



**Republic v Gichovi (Criminal Case E012 of 2022)  
[2024] KEHC 5017 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E012 OF 2022**

**LM NJUGUNA, J**

**MAY 15, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MOSES MUNYI GICHOVI ..... 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 11<sup>th</sup> August 2022 at Nthambo village Kithungururu location in Embu North Sub-county within Embu County, the accused person murdered Benson Mwaniki Gichovi. The accused person pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. PW1, Salome Rwamba, mother of both the accused and the deceased, stated that on the day of the incident, she was in her house sleeping when she heard movements in the kitchen which is outside the house. It was the accused person who had come in and that the deceased had gotten home earlier but he had already gone to his house. She stated that when the accused went to the kitchen, he put food on the jiko. That the deceased called her and told her that his food for the dogs was missing and at the time, the accused person was still in the kitchen. That the deceased went to the kitchen to confront the accused about the food and a fight ensued and she heard commotion and screaming in the kitchen.
3. It was her testimony that when she went to ask them what was happening, she found the deceased pushing the accused towards the door and the deceased seemed like he slipped and fell since it was muddy. That her nephew, one Mugendi, came to the scene and called out the deceased to ask what had happened. That they examined the body of the deceased and they saw blood stains and a small stab wound on left side of his stomach but the wound was not bleeding. That she called her brother-in-law, Nderi who accompanied her to the scene and they reported the matter to the area chief. That they did not take the deceased to hospital because they were waiting for the authorities to go to the scene. She



- stated that the police arrived at the scene the following morning at 5.00 a.m. That she did not know where the accused went to, that night and that they found a knife next to the body of the deceased, which they gave to the police.
4. On cross examination, she stated that she did not know if it was the accused who had put food on the jiko since the deceased was in the same kitchen earlier and that he prepared his food earlier during the day and not at night. That from the commotion, she heard the deceased telling the accused to give him food. She stated that in her statement to the police, she said that she saw the deceased pushing the accused. That Mugendi arrived after the deceased had already fallen on the ground. That between the time of the incident and when the police arrived at 5.00 a.m the body of the deceased was inside the kitchen and that all that time she stood at the door of the kitchen.
  5. PW2, John Mugendi, a cousin of the accused and the deceased, testified that on the day of the incident at around midnight, he heard distress calls from the PW1's house which is about 200 meters from his house. That he woke up and went towards PW1's house and he saw the deceased lying down, bleeding from a stab wound on the left side of the chest. Upon asking PW1 what had happened, she told him that the accused and the deceased had fought and the accused stabbed the deceased with a knife. She showed him the knife that was used and it had a white handle. That he noticed that the deceased did not have a pulse but he did not tell PW1 that he was dead but they lifted the body from outside because it was raining and placed it inside the kitchen.
  6. He stated that he went to a nearby bar to look for the deceased's brother known as Cyrus Mugambi and informed him of what had happened. That he went back home and people started gathering at the scene. It was his testimony that Emilio Nderi called the Area Chief who could not go to the scene immediately but he arrived with the police the next morning. On cross-examination, he stated that the distress calls he heard were from PW1. That he did not see the accused person at the scene. That he saw a stab wound on the body of the deceased but he did not know who inflicted it.
  7. PW3, Cyrus Gichovi, brother of the accused and the deceased, stated that on the day of the incident, he arrived home at around 11PM and as he was bidding his mother goodnight, she told him that the deceased had been stabbed by the accused and that he was lying in the kitchen. That he went to the kitchen to check and he noted that the eyes of the deceased were blue and he had been stabbed on the left side of the chest. That they agreed with PW1 to go to Emilio Nderi's place to tell him what had happened who accompanied them back to the scene.
  8. He stated that Emilio Nderi who is his uncle sent him to call Patrick Kinyua, Emilio Nderi's son who called a village elder, who called the police. That the police and area chief arrived at the scene the following day in the morning and removed the body to the mortuary, accompanied by PW1, PW2 and himself. That the accused and the deceased lived peacefully with each other and there was no bad blood between them. On cross-examination, he stated that when he first saw the deceased, he did not know that he was dead since he was not bleeding. That after they went to Emilio Nderi's house and returned, they found the deceased dead.
  9. PW4, Dr. Joseph Thuo of Embu Level 5 Hospital stated that he conducted a mental assessment on the accused and he found that he was unfit to stand trial. That he prescribed medication for him and then recommended another assessment within 2 months. That on 02<sup>nd</sup> November 2022, he was brought for another examination where Dr. Sheila Shavulimo found that the accused still had signs of mental illness but he was fit to stand trial. He produced the report dated 24<sup>th</sup> August 2022 as exhibit but Mr. Munene Counsel for the accused objected to the production of the report dated the 2<sup>nd</sup> November, 2022 as PW4 was not the maker.



10. PW5 was Henry Kiptoo Sang from government chemist, who stated that his office in Nairobi received the deceased's blood in a vacutainer together with a knife in a Khaki envelop from PC Stanley Kiprono of DCI Embu North. The items were accompanied by a memo requesting for examination of the blood sample in the vacutainer and on the knife to find out if they are of the same origin. That he generated DNA profiles from the blood in the vacutainer and from the blood stain on the knife and concluded that the profiles matched. He prepared a report on his findings, which he produced as evidence.
11. PW6, Dr. Rosemary Wangari Kamau of Embu Level 5 Hospital conducted post mortem on the body of the deceased. She observed that the body had a penetrating wound measuring 2cm by 1cm on the left side of the chest between the 5<sup>th</sup> and 6<sup>th</sup> ribs. There was approximately 700ml blood surrounding the heart. She stated that there was a penetrating wound measuring 2cm by 1cm on the left ventricle. She formed the opinion that the cause of death was hypovolemic shock due to penetrating injury to the heart. She produced the postmortem report as evidence. She also stated that she collected blood samples of the deceased's blood for further analysis.
12. PW7, Stanley Kiprono of DCI Embu North, stated that on 11<sup>th</sup> August 2022, he received a phone call at around 8AM from CI Magwana Otmar, informing him of the incident and telling him to accompany police officers from Manyatta Police Station to the scene. That upon arrival at the scene, they found the Chief, her assistant and other people including PW1. That in the kitchen, they found the body of the deceased lying in a pool of blood and PW1 gave them a knife which was the alleged murder weapon. He stated that PW1 told them that the deceased was demanding the accused person's food so that he could feed it to the dogs and they fought about it before the accused stabbed the deceased with a kitchen knife.
13. That they removed the body of the deceased and took it to Embu Level 5 Hospital mortuary. That on the same day, he received a call from the area chief informing him that the accused, who was the main suspect, had been apprehended at Gakwegori market and was taken to Manyatta Police Station where he was held pending investigations. That he escorted the accused for mental assessment twice before he was found fit to stand trial. On cross-examination, he stated that he is the only one who handled the knife when it was given to him by PW1 and that he is the one who presented it to government chemist for analysis.
14. After the close of the prosecution's case, the court found that the accused person had a case to answer and he was placed on his defense.
15. DW1, the accused person, stated that on the day of the incident, he returned home from work and he went to the kitchen to prepare food. That the deceased, who was drunk, found him lighting fire and he started insulting him. That the deceased was trying to chase him away from the house and poured his food. That they began fighting and he pushed him to the ground outside the house and left him there. That he spent the night elsewhere and when he returned home the following day, he heard that his brother had died. That when he was cooking, he did not have a knife because his vegetables had been chopped at the market. That when he arrived at home, he found his uncle who told him to run away but he was arrested the same day. He stated that he did not know what caused the death of the deceased.
16. After the close of the defense case, the parties opted not to file any written submissions.
17. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
18. 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.”

19. 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.”

20. The first element is death and cause of death. The testimony of PW6 was that when she examined the body of the deceased, it had a penetrating wound measuring 2cm by 1cm on the left side of the chest between the 5<sup>th</sup> and 6<sup>th</sup> ribs. That there was approximately 700ml of blood surrounding the heart and the left ventricle was punctured. She formed the opinion that the cause of death was hypovolemic shock due to penetrating injury to the heart. On the night of the incident, PW1 narrated that the accused person went home sometime after the deceased had already gone to bed. That he started preparing food but soon afterwards, the deceased started claiming that the accused had taken the food he had kept for the dogs.
21. She stated that she heard commotion in the kitchen and then someone screamed. That when she went to check, she found the deceased pushing the accused and then he fell down. That she thought the deceased had slipped and fallen because it was muddy but when PW2 came, they saw that he had a stab wound on the left side of his chest. PW1 stated that after the incident, the accused person left and she did not know where he went to spend the night. PW3 stated that he was informed by PW1 that the deceased was lying in the kitchen and that he had been stabbed by the accused.
22. PW3 went to see for himself and found the deceased lying in the kitchen and later on, they found out that he had died. PW2 and PW3 did not find the accused at the scene. In his defence, DW1 stated that he went home and the deceased engaged him in a fight, claiming to be given the food he was cooking. He stated that the deceased was insulting him and trying to chase him from the house and that is when a fight broke out and he wrestled the deceased, who was drunk, to the ground and then he left. That he did not handle a knife on that night since his vegetables had already been chopped at the market.
23. From the evidence of PW1 and DW1, the accused was indeed at the scene of the crime and both testimonies confirm that there was an altercation between the accused and the deceased. PW1 did not see the accused stabbing the deceased but she stated that a knife was found next to the body of the deceased. PW2 and PW3 also stated as much. PW7 stated that he was given a knife by PW1 and she told the police that the knife was found next to the body of the deceased. In as much as there is no direct evidence of the accused stabbing the deceased, there is plenty of evidence, including his own, placing him at the scene and being the last person who fought with the deceased when he was alive and immediately before he was found dead just outside their kitchen.
24. From the foregoing, I am persuaded that even though there is no direct evidence of the accused stabbing the deceased to death, there is sufficient evidence that the accused fought with the deceased a few minutes before PW1 found the deceased lying outside their Kitchen with injuries on the left side of his chest from which he died.



25. 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.”

26. 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 Vs 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 Vs 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.....”

27. According to the testimony of PW6, the cause of death was hypovolemic shock due to a penetrating injury to the heart. There is no doubt as to whether the knife presented by PW1 to PW7 was the murder weapon since the analysis by PW7 confirmed that the DNA profile from the blood stains on the knife matched that of the deceased’s blood. Having determined that the accused person did the unlawful act that caused the death of the deceased, the nature of the injuries speak a lot to motive. The deceased died out of the stab wound to his heart, inflicted using the murder weapon that was recovered. This is sufficient prove of malice aforethought on the part of the accused person.

28. 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.



29. It is so ordered.

Delivered, dated and signed at Embu this 15<sup>th</sup> day of May, 2024.

**L. NJUGUNA**

**JUDGE**

.....for the State

.....for the Accused Person

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