



REPUBLIC OF KENYA



**Republic v Njogu (Criminal Case 14 of 2016)
[2024] KEHC 979 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 979 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 14 OF 2016
LM NJUGUNA, J
FEBRUARY 7, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

JOHN NGARE NJOGU ACCUSED

JUDGMENT

1. The accused person was charged with murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The particulars of the offence are that on 06th August 2016 at Makumbiri village Nembure within Embu County, the accused person, jointly with others not before court, murdered James Mukundi Njue. Upon arraignment, he pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing. The prosecution called 10 witnesses in support of its case.
2. PW1, Patrick Ndwiga Njagi, the area Assistant Chief of Gatunduri Location stated that on the day of the incident, one Mwaniki called to inform him that the deceased who was his relative, had been attacked by a mob. That he instructed him to take the victim to hospital through the police station. That at around 8pm that evening, the said Mwaniki called to inform him that the victim had been declared dead on arrival at the hospital and that he was on the way to the police station to report the death. He stated that the following day, he went to the scene in the company of the OCS Itabua Police Station and a village elder and then he recorded his statement with the police. That the accused is one of his constituents in the sub-location.
3. PW2, Gibson Njue Nyaga, the father of the deceased, stated that on the day of the incident, someone called him and told him to rush to Makumberi area and that his son was there. That he went with his brother and his wife and on the way, they found the accused beating the deceased with a *jembe* handle. That when he asked the accused what the deceased had done, he told him that the deceased was a thief and he had to finish him. That the people who had gathered at the scene pleaded with the accused to



- stop beating the deceased but he continued. That it was only until the crowd threatened to beat the accused that he stopped beating the deceased. He stated that he called for a vehicle and his brother-in-law Mwaniki hired a taxi for them.
4. That they went to Itabua Police Station where they were given a treatment note before proceeding to Embu Level 5 Hospital where the deceased was pronounced dead on arrival. That the body of the deceased was taken to Gakwegori Funeral Home where he identified it for purposes of postmortem on 11th August 2016. That he recorded his statement with the police. On cross-examination, he stated that the person who called told him that his son was being assaulted and it took him about 20 minutes to get to the scene which was along a footpath. That a crowd of about 20 people had gathered and were watching as the accused assaulted the deceased. That he did not know the name of the accused but later came to know that he was called Njogu.
 5. PW3, Jane Karimi, mother of the deceased stated that on the day of the incident, her sister Teresia Wandigi called her and informed her that the deceased was being assaulted. That she proceeded to the scene in the company of her brother Peterson Kinyanjui, and her husband. That at the scene they found Mwaniki her brother-in-law and the deceased lying on the ground being badly injured. That they took the deceased to hospital and he was pronounced dead on arrival.
 6. PW4, John Mwaniki stated that his mother Teresiah called to inform him that the deceased who was his nephew, was being assaulted. That he called PW1 who advised him to go and take the deceased to hospital. That when he arrived at the scene, he found the accused beating the deceased with something that he couldn't identify as it was getting dark. That he was able to identify the accused because of the moonlight. That he called for a taxi and the deceased's parents took him to Itabua Police Station before proceeding to Embu Level 5 Hospital where he was pronounced dead. On cross-examination, he stated that there was enough light to enable him identify the accused. That a crowd of about 20 people had gathered and were shouting the name of the accused as "John". That they were given a treatment note at the police station before proceeding to Embu Level 5 Hospital.
 7. PW5, Dr. Godfrey Njuki Njiru of Embu Level 5 Hospital intended to testify on behalf of Dr. Phylis who is his colleague working in a different department of the same hospital. His testimony was not recorded following an objection wherein the defense counsel stated that the examining doctor was not completely unavailable to testify. For this reason, he was stood down as a witness.
 8. PW6, Caroline Ntinyari Muriithi, cousin of the deceased stated that she was called by one Mugendi who told her that the deceased was being beaten. That she rushed to the scene where she found the accused holding a fork *jembe* handle which he used to beat the deceased on allegation that he had stolen the accused's mobile phones and gas cylinder. That she pleaded with him to stop beating the deceased and offered to pay for any stolen items but he refused. That the accused chased her away saying that she was the deceased's accomplice in theft. That she stayed at the scene for about 2 hours and the parents of the deceased also went to the scene.
 9. On cross-examination, she stated that when Mugendi called her, it was 6:30PM and she was taken to the scene by a motor cycle being ridden by her husband and they arrived at the scene at 6:35PM. That it was getting dark and there was a crowd of more than 30 people who were saying that the deceased was a thief and that he should be lynched. That she could not call the police or the chief because she did not have their contacts and she stood there waiting for the family of the deceased. That one Gathoni, who was part of the crowd kept threatening to lynch her as well.
 10. PW7, Kennedy Mugendi stated that on the day of the incident, he was on his way home from work when he found a crowd of people. That when he enquired, he was told that the deceased was being beaten by the accused. That he called PW2 to the scene. That he saw the accused beating the deceased



- on his head, hands and legs with a fork *jembe* handle. That PW2 called PW1 and they took the deceased to Embu Level 5 Hospital after they were given a P3 form at Itabua Police Station, but the deceased was pronounced dead on arrival. That he did not know the accused before that day and that nobody else beat the deceased.
11. On cross-examination, he stated that at the time of the incident, darkness was just setting in and that he was standing within the crowd, watching the accused beating the deceased but didn't do anything to stop him because he was afraid. That from the crowd, he could identify one Gathoni and PW6 and he talked to them. That when he arrived at the scene, a crowd had already gathered and he penetrated it to see what was happening and he saw the accused beating the deceased with a fork *jembe* handle. He stated that it was only the accused who beat up the deceased and not the mob. That the deceased was beaten on allegation of theft of mobile phones and a gas cylinder.
 12. PW8 Dr. Sheila Shavulimu, a psychiatrist at Embu Level 5 Hospital testified on behalf of Dr. Thuo who was unavailable. She stated that Dr. Thuo assessed the accused's mental state and concluded that he was mentally fit to stand trial. She produced the mental assessment report as an exhibit on behalf of the examining doctor, being familiar with his handwriting and signature.
 13. PW9, Dr. Phillis Muhonja of Embu Level 5 Hospital stated that she conducted postmortem on the body of the deceased and she prepared the postmortem report. She observed that the deceased had an injury on the right thumb, a bruise on the left wrist joint, abrasions on the lateral regions of the scapula on both sides, a bruise on the right eyelid, a bruise on the left mid-leg and hematoma on the left eye. That upon examination of the internal organs, she observed that there was blood in the lung cavity and the left lung had a contusion. That there were multiple abrasions and bruises on the scalp, an extensive abrasion on the occipital skull and a sub-dural hematoma.
 14. She formed the opinion that the cause of death was intra-cranial pressure due to massive sub-dural hematoma with blunt force contusion chest injury due to blunt force trauma. She produced the postmortem report as an exhibit. On cross-examination, she stated that the autopsy was carried out at Gakwegori Funeral Home upon request by the facility's administration and in the presence of the police. That it was possible that the deceased was beaten by many people.
 15. PW10 was Inspector Charles Emodo of Embu West DCI Office who was the investigating officer in the matter. He stated that the incident was reported and the case was assigned to him for investigations. That he went to the scene in the company of his colleagues and they found a crowd but the person who had been beaten was not there. That the crowd informed him that the accused and the deceased had a disagreement and the accused told him that the deceased had stolen some electronics from his house. That on the material day, the deceased had gone to his farm and was stealing sugarcane and when he chased him, the crowd beat the deceased.
 16. That the accused and his friends beat up the deceased and so they arrested him and took him to Itabua police Station. That the accused was escorted to Embu Level 5 Hospital for mental assessment and then he went to Gakwegori Funeral Home for the postmortem on the body of the deceased. That he did not recover the murder weapon and the accused person was charged with the offence of murder. On cross-examination, he stated that he could not remember how many people recorded their statements but they were secured. That it was the accused himself who told him that there was a grudge between him and the deceased.
 17. The prosecution closed its case and in its ruling the court found that the accused had a case to answer. The accused person was placed on his defense but he chose to remain silent and not call any witnesses, therefore closing the defense hearing.



18. The court directed the parties to file their written submissions but only the Republic through Prosecution complied.
19. The prosecution filed its written submissions in which they urged the court to consider the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR where the elements of murder were outlined as regards section 203 of the *Penal Code*. It stated that on the element of proof of death, the death and cause of death were ascertained by PW2 who was a direct witness of the incident and PW9 who conducted postmortem on the body of the deceased and produced the postmortem report and the death certificate. It relied on the cases of *Republic v. Stephen Sila Wambua* (2017) eKLR and *Guzambizi Wesonga v. Republic* (1948) 15 EACA 63 for the argument that Article 26(1) and (3) of the *Constitution* accords everyone the right to life and that there is no justifiable cause for the deceased's life to be taken away. On the issue of whether the accused person caused the death of the deceased, it was its argument that there was sufficient evidence from PW2, PW3 and PW4 to prove that indeed the accused was at the scene and he inflicted fatal injuries to the deceased.
20. On the element of malice aforethought, it relied on section 206 of the *Penal Code* and the case of *Joseph Kimani Njau v. Republic* (2014) eKLR and stated that malice aforethought was proved by the prosecution and that the accused was rightly charged with murder. That the evidence adduced by PW9 showed the cause of death was due to blunt force trauma caused by the accused person to the deceased. That since the accused remained silent when placed on his defense, it urged the court to determine in favour of the state.
21. The issue for determination is whether the offence of murder has been proved beyond reasonable doubt.
22. Article 26 of the *Constitution of Kenya* provides that a person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or written law. The accused person herein faces the charge of murder under sections 203 and 204 of the *Penal Code*. The prosecution bears the burden of proving beyond reasonable doubt, that the accused murdered the deceased. These provisions of the *Penal Code* provide the elements of the offence as follows:
 - “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
23. In the case of *Republic v W.O.O.* [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, as guided by the Court of Appeal in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR, as follows:
 - “For the offence of murder to be proved, there are three elements 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 that 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.”
24. On the first element of death and cause of death, PW9 produced the death certificate and the postmortem report. She recorded the injuries sustained by the deceased and formed the opinion that the cause of death was intra-cranial pressure due to massive sub-dural hematoma with blunt force contusion chest injury due to blunt force trauma. This evidence corroborates the testimonies of the



eyewitnesses who were PW2, PW4, PW6 and PW7 who stated that they saw the accused beating the deceased with a fork *jembe* handle.

25. On the element of the unlawful act which caused the death of the accused, the prosecution must prove beyond reasonable doubt that the accused was linked to the death of the deceased. PW2, PW4, PW6 and PW7 all stated when they arrived at the scene, they all saw the accused beating the deceased. PW4 when asked how he was able to identify the accused, stated that although darkness had started setting in, he could see the accused with the help of moonlight. PW6 also stated that she arrived at the scene at around 6:35PM and it was getting dark but the darkness had not set in completely and so she could see the accused. They all stated that they saw the accused beating the deceased with a fork *jembe* handle. That no one else in the crowd beat the deceased except the accused. This is sufficient evidence to place the accused person at the scene of the crime.
26. On the element of malice aforethought, malice aforethought is provided for under section 206 of the *Penal Code*. It can be inferred from different points within a case, for instance, the words or behavior of the accused before, during or after the crime and the weapons used, among others. In the case of *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held;

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic v Tubere 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. In the *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango v Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.”
27. PW10 stated that the accused person told him that he had a grudge with the deceased and that the deceased had stolen some electronics from his house and that on the day of the incident, he had taken some sugarcane stalks from his farm. PW6 testified that when she found the accused person beating the deceased, she tried to intervene and asked why he was beating him and the accused said that the deceased was a thief. PW2 also stated that the accused told him that the deceased was a thief and needed to be “finished”, and I take this to mean that the accused intended to murder the deceased. PW2 and PW3 stated that the deceased had injuries on the head among other parts of his body and had they found him lying on the ground. There is overwhelming evidence to show that the accused beat the deceased with a fork *jembe* handle even though PW10 stated that the murder weapon was not recovered. PW9 noted that the injuries were inflicted by a blunt object. In my view, this element has been proved beyond reasonable doubt.
28. From the evidence before me, I find that the prosecution has proved its case against the accused person beyond reasonable doubt. Therefore, I find the accused person guilty of the offence of murder contrary to Section 203 of the *Penal Code*, and I hereby convict him accordingly.
29. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 07TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

..... for the State

..... for the Accused person

