



**Republic v Ndwiga (Criminal Case 17 of 2020)  
[2024] KEHC 5713 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5713 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 17 OF 2020**

**LM NJUGUNA, J**

**MAY 22, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER NYAGA NDWIGA ..... 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 04<sup>th</sup> August 2020 at Gachutheri village of Kithimu location in Embu West Sub County within Embu County, the accused murdered Njeru Mukono. Upon arraignment, the accused pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing. The prosecution called 14 witnesses in support of its case.
2. PW1, Ndwiga Mukono, the father of the accused, stated that the deceased is his brother. That on the day of the incident, he was on the way home from getting fodder for his cattle when he found the accused and the deceased fighting over some nuts and miraa. That the accused was warning the deceased against stealing his nuts and miraa and threatened to beat him if he did not stop. That he left them arguing and soon after, a physical fight broke out and the deceased fell on a stone then the accused sat on him. That they were separated by a lady in the neighborhood and he took the deceased home where Salesio Kariuki arranged for transportation to hospital but the deceased died while on the way. He stated that he saw the accused and the deceased fighting and all along, the accused was warning the deceased to stop stealing his nuts and miraa from the farm. That the deceased habitually stole from the accused's farm.
3. On cross-examination, he stated that his son, the accused had mental issues since when he turned 18 years of age. That the farm where he picked nuts belonged to the deceased. That on the day of the incident, it is the deceased who started the fight. That he could not separate them because they were both very strong people but he called Muchangi, who was nearby, to help him separate them. He stated



- that the accused did not have a weapon and when he sat on the deceased, he (PW1) is the one who persuaded him to stand up. That when they were taking the deceased to hospital, they did not see any injuries on him.
4. PW2 was Justin Muchangi who stated that on the day of the incident, he was watering miraa in the company of PW1 who was cutting fodder for his cattle. That the deceased found the accused picking miraa and nuts from his farm and he threatened to beat him if he did not return the miraa he had picked. That shortly afterwards, the accused started beating the deceased and he hit him on the chest. That PW1 said that they should take the deceased home and find transportation to take him to hospital. That the accused and deceased were fighting from about 20 meters from where he was and he could see them clearly. He stated that when the deceased was taken away, he had injuries on his hand. On cross-examination, he stated that he had known the accused for 10 years and he never knew him to have a mental illness. That the accused was generally a quiet person and it surprised him to see the accused fighting with the deceased. He stated that it is the accused who first hit the deceased on his chest. That by the time he went to separate them, the accused had run away.
  5. PW3, Felista Muthoni stated that she was cultivating Mugo's farm while in the company of Lilian Wanyaga and Evangeline Kagendo. That Evangeline told her that there were people fighting about 1KM away from where they were. That she didn't see the people fighting but she called PW2 who was working near where they were fighting and asked him to go and separate them. That later, she heard that the deceased had died. On cross-examination, she stated that she knew both the accused and the deceased and that the accused was generally a peaceful person who did not involve himself in criminal activities.
  6. PW4, Lilian Wanyaga stated that on the day of the incident, she was working on Mugo's farm with Evangeline Kagendo and PW3 when Evangeline told them that some people were fighting at the deceased's farm. That when they checked, they saw the accused lying on top of the deceased and they requested PW2 to separate them after which the accused went away. That they were about 70 meters away from the scene and could not see what was happening clearly but she saw the accused. On cross-examination, she stated that she saw the accused lying on top of someone but she couldn't see the other person on whom he lay on. That she did not know what caused the death of the deceased.
  7. PW5 was Evangeline Kagendo who stated that she was working on Mugo's farm with PW3 and PW4 when she turned and saw 2 people fighting but because she was far, she was not able to identify the people. She stated that she does not know the accused and couldn't identify him in court.
  8. PW6, Salesio Kariuki stated that he heard distress calls from people saying that someone had been beaten to death. PW1 asked him to help him carry the deceased into a motor vehicle and he went to the scene where he found the deceased lying on a stone and he looked dead. That he did not see anyone else at the scene and the deceased was taken to hospital by one Francis Njeru. He stated that he did not know why the deceased was beaten but the accused was arrested in connection with the death of the deceased. On cross-examination, he stated that the accused is his elder brother and that there is no bad blood between them. That the accused was a calm person who interacted well with the deceased and on the day of the incident, people were saying that the deceased was harvesting macadamia nuts from the accused's land. He stated that when they found the deceased, he was blinking his eyes but he was not talking.
  9. PW7, Francis Njiru stated that he met PW6 who was looking for a vehicle to take the deceased to hospital and they found Salvio at the shopping center to help them. That they took the deceased, who was unconscious, to Tenri Hospital where they were told that he was already dead. He stated that the accused and the deceased lived in the same compound and that both of them had planted miraa and



- macadamia nuts. That people were saying that the accused had hit the deceased with a panga for stealing his macadamia nuts. That the accused was arrested by the police in connection with the incident. On cross-examination, he stated that the accused was his elder brother who has a mental issue and he always bother people. That the deceased used to pick the accused's miraa habitually. That when the incident occurred he was not around to witness it but the accused was in his house.
10. PW8 was Dominic Savio Njiru stated that PW6 ran to him to ask if he could take the deceased to hospital since it was an emergency. That he went to the home of the deceased and people put him in the car and he went with Njiru to Tenri Hospital which was the nearest. That the deceased seemed like he was in bad shape and when they arrived at the hospital, the medical officers told them to go to the police station first. He stated that when they went to the police station, they reported the matter but they also consulted at a public dispensary near the police station and the officers told them that the deceased was not alive. That they went home to pick the deceased's father before heading to Embu Level 5 Hospital mortuary where they left the body of the deceased. That they went back to Githimu Police Station and the police asked to visit the scene and they processed it. That the accused was arrested at the homestead.
  11. On cross-examination, he stated that he saw other people at the homestead that day but he did not recall who they were. That he did not witness the scuffle but what he stated is what he heard from the people who witnessed the incident. He stated that he had known the accused for about 40 years and he was not violent. That he only helped take the deceased to hospital and that the deceased was not bleeding when they took him to hospital. That he couldn't tell whether or not the deceased was alive when they put him in his car.
  12. PW9 was Fenanzio Ileri Ndwiga who is a brother of the deceased. He stated that on 08<sup>th</sup> August, 2020, he was informed by PW1 that the deceased had been taken to hospital but he had died and was taken to the mortuary at Embu Level 5 Hospital. On cross-examination, he stated that he knows that the accused has been charged with murder but he did not witness the incident.
  13. PW10 was Cpl. Joshua Toroitich of Githimu Police Station, who stated that on the day of the incident at around 1PM, he perused the OB and found that the death had been reported and the body of the deceased had been taken to Embu Level 5 Hospital. That he visited the scene in the company of his colleague and they were informed by members of the community and the family that the accused and the deceased fought near a macadamia tree and the deceased fell. That they sought the help of PW8 to take the deceased to hospital. That in the course of their investigations, they found the deceased's belt which the DCI officers took. That the accused was arrested in connection with the death of the deceased. On cross-examination, he stated that he was the investigating officer. That at the scene, there was only one macadamia tree. That the waist belt was recovered but it had nothing to do with the death of the deceased. That he interviewed the eye witnesses to the incident as part of his investigations.
  14. PW11, Dr. Rosemary Kamau, a pathologist at Embu Level 5 Hospital produced the postmortem report dated 08<sup>th</sup> August 2020, authored by Dr. Njiru. The report showed that the deceased had a fracture on the left limb and was bleeding from the nose and ears. That there was a fracture on the skull and on the brain, there was cerebral hematoma. He formed the opinion that the cause of death was cardiopulmonary arrest secondary to head injury after a fight. On cross-examination, she stated that the cause of death was due to blunt force caused by a heavy object like a stone or a jembe. That there was a left humerus upper fracture.
  15. PW12 was Cpl. David Nabea, formerly of Githimu Police Station stated that PW1, PW6 and PW7 went to the police station to report that the deceased had gone to the accused person's farm to pick macadamia nuts but he was stopped by the accused and a fight broke out. That they took him to hospital but he died while on the way. On cross-examination, he stated that he accompanied PW10 to



- the scene where they arrested the accused as a suspect. That they did not find anything at the scene and that the investigations were taken over by PC Kaluma.
16. PW13 was Dr. Sheila Shavulimo of Embu Level 5 Hospital who stated that she carried out a mental assessment on the accused on 03<sup>rd</sup> August 2022. That the accused exhibited signs of mental illness despite being on treatment. That owing to his mental illness, it was likely that he would not fully recover his cognitive function to be able to fully understand the charges brought against him. It was her recommendation in the mental assessment report, that the court exercises its discretion in continuing with the trial. She produced the mental assessment report that she authored.
  17. PW14 was PC Christopher Karumba of DCI Embu West who stated that the murder incident was reported and he accompanied PW10 and PW12 to the scene. That the deceased reportedly died on the way to hospital and his body was taken to Embu Level 5 Hospital. That from the statements by the witnesses, it was established that the accused was involved in the death of the deceased and the facts were reaffirmed to him through the testimonies. That when the body of the deceased was taken to Embu Level 5 Hospital, Dr. Njiru conducted the postmortem on it. It was his testimony that he escorted the accused to Chuka Level 5 Hospital where a mental assessment was conducted by Dr. Mbundi who ascertained that the deceased was not fit to stand trial. That another mental assessment was done by PW13 who found the accused fit to plead.
  18. He stated that the scene was not processed by scenes of crime personnel because the body of the deceased had been removed from the scene. On cross-examination, he stated that when PW10 and PW12 interviewed the accused, he seemed like he was under the influence of drugs and the family members told them that the accused was involved in taking drugs. He stated that the accused did not seem like someone who had a mental illness but PW1 disclosed that the accused was continually using bhang. That the accused was charged with the offence only after investigations were completed.
  19. After the close of the prosecution's case, the court found that the accused had a case to answer and he was placed on his defense.
  20. DW1, the accused, stated that he was charged because he broke someone's hand but the person was treated and has a cast on his hand. That the person got well and he is back home. On cross-examination, he stated that he has never been treated for a mental illness but was taking medication at the time of committing the offence and afterwards. He stated that he does not know why he takes medication.
  21. At the close of the defense case, the court directed the parties to file their written submissions but only the accused complied. The state indicated that it would not wish to file written submissions.
  22. The accused person, in his submissions, relied on the case of *Woolmington v. DPP* (1935) AC 462 in which the standard of proof was set. It was his case that the burden of proof lay on the prosecution to prove the offence as was held in the case of *R. v. Mohammed Kokane & Others* (2014) eKLR. That the prosecution failed to prove malice aforethought since the accused lacked capacity to comprehend or pre-arrange ideas as he suffers from a mental illness. That PW13 stated that the accused was unlikely to regain his cognitive function despite the fact that he is on treatment.
  23. He relied on the definition of mental illness according to the *Blacks Law Dictionary* and the case of *Ephantus Karanja Wangari v. Republic* (2016) eKLR. That the postmortem report produced by PW11 stated that the deceased had a history of spinal injury and so it is not the accused who caused his death. That PW3, PW4 and PW5 did not actually see the accused beating the deceased because they were not nearby. That owing to the accused person's mental illness, he should be found guilty but insane and be sentenced to 3 years probation.



24. The issue for determination is whether the offence of murder has been proved beyond reasonable doubt.
25. 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.”
26. 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 vs 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.”
27. On the first element of death and cause of death, PW11 produced a postmortem report authored by Dr. Njiru which detailed the cause of death as cardiopulmonary arrest secondary to head injury. She stated that it is likely that the injury was caused by blunt force caused by a heavy object like a stone or a jembe.
28. As to whether the accused caused the death of the deceased, PW1 testified that a brawl ensued between the deceased and the accused and in the process, the deceased fell on a stone. That they were fighting because the deceased was stealing the accused person’s miraa and macadamia nuts and wouldn’t return them when asked to do so. That the farm where the incident happened belonged to the deceased and PW7 testified that both of them had planted macadamia and miraa trees. That after the deceased had fallen down, the accused sat on him and PW1 asked him to get off and he heeded.
29. PW2 stated that by the time he arrived at the scene to separate the fighting parties, the deceased was already on the ground and the accused had gone away. PW3 stated that she was working at a nearby farm when PW5 alerted them of an ongoing fight. She stated that she asked PW2 to go and separate them because he was nearer the scene. That she saw the accused hitting the deceased on the chest. PW4 stated that when PW5 alerted them about the brawl, she saw the accused lying on top of the deceased. PW5 stated that she saw 2 people fighting but she did not know who they were and could not identify the accused in court. All this evidence considered, placed the accused person at the scene assaulting the deceased right before he died.
30. On the element of malice aforethought, it 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. However, in this case, this guilty mind of the accused is subject to the testimony of PW13, who carried out a mental assessment on the accused.



31. In this context, there is a rebuttable presumption of soundness of mind. Section 11 of the [Penal Code](#) provides that:
- “Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved.”
32. This presumption is rebutted by the testimony of PW13 who testified that the accused showed signs of mental illness and that even though he is on treatment, it is unlikely that he will regain his cognitive function. She recommended that the court exercises its discretion in proceeding with the trial. Section 12 of the [penal code](#) provides:
- “A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that Act or omission.”
33. The Court of Appeal in the case of [Leonard Mwangemi Munyasia v Republic](#) [2015] eKLR held that;
- “if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the [Penal Code](#) he could not be held criminally responsible for the murder of the deceased. Both Section 12 aforesaid and the M/c Naughten Rules recognise that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to the law. The test is strictly on the time when the offence was committed and no other.”
34. PW1 and PW7 stated that the accused had a mental illness and that he usually bothered people. In his defense, the accused stated that he takes medication but he did not know what it is for. In the mental assessment report by PW13, the conclusions were that “...on account of the chronicity of the illness, it is unlikely that he will regain some of his cognitive function to fully understand the gravity of charges...”. In my view, the accused, at the time of the incident, had a state of mind that was incapable of understanding what he was doing or of knowing that he ought not to do the act which caused the death of the deceased.
35. From the evidence before the court, I find that the crime was indeed committed but the accused, at the time of committing the offence, was suffering from a mental illness.
36. Accordingly, I make a special finding under Section 166 (1) of the [Criminal Procedure Code](#) to the effect that the accused is guilty of murder contrary to Section 203 of the [Penal Code](#), but was insane at the time he committed the offence. Therefore, I hereby enter a special finding of guilty but insane.
37. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the State



.....for Accused Person

