



REPUBLIC OF KENYA



**Republic v Githinji (Criminal Case E026 of 2022)
[2024] KEHC 1112 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE E026 OF 2022
A. ONG'INJO, J
FEBRUARY 8, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

EMILY WAITHIRA GITHINJI ACCUSED

JUDGMENT

1. The accused Emily Waithira Githinji is charged with the offence of murder contrary to section 203 as read with section 204 of the [penal code](#).
2. Particulars are that Emily Waithira Githinji on 29th day of September 2022 at Alidina Jomvu Sub-County, withing Mombasa County murdered Peter Oloo Odhiambo.
3. The prosecution called 8 witnesses to support its case that the accused person committed the offence herein and she was placed on her defence.

Prosecution Case

4. The prosecution's case was that PW1, Milkah Awuor Ouko who was a neighbour to the accused and deceased heard the deceased crying at around 11.00pm and saying "Usiniuwe! Usiniuwe!" She said the deceased was talking to the accused who was his wife. PW1 said the accused wanted the deceased to leave as he was not paying rent. PW1 heard the accused threaten that she would call people to help her remove the deceased from the house if he refused to leave. That the deceased asked how he was going to see and yet he had been stabbed in the eye. PW1 said some three young men came after the accused made a phone call but they could not enter as the dog started barking.
5. That the accused made another phone call and another young man came and the deceased talked to him telling him the accused would do to him what she had done to the deceased. That when the said young man left, PW1 heard the deceased cry loudly. That when PW1 asked her husband to go and



- intervene he refused saying the neighbours had frequent fights. That when PW1 got out of the house and went to the back gate, she saw the accused get out with a blood stained knife. That when PW1 passed by the accused person's house, she saw the deceased lying down and there was a lot of blood.
6. That when PW1 saw accused holding a blood stained knife, she ran to the back gate and went to report to the landlady and her husband. She subsequently went to Mikindani police station to report and she was referred to Jomvu Police Station. She however went back to the plot and told the village elder to go and report the matter at Jomvu Police Station. That the police from Jomvu Police Station went to the plot and arrested the accused whereas they were instructed to take the deceased to Port Reitz hospital.
 7. PW1 said that the deceased person joined the accused at the plot when the elections were approaching and it is the accused who sent fare for him to come to Mombasa. She said the accused occupied a house at the plot 3 months prior to the incident. PW1 said the accused had the habit of beating her husband and PW1 had told her. She would report to the police. PW1 said she had no grudge with the accused. PW1 said the landlady had given the accused eviction notice because of frequent quarrels in the plot.
 8. PW3 Dr. Abdul Aziz Mohammed of Coast General Teaching & Referral Hospital produced Postmortem Report for the body of the deceased which was examined by Dr. Amal on 12th October 2022. Dr. Amal was of the opinion that death was caused by head injury and brain edema secondary to sharp trauma as well as hemorrhagic shock secondary to excessive bleeding.
 9. PW4, Wycliffe Ochieng Okeyo testified that on 29.09.2022 while he was on his way home from work at 10.00pm, he heard people talking at the plot where the deceased was staying. He said the accused used to sell alcohol and he decided to pass by to buy some alcohol. He said the accused person went to buy for him alcohol for Kshs. 100/= as she did not have any. That while at the accused person's place he heard the deceased cry and say "Emily nini umenifanyia". That PW4 then saw blood flowing from the deceased person's eye and he asked what was happening.
 10. PW4 said he suspected the accused and the deceased might have had a problem before he arrived. That he counselled them and left. The following day he learnt that the accused had stabbed her husband. PW4 said that the deceased was staying with the accused in Bangla Estate. He said that he and the deceased were trained together as Mechanics. PW4 said he reprimanded the accused for injuring the deceased on the eye. He said the deceased cried out while calling the deceased' name as having injured her.
 11. PW5 testified that he was a tenant in same plot as the accused and deceased and that on 29/09/2022 he witnessed a swelling on the forehead of the deceased and that the deceased asked him "Hii ni haki vile Emily amenifanyia?". He said that the accused and PW4 were seated at the verandah drinking and PW4 also asked the accused "mbona umemfanyia hivi mwenzako?" and that Emily replied "wachana na huyu". That PW4 reprimanded the accused and told her what she had done was wrong.
 12. That after the accused had opened the gate for PW4 to leave at midnight, she went back to the veranda where they started quarrelling. That while the deceased spoke in a dholuo, Emily spoke in kikuyu. That they entered the house and continued quarreling & insulting each other. That after sometime he heard the deceased say "Emily, Emily hii ni haki unanifanyia?" That the deceased then said he was going to report. That when the main gate was opened PW5 got out of his house and saw a trail of blood. PW4 said his landlord who was his neighbour got out and called the accused saying they might injure each other.
 13. PW5 said the landlord and Milkah PW1 left at 1.00am and as deceased remained seated on the beach he went back to his house. That when the landlord & Milkah returned, PW5 heard a knock at Emily's house and when Emily did not open, the door was kicked open. PW5 got out and found it was the



- police who had kicked the accused person's door open. That by the time Emily was removed from the house by police the deceased had lost consciousness. That accused told the deceased that she had been arrested and that he would find her at the station. That the accused was allowed to carry her baby. PW5 said that police told PW1 to arrange and take the deceased to hospital.
14. PW6, Stephen Otieno, the deceased person's cousin identified the body for postmortem before Dr. Amal examined the body and filled the post-mortem report form.
 15. PW7, Patrick Okwako Odhiambo, testified that Lucy, his late brother's daughter, called at 0430 hours and informed him the father was sick. He gave instructions that his brother should be taken to hospital by the accused but Lucy was hesitant. The following day at 9.00am, he received a phone call from his brother's colleague who told him the brother had been killed. That he proceeded to Aldina Police Post where he found the accused and the daughter Lucy. That when he went to Port Reitz Hospital he learnt that the brother died 30 minutes after arrival at the hospital. He said he observed a stab wounds on the deceased right eye and forehead. On 12.10.2022 he identified the body for postmortem.
 16. PW8, Sergeant Charles Munyao, was initially PW2 but was stood down. He said he was a police officer from Jomvu Police Station. He said that on 29.09.2022 he was at the station when at 4.30am he received a call from the OCS who instructed him to proceed to Aldina where a report of assault had been made. When he arrived at the scene he found the deceased herein seated outside his house. That the deceased had a stab wound on the head. They were informed that the suspect was inside the house whose door was bolted from outside. That they opened the door and arrested the accused herein as the deceased was taken to Port Reitz Hospital by neighbours.
 17. PW8 said that after escorting accused to police station the matter was taken over by DCI. PW8 said the house had been cleaned and the deceased body was wet and it appeared he had also been cleaned up. He said neighbours had locked the accused in the house and they identified her before she was arrested.
 18. PW9, P.C. Fredrick Okoth, of DCI Jomvu testified that a report of assault was made at the police station to the effect Emily Githinji had assaulted her husband known as Peter Oloo Odhiambo. That the victim of the assault was taken to Port Reitz Hospital but he died. He launched investigations as the suspect had already been arrested and detained at Jomvu Police Station. PW9 said they visited the scene and recovered a knife and piece of glass both of which were blood stained. PW9 produced the knife with brown handle as exhibit P1.
 19. That on 12th October 2022 Post mortem was done on the body of the deceased. PW9 also produced Government Analyst Report – Ex. P3. He said that analysis of the blood on the knife tested negative for human blood.

Defence Case

20. When accused was placed on defence accused gave sworn statement and said that on 29.09.2022 at 8.00 pm she was with her husband, the deceased herein in their house. He said they both used to drink. She said that on the material day she was with her husband and Wycliffe drinking from the verandah. That after Wycliffe left, the alcohol they were taking ran out and they decided to go and look for more.
21. The accused denied having inflicted injuries on her husband. She said Milkah who is their neighbour did not witness her assault the deceased. She said they did not have any differences with Saumu Uchi the landlady. She said that it was not true she had frequent quarrels and fights with the deceased. She said the deceased had gone to look for more alcohol and that she was arrested from inside the house. The accused claimed that while they were going to look for alcohol they met people who stopped them



and demanded they produce whatever they had and that they were beaten and the attackers produced something and used it to injure the deceased.

22. Accused said she got married to the accused when she was 14 years and they had been married for 14 years. The accused person said that they came to Mombasa so as to work and earn a living for their family. She said she was stressed as she had been told her children were suffering wherever they were. She said the court should consider that what happened to her husband was an accident and she had no way of preventing the attack on the deceased.

Analysis and Determination

23. In consideration of the evidence of 8 prosecution witnesses and in consideration of the sworn defence evidence, this court is to determine whether the ingredients of the offence of murder as provided for under section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

24. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’

25. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

Death of the deceased

26. There is no dispute as to the death of the deceased Peter Oloo Odhiambo.

Death was caused by an unlawful act or omission

27. The injuries inflicted on the deceased observed by Dr. Amal as frontal cut wound, multiple facial bruises, bruises on the anterior neck, chest and upper limbs, bruises on the upper tip of the shoulder, several bruises on the lower limbs, bruises on the occipital region, pale conjunctiva and the cause of death was established as head injury with brain edema secondary to sharp trauma as well as hemorrhagic shock secondary to excessive bleeding. The injuries were not self-inflicted and they were not accidental. It is no doubt therefore that the cause of death was through an unlawful act.

Participation of the accused in the commission of the alleged offence

28. PW1, a neighbor to the accused and the deceased said she heard the deceased crying “usiniue usiniue!” She also said she heard the accused tell the deceased to leave or she would call people to remove him from the house because he was not paying rent. She also said that she heard the deceased ask “umenidunga macho nitaona na wapi?” When she finally heard the deceased crying out loudly and she told the



husband that they should intervene and he refused, she got out and she saw the accused coming out of the house while holding a blood-stained knife. She then ran to go and report to the landlady. She also went to Mikindani Police Station that the accused was assaulting her husband and she was referred to Jomvu Police Station. She went back to the plot and went and told the Village Elder to go and report to Jomvu Police Station.

29. PW4 said that on the material night she passed by the deceased and the accused person's house as the accused used to sell alcohol and that the accused used to buy him alcohol for Kshs. 100 and she gave him some food. He said that while he was eating, he heard the deceased say "Emily umenifanyia nini". He then saw blood coming from the deceased person's eye and suspected that the accused had stabbed the deceased and he reprimanded her before he left.
30. PW5 also a tenant at the plot where the accused and the deceased resided testified that on the material night when he went out for a short call, he met the deceased who showed him a swelling on his forehead and said that Emily had caused the swelling on his forehead. He said that the accused, the deceased and PW4 were drinking at the verandah at that time. That when he had gone back to the house, he heard PW4 asking the accused "Mbona umemfanyia hivi mwenzako?" He said that after PW4 had left, the accused and the deceased entered the house and after some time, PW5 heard the deceased say "Emily, hii ni haki umenifanyia?" That he heard the deceased say he was going to report and the main gate was opened. PW5 also got out of his house and saw a trail of blood and he said it appeared the deceased was bleeding.
31. When police officers from Jomvu Police Station arrived at the scene, the accused was found inside the house where the deceased who was still alive was seated outside with a stab wound on the head. Sgt Charles Munyao said the house had been cleaned and the deceased person's body was wet and it appeared that he had also been cleaned up. The report made at Jomvu Police Station was to the effect that the accuse is the one who assaulted her husband.
32. Evidence of all the witnesses is proof that the accused person is the one who committed the unlawful act that caused the death of the deceased and her evidence that the deceased was attacked by robbers away from the house is challenged.

Malice aforethought

33. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

"Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony".



34. On the element of malice aforethought in respect to section 206 of the Penal Code, the court held as follows in the case of *Isaac Kimathi Kanuachobi -vs- R* (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

35. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where 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.”

36. The use of a knife to inflict the injuries shown in the postmortem report, the cleaning of the house and the deceased person’s body to conceal evidence, and the number of injuries inflicted on the deceased by the accused even after PW4 had reprimanded her is proof of the extent of malice on the part of the accused.

37. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted accordingly pursuant to Section 322(1) of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 8TH DAY OF FEBRUARY 2024.**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Ms. Nyarieda H/B for Ms. Memia Advocate for the Accused

Accused person present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

Ms. Nyarieda: We do not have previous records and she may be treated as a 1st offender.

Ms. Memia Advocate: I pray for a copy of judgment. We can take a date for mitigation.

Order: Mention on 26.2.2024 for Victim Impact Statement, pre-sentence report and mitigation.

HON. LADY JUSTICE A. ONG’INJO

JUDGE

8.2.2024

