



REPUBLIC OF KENYA



**Republic v Njue (Criminal Case E010 of 2021)
[2023] KEHC 648 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E010 OF 2021
LM NJUGUNA, J
FEBRUARY 1, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

NORMAN NJERU NJUE ACCUSED

JUDGMENT

1. The accused person is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on January 29, 2021 at Jubilee bar in Makengi location, in Embu West Sub-County, within Embu County, murdered David Muchangi Gitonga.
2. He pleaded not guilty to the charge and in support of its case the prosecution called a total of seven (7) witnesses and at the close of the prosecution's case the accused was placed on his defence. He gave sworn testimony but did not call any witnesses.
3. Thereafter, the accused person and the prosecution filed submissions in support of their respective positions.
4. PW1 (Stephen Mugo Njeru) testified that on the material day, he was at his bar, Jubilee and also referred to as Njukiri bar, when the deceased visited the bar and asked him to buy him a drink which he did. The deceased sat on the same table with the accused and they started quarrelling but PW1 could not tell what the problem was. He asked the deceased what the problem was, and he said there was none. He closed the bar at 9.15 pm and all the people left the bar and he was left alone. That the following day he was called by Kennedy Gitonga who is a cousin of the deceased who informed him that the deceased was beaten and it was alleged that the deceased was beaten while at his bar but he stated that it was not true. The following day he visited the deceased at home but found him unconscious and could not identify anyone. He assisted in taking the deceased to hospital but he died later.



5. In cross-examination he stated that the accused and the deceased did not know each other and that he did not know what happened to the deceased on the January 29, 2021.
6. PW2, Kennedy Gitonga Dorothy testified that on the January 29, 2021 he was asleep in his house when he heard the deceased calling out his name saying he needed assistance as he had been attacked. He went to his house and found him seated on a seat and he was bleeding from the forehead and with the help of his wife, they gave the deceased first aid. The deceased told him he was going home when he was called by PW1 who requested him to take mama Mercy (PW7) home using PW1's motorbike, which he did and later went back to the bar and PW1 bought him some beer and as he was taking, the accused asked him about the beer that (PW7) had taken and who was to pay for it and a quarrel ensued between them. It was his evidence that the accused told him that he was beaten by Norman Njeru as they were going home with (PW1) and that he was hit with a rungu. He later went and identified the body of the deceased to the doctor who conducted the post-mortem on the body of the deceased.
7. On cross-examination he stated that he was not at Jubilee bar on the night of the January 29, 2021. It was his further evidence that on the night of January 29, 2021 the accused person gave the name of Kinyua as the person who attacked him that night but later on, while the deceased was in hospital on the January 30, 2021 he was able to explain to him what transpired on the previous night and he said it was Njeru who beat him. On further cross-examination he stated that the deceased did not tell him the Njeru who beat him. That on the February 11, 2021 he went to the accused person brother's home and told him what had happened.
8. PW3, Dickson Kinyua Nyaga in his evidence stated that on the January 29, 2021 he was at Njukiri Bar at about 8.30 pm when the deceased went to the bar and they started talking. That the deceased told him that he had taken (PW7) home. That at around 9.00 pm they left the bar and as they were standing outside, he found the accused herein who hit him (PW3) on the shoulder but after two (2) days he heard that the deceased had died. It was his evidence that he could not tell what the accused hit him with and that there was no fracas inside the bar. Further that that he did not witness anything.
9. PW4 Catherine Ngunju stated that she was the investigating officer but took over investigations on the February 10, 2021. He recorded the statements of witnesses and charged the accused person with the offence of murder. It was her evidence that on the material day the deceased and the accused person picked a quarrel and PW1 ordered them to get out of the bar and on the following day PW1 learnt that the deceased had been assaulted outside his bar. That one Dickson Kinyua (PW3) confirmed to her that he was with the deceased in Jubilee bar and he was informed by the deceased that before he went to the bar, he had gone to escort one Pauline Nyambura (PW7) after he had been instructed to do so by PW1. Further that PW3 told her that the accused person shouted at the deceased asking him who would cater for PW7's bill for the beer that she had taken now that he had escorted her home. That an argument arose between them and they were instructed by the owner of the bar to go out. They both went outside as instructed by PW1 and it is while there that the accused hit PW3 with a piece of wood and PW3 managed to run away leaving the deceased behind. That the deceased stated that he was also hit by the accused after PW3 was hit.
10. In cross-examination she stated that the statements by the witnesses were not corroborative and that it was hard for her to tell who hit the deceased. That the rungu that was produced in court was given to him by Kennedy Gitonga (PW2) and she could not tell if it was the same rungu that was used to hit the deceased. She also admitted that PW3 did not see the accused hit the deceased.
11. PW5, Eric Mbundi a clinical officer and a psychiatrist at Chuka General Hospital examined the accused person and found that he was fit to plead and stand trial.



12. PW7, Pauline Nyambura in her evidence stated that on the January 29, 2021 she was at Jubilee bar where she had gone to sell nuts to the owner of the bar (PW1). That while there, she decided to take a glass of keg and one Cyrus Gitonga offered to buy her one bottle of tusker. She later excused herself and the said Cyrus offered her a lift home in his car. That she did not see the accused and the deceased in the bar at the material time and on February 11, 2021 a broker went to her home and told her that the police were looking for all the people who were in Jubilee bar on the January 29, 2021. She stated that she does not know what caused the death of the deceased.
13. In his defence, the accused person who testified on oath, stated that on the January 29, 2021 he was at Jubilee bar at 9.00 pm at which time he was discussing a few things with PW1 as he chewed miraa at the same time taking energy drink. He denied knowing the deceased. He stated that there was no fight in the bar on the material day and that he left the club at 9.30 pm That on the February 18, 2021, he was arrested after he was accused of having been involved in a fight at Jubilee bar.
14. The court has considered the evidence on record and the submissions filed herein.
15. The accused person has been charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The offence 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'.
16. The main elements of the offence of murder as enumerated in the case of [*Antony Ndegwa Ngari vs 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.
17. On the proof of death, we have the evidence of PW1, PW2, PW3, PW4 and PW5 who have confirmed that the deceased died. PW2 in his evidence stated that he attended the post-mortem and identified the body of the deceased. It is therefore clear that the deceased died.
18. On whether the accused person caused the death of the deceased, from the evidence, no eye witness saw the accused person inflict any injury on the deceased. The main witnesses were PW1 and PW2. On his part PW1 stated that though the deceased and the accused quarrelled while in his bar, he did not see the accused hit the deceased. That, the following day, he was told that the deceased had been beaten and it was alleged that he was beaten while in his bar but he denied that allegation. He was categorical that he did not know what happened to the deceased on the January 29, 2021. He also denied that on the material night he had sent the deceased to drop PW7 using his motor bike.
19. PW3 was with the deceased at Jubilee bar on the material night and the accused was in the bar. He left the bar at 9.00 pm and as he was standing outside the bar, the accused person hit him on the left shoulder with a bar. According to him there was no fracas in the bar. Infact, in his evidence he did not even mention any quarrelling between the accused and the deceased let alone him witnessing the attack on the deceased by the accused person.
20. The prosecution in its evidence through PW2 tried to rely on the doctrine of a dying declaration. According to PW2 he asked the deceased what had happened and he told him that as he was taking beer



in PW1's bar, there was an exchange between him and the accused and as they were going home with PW1, they were attacked by the accused person. That he was hit by the accused person after which he lost consciousness but later regained it and walked home. That the deceased told him that he was hit with a rungu. On cross examination, he stated that on the night of January 29, 2021 the deceased told him that it was Njeru who attacked him. Further he stated that the deceased did not tell him who that Njeru was.

21. Though it was PW2's evidence that he told the brother to the deceased what the deceased told him that night, the court notes that the said brother was not called as a witness and his name was also not given by the witness. The principles governing the admissibility of the evidence of dying declaration were discussed in the case of *Republic vs Philip Nzaka Watu [2016] eKLR*.
22. Looking at the evidence of PW2 and PW3, there are gaping material contradictions on what transpired on the night of January 29, 2021 at Jubilee bar. PW1 and PW3 denied any knowledge of fracas in the bar at the material time. PW3 on his part stated that he is the only one who was attacked by the accused person while outside Jubilee bar with a bar and he did not state anywhere in his evidence that the accused person hit the deceased.
23. PW2 in his evidence testified that the deceased told him that the accused attacked him and PW3 while they were on their way home and that he attacked them with a rungu. On his part PW3 in his evidence stated that the accused person hit him with a bar.
24. Of importance also to note is that the investigating officer did not tell the court who recovered the rungu that was produced in court or where it was recovered from. Though PW2 in his evidence told the court that he found a rungu in the deceased's house, it is not clear whether it is the rungu that was used to attack the deceased or how it got there.
25. The investigating officer in cross-examination admitted that the witness statements were not corroborative. She admitted that it was hard to tell who hit the deceased. I fully agree with the statement by the investigating officer that it is hard to tell who hit the deceased or what caused his death. The evidence of prosecution witnesses was so contradicting that it created a lot of doubts in the mind of this court. PW7 did not come across as a truthful witness as her evidence was contrary to the evidence that was given by other witnesses.
26. As earlier stated, there is no direct evidence linking the accused to the murder and the circumstantial evidence relied upon by the prosecution cannot sustain a conviction.
27. In the end, I find that the prosecution has failed to prove the case of murder against the accused person. I hereby acquit him of the charge.
28. 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**

