



Republic v Nduati (Criminal Case 4 of 2018) [2023] KEHC 542 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEHC 542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 4 OF 2018
LM NJUGUNA, J
FEBRUARY 1, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

FLORENCE RWAMBA NDUATI ACCUSED

RULING

1. The accused person herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that; on January 10, 2018 at around 10.00 hours in Kathita village at Embu Township within Embu County jointly with others not before the court murdered John Gichovi.
2. She pleaded not guilty to the charge and in a bid to prove its case, the prosecution called seven (7) witnesses and closed its case. This ruling is pursuant to section 306 of the *Criminal Procedure Code* which provides as follows;

306(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, in all cases shall require him or his advocate, if any, to state whether it is intended to call any witnesses



as to fact other than the accused person himself; and upon being informed thereof, the judge shall read the fact.

3. PW1, Jackson Kamau testified that on the January 11, 2018 he was in his house when he was informed that a dead body had been spotted at Kathita village and it was identified as that of John Gichovi (the deceased herein).
4. He reported the matter at Embu Police Station and in the company of police officer and a scene of crime officer visited the scene. They found the body in a bushy area and it had injuries on the lower and upper arms, the upper body and the head. That they found one Kawira at the scene who was a sister of the deceased and she was in the company of Karambu Muchangi who said he had also been attacked together with the deceased.
5. PW2, Elijah Muchangi Wambugu stated that on the January 10, 2018 at around 9.00 p.m. he was coming from Embu town when he met his neighbour one Wanja who requested him to help her carry a shopping bag and he did so. That on arrival at her home some three men namely Wambugu, Macharia and Gitonga knocked the door and went inside. They told him to go and give them a phone which they had stolen with Gichovi, the deceased in this case.
6. That they beat him up and dragged him about 250 metres away where he found Gichovi tied with ropes on a tree. He managed to see the deceased although it was dark. That he was tied on a tree with a rope next to the deceased who was crying and groaning in pain. He was asked where the phone was, but some children who were present told them that they did not see him (PW2) where the phone was stolen. He was untied and left for his house. That on January 11, 2018, one mama Cidi and others knocked on his door and told him that Gichovi had been killed. He followed the woman to about 100 meters from his house and saw the body of the deceased which was later taken away by the police. The three men who were beating them namely Wambugu, Macharia and Gitonga said that the phone belonged to Wachuka Rwamba.
7. On cross-examination he stated that the men said the phone belonged to Wachuka but not daughter of Rwamba.
8. PW3 Joseph Thuo is a psychiatrist who examined the accused person on the January 16, 2018, on her mental status and he found her fit to plead and stand trial.
9. PW4 Phyllis Muhonja a pathologist carried out post-mortem on the body of the deceased on 17.01.2018 and prepared a post mortem report. She formed the opinion that the cause of the deceased's death was haemorrhage shock due to multiple point blunt force trauma.
10. PW5, PC Murimi Musabi testified that on the 11.021.2018, he received a call from the DCI, regional headquarters, Embu from one Inspector Ababa Wagame who informed him that there was a scene to be visited at municipality. He proceeded to the scene where he found a lifeless body of the deceased herein which was identified by his relatives. The body had various injuries all over and had one shoe. He documented the scene by taking photographs which he produced as exhibits.
11. PW6, Inspector Charles Enodo was the investigating officer. He testified that on the January 11, 2018, he was called by the DCIO, CI George Atiang to accompany him with other officers to a village called Kathita in Embu. On arrival at the scene they found a lifeless body and upon making enquiry and interviewing; he established that the deceased had been beaten by people within the area and that the accused who was an aunt to the deceased was one of the suspects. That he had been beaten with allegations that he had stolen the accused person's mobile phone. They arrested the accused and



- charged her with the offence of murder. The other people suspected to have been with the accused were not arrested as they ran away.
12. On cross-examination he stated that the accused was the cause of the death of the deceased. That she was taking care of him and that he allegedly stole her phone and she is the one who instigated the beating of the deceased by the other suspects. However, he admitted that there is no evidence that the accused person lost her phone. Further he stated that he collected pieces and bits of evidence which was not there and also recorded statements from witnesses. That PW2 gave him the names of the people who participated in the commission of the offence but he did not arrest them because he could not find them and he was thereafter transferred from the station.
 13. As earlier stated, the accused person has been charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The offence of murder is defined as follows;

“ Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”.
 14. The court has carefully considered the evidence that has been adduced by the prosecution against the accused person herein.
 15. The main elements of the offence of murder as enumerated in the case of *Antony Ndegwa Ngari v Republic* [2014] eKLR are as follows;
 - a) Proof that the death of the deceased occurred;
 - b) Proof that the accused committed the unlawful act which caused the death of the deceased; and
 - c) Proof that the accused had malice aforethought.
 16. On the proof of death, the evidence available is that of PW1 and PW2. Their evidence was corroborated by that of PW5 who conducted post-mortem on the body of the deceased and formed an opinion on the cause of death.
 17. On the proof that the accused person committed the unlawful act that caused the death of the deceased, I hasten to mention that there is no direct evidence linking the accused person with the offence of murder that he is charged with. The eye witness who is PW2 stated that on the January 10, 2018, at around 11.00 p.m., he was in the house of one Wanja when three men whom he named as Wambugu, Macharia and Gitonga knocked on Wanja’s door and told him to accompany them so as to give them a phone which they had stolen with the deceased. He accompanied them to a place where he found the deceased tied with ropes on a tree and he was able to recognize him although it was dark. He was tied on a tree next to the deceased who was crying and groaning in pain and though he was beaten, he was released to go after he was saved from the attackers by some children who told them that he was not at the scene where the phone was stolen. It was not until the following day that he learnt of the deceased’s death through one, mama Cidi and other people who went to his house to check on him as they thought he had also been killed by the same attackers.
 18. From the evidence, no other witness told the court that he too witnessed the incident. PW2 gave the names of the suspects when he gave his statement to the police and he said the phone that was allegedly stolen belonged to one Wachuka Rwamba, who was his neighbour. He was categorical that he did not see the accused at the scene.



19. On cross-examination, it was his evidence that the three men said that the phone belonged to Wachuka but not the daughter of Rwamba and that they are people who are known to him. He however admitted that the accused has a daughter called Wachuka.
20. In his evidence, PW6 testified that he arrested the accused person after he interviewed relatives of the deceased and upon making enquiries. He, however, did not call the relatives whom he interviewed as witnesses to tell the court how the accused was involved in the death of the deceased. Further, I note that his evidence contradicts that of PW2 on whose phone had been stolen. While PW2 stated that the three men alleged that the phone belonged to one Wachuka, PW6 in his evidence told the court that it is accused person's phone that was stolen. Further, it was his evidence that the accused person was in the forefront in beating the deceased but that assertion has not been supported by any evidence.
21. In his cross-examination, PW7 admitted that there was no evidence by any of the witnesses that the accused person lost her phone and therefore this would mean that he did not have any reason to link her with the commission of the offence. Of importance to note is that PW7 also admitted that he collected pieces and bits of evidence which was not there and though he heavily relied on the evidence of PW2 to prefer murder charges against the accused, he admitted PW2 did not mention the accused person among the people who beat and inflicted injuries on the deceased. It was his evidence that PW2 gave him the names of the people who participated in the commission of the offence but he did not arrest them as he was transferred and stated that if they are still there and their whereabouts are known, he can still arrest them.
22. Going by that analysis, I find that there is no evidence linking the accused person to the commission of the offence. The prosecution relied on circumstantial evidence, which they advanced through the alleged stolen phone but which could not meet the threshold required in law.
23. In the end, I hold that the prosecution did not establish a *prima facie* case to warrant the accused person to be placed on her defence. She is hereby acquitted under section 306(1) of the [Criminal Procedure Code](#).
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

