took the alcohol and drunk. she said accused 1 said he was from her home [called Keroche] and changaa was concentrated and requested them to go with him there.



33. She said they walked ahead of her talking in Kiswahili language and on reaching home, she greeted her mother and sat down then Accused 1 and his wife entered. She said Accused 1's wife asked for alcohol while accused 1 went with Pw1 Jackline Awino who is her brother's wife near the toilet and then Pw1 went to where Accused 2's mother was seated but she does not know what she discussed with her and her mother started quarreling her. She said her mother was quarreling her because she had stayed for two days without going to her home and she had not packed clothes for the children. She said her mother asked her to take the clothes to her house to wash and at about 5.00 p.m, she put the clothes in a basin and took them to her house. she said accused 1 and his wife were still drinking and there were other customers. She said she took baby shawl and boarded a vehicle to Eldama Ravine where the father of her child lived. She stated that she left without telling her mother because her mother had quarreled her. She said she only informed her children she was leaving and would come back.
34. Accused 2 further stated that on 1<sup>st</sup> February,2024, she went to the market and while going back, she met Accused 1's sister Washu who appeared annoyed and when she asked her why, Washu told her "don't you know what you have done". She said "utajua mbele". That she made a call and shortly DCI's vehicle came and she learned she was being arrested for offence of murder. That she said it was her who had killed Mary Njeri. That Washu did not testify in court as a witness. That the relationship between her, accused 1 and Mary Njeri was good and she did not disagree with Mary Njeri before going to Eldama Ravie on 21<sup>st</sup> December,2023.
35. She informed the court that Pw1Jacqueline Awino is her brother's wife while Pw2 Paris Akinyi Obiero also called Keroche is her mother. She denied seeing on a panga the evening of 20<sup>th</sup> December,2023 and said no panga was produced in court as exhibit. She also stated that Pw3 Naomi Nyamoita is her mother's employee who brews changaa and at 6p.m that evening, she was drunk and was sleeping near the kitchen. She testified that her relationship with Pw1 Jackline Awino Mbiya was not good as she used to gossip about her with her mother Pw2 and that they have never been in good terms. She said Pw1 lied in court and may have lied because their relationship is not good.
36. She also said that her mother Peris Akinyi is a seller of changaa without license who sold alcohol to the deceased and the deceased went and died and for that reason she may have spoken lies against her because e she concealed the fact that she sold alcohol to the deceased and what Accused 1 was referring to as githeri for 10 shillings was alcohol; and also what Peris, Nyamoita and Jackline talked about accused 1 buying githeri of 10 shillings was a lie. She denied paying accused 1 kshs 5,000/= to kill Pw2 Jackline. Accused 2 stated that she was not working and she relied on her mother and if accused 1 had a panga, they would have gone with jackline to report to police and further stated that if accused 1 had 5,000 he would have purchased alcohol and would not have borrowed and there is no evidence that anyone saw her pay accused 1 kshs 5,000/=neither is there evidence to show that she paid 5,000/= to accused 1.
37. Upon the close of the case, only the 2<sup>nd</sup> accused filed written submissions.

### **Submissions By Accused 2**

38. Counsel for the 2<sup>nd</sup> Accused submit that for prosecution to secure conviction on the charge of murder, three ingredients Have to be proved against an accused person beyond reasonable doubt and in Nyeri Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari v Republic [2014] eKLR, the court of appeal summed up the elements of the offence of murder as follows:-
- a. The death of the deceased and its cause;
  - b. that the accused committed the unlawful act which caused the death of the deceased; and



- c. That the accused had malice aforethought.
39. Counsel submits that the burden of proof of the three ingredients for the offence of murder lies on the prosecution throughout the trial and it does not shift to the accused person to prove his innocence and that is the only way fair trial of the accused person can be guaranteed as stipulated in Article 50 [2] of *the Constitution*.
40. Counsel further submit that prosecution evidence against the accused person was hinged on circumstantial evidence and that the body of the deceased identified as Mary Njeri was found lying on the ground near the cypress area of Maji Mazuri on the morning of 21-12-2025 suspected to have been murdered.
41. Further that according to the evidence presented by the prosecution witnesses Jackline Awino Mbuya [PW1], Peris Akinyi Oriaro [PW2], Naomi Nyamoita [PW3], John W Wangombe [PW4] and Daniel Mburu [PW5], the deceased was last seen on the evening of 20<sup>th</sup> December 2023 at the home of PW2 while partaking Changaa in the company of the accused persons and also PW1, PW2 and PW3 and according to pw1, there was grudge between the 2<sup>nd</sup> accused person and her and it was alleged that as a result of the grudge, Accused 2 paid the sum of Ksh 5,000/= to Accused 1 to murder pw1 and that the deceased was aware of this plot.
42. On whether the prosecution witnesses Pw1, pw2 and pw3 have lied to the court regarding the circumstances of 20<sup>th</sup> December, 2023, counsel submit that it emerged during the trial that pw2 was indeed a brewer and seller of potent illicit brew known as changaa and Accused 1 testified that he and his wife [the deceased] had gone to pw2's home on the evening of 20<sup>th</sup> December, 2023 to drink Changaa since her changaa was potent compared to the ones sold in other Changaa dens.
43. That however, pw2, her daughter in law pw1 and pw3 her employee in order to protect the illicit business of pw2 lied to this court on what the deceased, Accused 1 and Accused 2 had gone to do at pw2's home on 20<sup>th</sup> December, 2024.
44. That it is important for this court to interrogate critically the evidence of Pw1, Pw2 and pw3 so as to determine their truthfulness, bearing in mind that both accused persons confirmed to this court that the three prosecution witnesses were involved in sale of illicit brew namely Changaa whereas the three witnesses had blatantly lied to court that pw2 Peris Akinyi Oriaro was engaged in the business of selling Mukimo [Githeri].
45. On the death of the deceased and its cause, counsel submit that the death of Mary Njeri was not disputed at all and it was confirmed by postmortem dated 27-12-2023 produced in court.
46. Counsel submit that what is in dispute is the cause of death and who caused it and according to the post mortem report, the cause of death was injury to the midbrain resulting from blunt force trauma consistent with assault and during cross-examination, Dr. Kamau [Pw9] could not completely rule out the possibility that the injuries sustained by the deceased could have been sustained as a result of a fall, bearing in mind that the deceased spent the better part of the evening prior to her partaking Changaa at the dent of Peris Akinyi Oriaro.
47. Further, considering the fact that no murder weapon was found at the scene and also no prosecution saw the deceased being killed, the cause of death alluded to in the Post mortem report is merely speculative and they urge this honourable court to treat it as such.
48. On whether the accused committed the unlawful act which caused the death of the deceased, counsel submit that none of the prosecution witnesses placed the 2<sup>nd</sup> accused person at or anywhere near the



scene of the crime and indeed, no one saw her near the scene where the body of the deceased was found on the morning of 21<sup>st</sup> December, 2023; further, no personal items of the 2<sup>nd</sup> accused and or DNA samples or fingerprints/footprints were found at the scene to implicate her in the murder of the deceased.

49. On whether there was malice aforethought, counsel submit that malice aforethought on the part of the 1<sup>st</sup> accused person was not established by the prosecution on the threshold of beyond reasonable doubt; that it was alleged by the prosecution witnesses Pw1, Pw2 and Pw3 that the 2<sup>nd</sup> accused person had allegedly paid the sum of Kshs 5,000/= to the 1<sup>st</sup> accused person to murder Jackline Awino Mbuya and that the deceased was aware of this plot but however, none of the prosecution witnesses saw the 2<sup>nd</sup> accused person paying the alleged sum of Ksh 5,000/= to the 1<sup>st</sup> accused person. That indeed, it was the prosecution case that the 1<sup>st</sup> accused person visited the changaa den of pw2 Peris Akinyi in the company of the deceased, where the 1<sup>st</sup> accused asked to be served Githeri worth 10/= and he was unable to pay for it and if indeed the 1<sup>st</sup> accused had been paid Ksh 5,000/= by the 2<sup>nd</sup> accused person just prior to the demise of the deceased, then he would not be begging for food/drink at pw2's home and/or ordering the same on credit.
50. On the issue of malice aforethought, counsel cited the case of Joseph Kimani Njau vs Republic [2014] eKLR, where the Court of Appeal in concurring with an earlier finding of that Court [but differently constituted] in Nzuki vs Republic [1993] KLR 171, held as follows:-

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

- i. The 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 bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of 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 the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. [See Hyman v Director of Public Prosecutions [1975] AC 55.]”

51. Counsel submits that malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. That the East African Court of Appeal explicated the circumstances under which malice aforethought can be inferred in the case of Republic v Tubere s/o Ochen [1945] 12 EACA 63. They further place reliance in the case of Republic v Francis Ochieng Nyambori [2018] KEHC 2043 [KLR] and in the locus classicus case of R v Kipkering arap Koske & Another [supra], the Court of Appeal cases of GMI v Republic [2013] eKLR, Musii Tulo v Republic [2014] eKLR among many others.
52. In conclusion, counsel submit that the prosecution has failed to prove the offence of murder against the 2<sup>nd</sup> accused and prayed that he be acquitted under section 210 of the Criminal Procedure Code.



## Analysis And Determination

53. In criminal cases, it is the duty of the prosecution to prove the case against an accused person beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say on that standard of proof:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

54. The ingredients for the offence of murder are from its definition under sections 203 of the [Penal Code](#) and were stated in the case of *Republic versus Andrew Omwenga* 2009 ECLR as follows:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission – there are therefore three ingredients of murder 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 the 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”.

55. In view of the above, I will consider the three ingredients as hereunder: -

### **(a) The death of the deceased**

56. The death of the deceased in this case is not in doubt. Postmortem examination was conducted on the body of the deceased by Dr. Philip Kamau who formed opinion that the cause of death was injury to the brain following assault on the head. He produced a postmortem report as exhibit before court.

### **(b) Whether the accused committed the unlawful act that led to the death of the deceased.**

57. From evidence adduced, no one saw the accused persons kill the deceased. The prosecution, therefore sought to rely on circumstantial evidence. For this court to base a conviction on circumstantial evidence, the prosecution must prove the following element as stated in *Abanga Alia Onyango Vs Republic* Criminal Appeal No. 32 of 1990: -

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

- i. The circumstances from which an inference of guilt is sought to be done must be cogently and firmly established.
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.



- 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 accused and no one else.

58. From evidence on record, Accused 1 and the deceased who was his wife were at pw2's home on 20<sup>th</sup> December, 2023 at around 7 P. Pw2 is the mother of Accused 2 and mother in law of Pw1. While in the home the 2<sup>nd</sup> Accused disagreed with the deceased after the deceased informed pw2 that her husband the 1<sup>st</sup> accused herein had been paid to kill her. Pw1 asked the deceased to tell her mother in-law pw2. Pw2 called her daughter Accused 2 and inquired whether the allegations were correct and what problem she had with her sister in-law pw1. From evidence adduced Accused 2 got annoyed with the deceased and threatened her. They left pw2's home and the next morning the deceased was found dead. That the 2<sup>nd</sup> Accused quarreled the deceased for airing out her issues and that her mother chased them from her compound saying that she did not want arguments; the next morning the deceased was found dead and 2<sup>nd</sup> Accused's son said Accused 2 had not returned home the previous day. Pw1 said Accused 1 informed him that that the 2<sup>nd</sup> Accused had purchased a panga for him to kill PW 1 where then accused 2 heard and came to where they were. That the 2<sup>nd</sup> accused confronted the deceased as to why she was exposing her and she chased them away. The next day she learnt that the 1<sup>st</sup> accused's wife had been killed and the 2<sup>nd</sup> accused had not gone back to her house.
59. PW 3 Naomi Nyamoita who worked for pw2 confirmed that on 20<sup>th</sup> December, 2023 at around 8p.m, the two accused persons and the deceased were at pw2's home at about 2 p.m and that she learnt for PW 1 that accused 1 had been tasked to kill her by Accused2 and the next morning she learnt that the deceased had been killed and that she was sent to check if Accused 2 was in her house but she did not find her.
60. The 2<sup>nd</sup> accused was last seen with the deceased. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Before doing so, the court must ask the following questions:-
  - i. Are the facts of this case compatible with the innocence of the accused?
  - ii. Are the facts capable of explanation upon other reasonable hypothesis than the guilt of appearance?
61. The Nigerian Case *Achie Vs State* [1993] In Nigerian case of *Ismeni Vs State* [2011] Kuktan JSC said of the doctrine.

“In a case of culpable homicide as in the present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before the death was responsible for his death and the accused is expected to provide an explanation of what happened.”
62. In the absence of any explanation by the defendant as to how the deceased met his death, the court can allow an inference that the defendant killed the deceased.
63. In this case, the evidence of PW 1, PW 2 and PW3 confirmed that the 2<sup>nd</sup> accused was the last person seen with the deceased alive. The 1<sup>st</sup> accused in his defence stated that he left the home of PW 2 leaving behind his wife and the Accused 2. He said that he went straight home and later went drinking with a friend and when he returned home, his daughter informed him that his wife the deceased herein not arrived. He slept and, in the morning, he went to drink only to learn of the death



of his wife from one Tukana man. He went to the scene and found the body of the deceased, reported the matter to the chief, went to mourn the deceased and started burial plans.

64. The evidence of 1<sup>st</sup> accused that he left the home of PW 2 leaving the deceased and the 2<sup>nd</sup> accused was corroborated by PW 1 who said the 1<sup>st</sup> accused left the home first. PW 9 the investigations officer stated that on 22<sup>nd</sup> December, 2023, they proceeded to scene and they were later shown the home of the 1<sup>st</sup> accused where they went to check and found the 1<sup>st</sup> accused at home sleeping. They interrogated him on what had happened but he only said the 2<sup>nd</sup> accused killed his wife. He said the 1<sup>st</sup> accused looked exhausted and shaken. PW 5 a uncle to the deceased stated that although there were differences earlier between the 1<sup>st</sup> accused and his wife [deceased], they had been resolved and they were living in harmony. From the above evidence, it is clear that the 2<sup>nd</sup> accused was last seen with the deceased and that they had disagreed. In respect to Accused, evidence adduced show that he left accused 2 with his wife and there is no proof of any disagreement or bad blood between him and his wife which could have motivated accused 1 to kill his wife the deceased herein.
65. The 2<sup>nd</sup> accused in her defence denied committing the offence on the alleged date stating that the prosecution witnesses framed her because of the differences between them. She said that she left to her husband's home that evening where she boarded a vehicle Eldama Ravine and that she was at her husband's home up until 1<sup>st</sup> February, 2024 when she went back and she was arrested on the same date. She confirmed that she was with the deceased on the 20<sup>th</sup> December, 2023. The conduct of the 2<sup>nd</sup> accused during and after the incident was a clear indication of one with a guilty mind. She went into hiding on the said night of 20<sup>th</sup> December, 2023 until the 1<sup>st</sup> February, 2024 a period of about one and half months. She did not go back to her house that night neither did she inform her mother pw2 that she will be away yet she had children left behind with pw2. PW 3 who went to check on the house the next morning confirmed that she was not in her house. Pw2 also said Accused 2's child went to inform her the morning after the incident that she did not return to her house. She did not return to her house after leaving the previous evening in company of the deceased. In view of the foregoing, I find that the 2<sup>nd</sup> accused participated in the killing of the deceased herein.

### **(c) Proof of Malice aforethought**

66. Malice aforethought is defined in Section 206 of the [Penal Code](#) in the following terms:-
- a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
  - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
67. The Court of Appeal in the case of Joseph Kimani Njau v Republic [2014] eKLR, held as follows on malice aforethought:-
- “ Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
- i) The 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 bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of 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 the one succumbed.....”

68. In *Republic vs Tebere s/o Ochen* [1945] 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
69. In the case of *John Mutuma Gatobu v Republic* [2015] eKLR the Court of Appeal stated:
- “Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal code.
- There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought.”
70. Malice aforethought can be inferred from the circumstances of the case. In *Ernest Asami Bwire Abanga alias Onyango v R* [CACRA No. 32 of 1990] the Court held:
- “The question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”
71. From evidence adduced, the deceased, her husband and Accused 2 were drinking buddies. They moved together from one drinking den to the other and even purchased alcohol for each other. Accused 2 was however angered by the deceased for revealing her ploy to kill her sister in-law pw1 whom they did not get along with. Even though it was alleged that Accused 2 had planned to kill pw2, in my view that was not the case with the deceased herein. Accused 2 was angered by the deceased who exposed her plan to kill pw1 and acted out of anger. From the time of the said exposure and the time of deceased’s death, there was no time to plan and in addition both accused 2 and the deceased were both drunk after drinking in different joints. From the foregoing find that malice aforethought has not been proved beyond reasonable doubt. I therefore find her guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.
72. In respect of accused 1 the prosecution did not prove beyond reasonable doubt that he caused the death of the deceased who was his wife.
73. Final Orders: -
1. Accused 1 is acquitted of the offence of murder under section 215 of the CPC.
  2. Accused 2 is hereby convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.



3. Right of appeal 14 days.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 8<sup>TH</sup> DAY OF MAY 2025.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

CA Elvis.

Ms. Kosgei for state.

Mr. Nyagaka for Accused1.

Mr. Bore for Accused 2.

Accused Present.

