



REPUBLIC OF KENYA



**Republic v Nyaga (Criminal Case E019 of 2022)
[2024] KEHC 5712 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E019 OF 2022**

LM NJUGUNA, J

MAY 22, 2024

BETWEEN

REPUBLIC PROSECUTION

AND

STEPHEN MUGO NYAGA ACCUSED

JUDGMENT

1. The accused 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 29th September 2022 at Kiritiri, within Mbeere South Sub-county in Embu County, the accused murdered James Ngari Gitumba. The accused person pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. PW1, Simon Ndwiga Ngari stated that the deceased is his father. That on the day of the incident, he was preparing a nursery for miraa seedlings when he heard his father telling someone “*toka kwa shamba langu na usiweke beacons kwa shamba langu*” (get out of my land and do not put beacons on it). That he was about 200 meters from the deceased and when he went to check who the deceased was talking to, he found the accused and his farmhand. That he told him to leave the deceased’s land as he had instructed. The accused had a hammer, a tape measure and a panga. That the accused had agreed not to trespass onto the deceased’s land after they entered an agreement in the presence of the DCI officers since the acreage had been determined.
3. That the deceased pushed one of the posts that had been placed by the accused and the accused took a stone and hit the deceased who then fell down. He stated that the accused said that he would take the remaining acre of land since it belonged to him, and then he walked away. That his mother was near the scene when the incident happened and the matter was reported at Kiritiri Police Station. That the body of the deceased was taken to the mortuary. On cross-examination, he stated that the deceased was between 62-63 years old. That the accused was fencing the deceased’s land but he and the deceased were



- trying to stop him since they had agreed that the land belonged to the deceased. That the accused did not respond when they told him to stop fencing the land and that he took a stone and hit the deceased.
4. He denied that the deceased slipped and fell while pushing the fencing post and stated that after the accused had hit the deceased with a stone, PW1 told him that he had killed the deceased and that he will report the matter to the police. He stated that he attended the post mortem exercise and he also recorded his statement with the police. That the deceased was hit with a stone on the head and not the chest.
 5. PW2, Joyce Ndegi Ngari, wife of the deceased, stated that on the day of the incident, she was in the shamba with the deceased who had gone to get fodder for the cows and they saw the accused putting up posts on their land. That the deceased went back to the shamba to check what the accused was upto since he did not have permission to enter the land. That the deceased pushed the posts and told him not to fix them but the accused picked a stone and hit him to his death. She identified the stone in court. She testified that the incident was reported at Kiritiri Police Station and the body of the deceased was taken to Embu Level 5 Hospital. That thereafter, the accused went missing but he was arrested 2 months after the incident. On cross-examination, she stated that by the time she was arriving at the scene, the posts had already been uprooted and she saw the accused hitting the deceased with a stone. That despite the fact that the land is rocky, the deceased did not just fall, he was hit with a stone.
 6. PW3 was Dr. Joseph Thuo, a psychiatrist, who stated that he conducted a mental examination on the accused and found him fit to plead. He produced the mental assessment report dated 16th November 2022.
 7. PW4 was Harrison Nthiga Mbiti, a nurse, stated that the accused and the deceased were his neighbours. That on the day of the incident, he was asleep at around 4PM when he heard distress calls from PW2 who was saying that the deceased had been killed. That he went to the scene where he found the deceased lying on the ground and PW1 and PW22 were there. They told him what had happened being that the accused had hit the deceased with a stone on the head.
 8. That he checked the hand and neck of the deceased to see if there was a pulse but the deceased had already died. That the accused ran away from the area and they reported the matter to the police. He stated that even though his statement does not indicate that the deceased was hit with a stone on the head, that was the truth. That he identified the body of the deceased at the postmortem which was conducted on 03rd October 2022 and it showed that the deceased died because of a head injury.
 9. PW5, Florence Karimi Nthiga, granddaughter of the deceased, stated that she was at home when PW1's wife went to tell her that PW2 was calling out in distress. That they went to check and found PW2 holding the deceased's head as he was lying on the ground and PW2 told them "*kile Mugo alikuwa anatutafutia tumepata, Ngari ametuacha*" (whatever Mugo intended for us has come to pass, Ngari has left us). That she saw the accused and another person that she did not know, leaving the scene. That PW1 told them that the deceased had asked the accused why he was taking his land and that the accused hit him with a stone. The matter was reported at Kiritiri Police Station and she accompanied PW1 to go and file the report.
 10. PW6 was Dr. Rosemary Wangari, a pathologist at Embu Level 5 Hospital, who conducted an autopsy on the body of the deceased. She stated that there was blood coming out of both nostrils of the deceased and there was hematoma on the skull but no fractures. There was also hematoma and signs of a swollen brain. She formed the opinion that the cause of death was head injury due to blunt force trauma. On cross-examination, she stated that the body of the deceased was identified by PW1 and PW4. That the deceased also had age related arteriosclerosis but it had nothing to do with his death.



11. PW7 was Inspector Leonard Munga of DCI Mbeere North who stated that a report of a murder was forwarded to his office from Kiritiri Police Station for investigations. That the police had responded to the distress call and they took the body to Embu Level 5 Hospital mortuary and referred the matter to them. That he visited the scene where he found the stone that was used to assault the deceased, which they kept as an exhibit and the accused was arrested in connection with the death.
12. On cross-examination, he stated that the stone was near the fencing poles. That the photographs were taken by officers from Kiritiri Police Station and that there were other rocks in the area but they were huge and the stone that killed the deceased was identified to them by PW1. Some poles had been erected but some were lying on the ground but there was no cement at the scene. That the initial statements show that the deceased was hit on the chest but the witnesses testified that he was hit on the head, this being an inadvertent mistake.
13. The prosecution closed its case and the court found that the accused had a case to answer. He was placed on his defense.
14. DW1, the accused, stated that on the day of the incident, he was fencing his land when the deceased and PW1 tried to stop him and they removed the fencing poles. That PW1 told him that if he did not stop, he would kill him like he killed one Kamandira. That the deceased tried to uproot a pole but he slipped and fell on a stone since the place was rocky. That PW1 told him that he would tell the police that he killed the deceased and he reported this threat at Siakago Police Station under OB No. 23/39/09/2022.
15. That as he was heading home from the police station, his wife called to inform him that some people were waiting to kill him and they were from a group called *mukuki* and the deceased's family. That he returned to the police station and he was advised not to go home, so he went to his other farm where he stayed for 6 days before he was arrested for the offence. On cross-examination, he stated that the deceased fell while trying to pull down one of the poles. He denied that he did not report the incident to the police to cover up his own offence.
16. At the close of the prosecution's case, the court directed parties to file their written submissions and they both complied.
17. The accused submitted that the prosecution had failed to meet the standard of proof in this case as was stated in the case of *Republic v. Savi Musingila* (2018) eKLR where the court cited the case of *Woolmington v. DPP* (1935) AC 462. That the crime scene has a lot of boulders and that there is no evidence showing that he killed the deceased, who according to him, fell on the rocks. That in fact, PW7 did not rule out the fact that the deceased fell. He pointed out the fact that there was inconsistency as to the details of injuries as stated in the statement and in court. That the statements by PW1 shows that the deceased was hit on the chest but in court he stated that the deceased was hit on his head. He argued that PW1 was coached to testify the way he did. That if the deceased was hit on the chest but the postmortem shows that he died because of a head injury, it is not possible that the accused caused his death. He urged the court to treat the testimonies of PW1, PW2 and PW5 as unreliable. Reliance was placed on the case of *Pius Arap Maina v. Republic* (2013) eKLR and he urged the court to focus on the evidentiary gap in its findings. He stated that the evidence presented was not sufficient to sustain a conviction.
18. The prosecution submitted relying on the case of *Anthony Ndegwa Ngari v. Republic* (2014) eKLR and the provisions of section 203 of the *Penal Code*. It also relied on Article 26 of the *Constitution* on the right to life and the case of *Republic v. Stephen Sila Wambua* (2017) eKLR. It was its argument that the testimony of PW1, PW2, PW4 and PW5 placed the accused person at the scene committing the



- offence. That malice aforethought as provided for under section 206 of the [Penal Code](#) was established through evidence. It also relied on the case of [Joseph Kimani Njau v. Republic](#) (2014) eKLR.
19. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
20. 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 as read together with 204 of the [Penal Code](#). It is upon the prosecution to prove beyond reasonable doubt, that the accused murdered the deceased. Section 203 of the [Penal Code](#) provides:
- “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
21. 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.”
22. The first element is death and cause of death. PW6 conducted postmortem on the body of the deceased and she stated that there was blood coming out of both nostrils of the deceased and there was hematoma on the skull but no fractures. There was also hematoma and signs of a swollen brain. She formed the opinion that the cause of death was head injury due to blunt force trauma. PW1 stated that the accused hit the deceased with a stone. In his original statement to the police, PW1 stated that the deceased was hit on the chest but in court he said the deceased was hit on the head. PW7 stated that the handwritten statement by PW1 shows that the accused hit the deceased on the chest but the typed statement stated that the accused hit the deceased on the head. He also stated that it is PW1 who identified the stone used.
23. Despite this inconsistency, the facts of the matter remain unshaken since PW2 saw the accused hitting the deceased with a stone on the head. PW3 and PW4 found the deceased at the scene, lying down and they were informed by PW1 and PW2 that it was the accused who had hit him. These testimonies placed the accused person at the scene of the crime, and prove that he indeed hit the deceased with a stone on the head, thus causing him fatal injuries. Further, in as much as the scene was rocky, the evidence shows that the accused hit the deceased with a rock and it is not possible that he fell on a rock.
24. The prosecution also has to prove that the accused person bore malice aforethought or that he intended to murder the deceased. Malice aforethought is defined and well explained under section 206 of the [Penal Code](#) as follows:
- “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—



- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

25. Further, the court in *Republic v Njeru & 3 others* (Criminal Case 2 of 2019) [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR stated as follows on the prove of malice aforethought; -

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue: It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick....”

26. According to the testimony of PW1, PW2 and PW7, there was a long-standing dispute between the accused and the deceased over land. PW1 and PW2 stated that the accused was attempting to fence the deceased’s land using poles along a boundary line that fell within the deceased’s portion of land. The deceased was stopping the accused from fencing his land and he started pushing the fencing poles. DW1 stated that the deceased slipped and fell to his death in the process of removing the fencing poles. PW1 stated that after the accused hit the deceased with a stone, he said that he would also claim the remaining portion of the land belonging to the deceased. There is sufficient proof of malice aforethought on the part of the accused.
27. In the end, having considered the evidence before the court and the relevant laws, it is my finding that the prosecution has proved the offence of murder beyond reasonable doubt. The accused is therefore found guilty of the offence of murder contrary to section 203 of the *Penal Code* and is hereby convicted accordingly.
28. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

.....for the State

.....for Accused Person

