



**Republic v Njoroge (Criminal Case 13 of 2016)  
[2023] KEHC 2268 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2268 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 13 OF 2016  
TM MATHEKA, J  
MARCH 22, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**STEPHEN KINUTHIA NJOROGE ..... ACCUSED**

**JUDGMENT**

1. The accused person, Stephen Kinuthia Njoroge, is charged with Murder contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on the February 27, 2016 at Kirima Farm, Solai in Nakuru North District within Nakuru County, he murdered Paul Mwiko Njoroge.
2. On March 11, 2016, the accused person pleaded not guilty to the charge. The matter went through a full trial where the prosecution called Seven (7) witnesses.
3. PW1, Sofia Wangui, neighbor to the accused person, recalled that on February 27, 2016 at around 10.00 p.m. she was taking her children to the outside toilet when they heard commotion at her neighbor's, Njoroge Mwiko's place and it sounded like they were fighting. She asked her son Geoffrey Chege to come with her so that they would check what was happening. On arrival, it was dark within the compound. There was no one outside and when she knocked on the door no one opened for them except someone asked from inside; 'who is it? She responded that it was her, Mama Ciru. When she identified herself as Mama Ciru, Kinuthia Stephen the son of Mwiko opened the door for her. It was dark inside. She put on her phone torch. She saw blood on the floor; tables turned upside down, broken stools and Paul was lying on the seat with blood on his face.
4. She asked Kinuthia "Why have you injured Paul?". His response was that Paul was loved too much by their father and had refused to pay a debt he owed him, Kinuthia. In her presence Kinuthia took the top of a stool and threw it at Paul's face. She asked Kinuthia whether he wanted to kill Paul. He told her he was not afraid of prison. She told him she would not watch him hit Paul again. She told Paul



- to get up so that they would leave together. However, when Paul got up, Kinuthia kicked him in the stomach, sending him falling back into the seat. In her words, Paul fell back onto the sofa and slept.
5. She then decided to leave and it was then that Kinuthia became frantic. He searched Paul's pockets for Paul's phone so that he would call their father. It was not there. He asked her for hers. She gave him, he called the father and told him that he had fought with Paul, and Paul was injured. He wanted the father to come and check on him. His mother one Nyambura called back tried to speak to Paul. She then told Kinuthia to accompany her so that they could wake up her husband to check on Paul. Kinuthia suggested they go to the neighbour Wagaki. They found Wagaki outside. Kinuthia asked whether his father had called him. Wagaki said no. Wagaki, Kinuthia and Danson Chege, the husband to witness who they woke up all went to check on Paul. She did not accompany them. She said that while she was there she never saw Paul hit Kinuthia.
  6. On cross examination she said she did not know whether the two were drunk. The two were in their father's house. Earlier she had seen Kinuthia and he was sober. That, Stephen hit Paul on the head, then kicked him in the stomach. She did not know whether Paul was a drunkard.
  7. PW2, Peter Njoroge Mwiko, father to both Kinuthia and Paul testified that on January 27, 2016 at about 10.30 p.m. while at Nakuru Town he received a phone call from a concealed number. It was the voice of his son Stephen. He told him that he had fought with his brother and Paul had sustained injuries and that he, PW2, should find a way to deal with it. He asked him why he had injured his brother. He responded angrily that his brother Paul had angered him, and switched off the phone. PW2 rang his neighbor Mwangi Macharia to go to his home and check on his sons. Mwangi went and called him from there telling him that he had found Paul with serious injuries on the head, was bleeding and had a swollen eye. PW2 then called another neighbor Samuel Waithagu (now deceased) who had a motor vehicle to transport Paul to Maili Kumi Hospital and he would meet them at the Police station.
  8. He met them at Maili Kumi Police Station and reported the matter and was issued with an OB. Thereafter they left for Bahati District Hospital where Paul got first aid and they were referred to Nakuru Provincial General Hospital where he was admitted. The following day at 8 a.m. when he visited he noted that Paul was getting worse and so he requested to have him transferred to Annex Hospital. This only happened by noon but when he got to Annex Hospital they were told he was already dead. He had the body moved to Nakuru War Memorial Mortuary.
  9. He testified that Paul and Stephen were his children. They both took alcohol, that Stephen was quarrelsome. Would take things without permission. Like this time, he had sold murrum/hardcore without permission and PW2 had stopped him from going on with the sale. On the other hand Paul had requested to sell two trailers from the quarry. He had allowed him to do so. It appeared to him that a disagreement arose when Stephen went to demand for the money from the proceeds that Paul had made from that sale. He said that Stephen had previously broken Paul's leg with a piece of wood and Paul had forgiven him. Though the two would fight, he had never seen Paul injure Stephen. PW3, Mwangi Macharia testified how on the material night between 10 -11pm while sleeping in his house, he was called by PW2 who told him that his two sons had fought and one was injured. He requested him to go and check on the injured one. He got up and left and met Kinuthia and PW1 Mama Ciru. They went together to Mwiko's home but mama Ciru left them and went to her home.
  10. Upon arrival PW3 noted that there was blood in the house on the floor, on the seats. It was in shambles, there were broken stools, and everything was broken. There were no lights. Paul was not in the sitting room. A search led them to the bathroom where he was found vomiting into a bucket. His head was bleeding profusely. There was blood all over his hands and face.



11. He found a cloth and wiped him. Paul requested to go to the toilet. PW3 led him to the toilet. They waited for him outside and when he took too long PW3 asked Kinuthia to check on him. He said it was not unusual. PW3 went to check on him and found he had collapsed in the toilet.
12. They took him out and cleaned his bleeding wounds with salt water which Kinuthia prepared. Paul was screaming telling Kinuthia: you are my brother and you want to kill me! Kinuthia responded If I kill you I will bury you, if you kill me You will bury me. The cleaning with salt water stemmed the bleeding.
13. They changed his clothes as they waited for transport to take him to hospital. He was still vomiting. When the motor vehicle came the Driver and one Nuthu took him to hospital. He stated that Kinuthia told him he and Paul fought but Kinuthia did not have injuries.
14. PW4 was Dr. Daniel Wanaina, chief officer health services at Nakuru County, registered medical practitioner no. A5828, who testified that on 3<sup>rd</sup> March 2016 at noon, he conducted a post mortem examination on the body of Paul Mwiko Njoroge at Nakuru War Memorial Mortuary. Externally, there were multiple minor cuts and bruises on the face. 2 long cuts, 5 cm each on the left temporal and occipital region of the scalp, bruises on chest wall and interior abdominal minor cut on the front left leg. He said internally, there was rupture of the intestines. Head and skull fracture bleeding into cranial cavity and swollen brain. He formed an opinion that the cause of death was as a result of severe head injury, skull fracture, multiple blunt trauma injuries and blunt abdominal trauma. He drew the conclusion that this was a homicide. On cross examination he stated that he was a registered medical doctor and not pathologist. That the cause of death was : severe head injury, skull fracture, cranial bleeding. On re-exam he said that he was qualified to perform post mortem examination.
15. PW5 Simon Kimani Kamau recalled that on 3<sup>rd</sup> March 2016 at around 9.00 a.m. -11. 00 a.m. in company of his cousin David Kimani Njoroge, went to War Memorial Mortuary and identified the deceased's body for postmortem.
16. PW6 No. 79119 Cpl Benard Koech Lagat recalled that on 1<sup>st</sup> March 2016 was at Solai police station one Peter Njoroge Mwiko made the report of the incident of 27<sup>th</sup> February 2016 at around 2240 hours. He said the report was that he received a call from his son Stephen Kinuthia Njoroge that he had assaulted his elder brother, and that he should organize to take him to hospital. He arranged for transport to take the deceased to the hospital but unfortunately died while undergoing treatment at Nakuru Provincial General Hospital. In company IP Muraya, PC Mutula, PC Driver Ng'ang'a he visited the scene which was the home of Peter Njoroge. Upon arrival he found broken tea tables and blood stains within the sitting room. He produced the broken table pieces as P. Exhibit 2 a, b, c, d, e, & f.
17. They arrested the accused person.
18. On cross examination he was referred to the exhibits he could not recall which one had blood stains.
19. PW7 was No. 235695 Police Inspector Stephen Muraya testified that on 1<sup>st</sup> of March 2016 he received a call from OCS, CI Zakayos Wakhungu at 11.00 a.m. to the effect that there was an OB entry of a homicide case at River Farm in Solai Location, and was directed to lead the investigations. In the company of Corporal Benard Koech, PC Mutura they took the statements of reportees and then proceeded to the scene of the homicide. Upon reaching there he saw scattered sofa sets, coffee tables, blood on the walls and floor. In the bedroom he found a blood stained shirt & a trouser. He produced broken coffee tables and an ashtray, blood stained checked shirt and grey trouser as exhibits. He recorded the suspect's statement under inquiry. He charged the accused person with murder based on the results of the postmortem and the evidence of PW1 of the witnesses.



20. On cross examination he stated that he did not establish whether the blood on the shirt belonged to the deceased. He said that the accused did not have injuries

### **The Defence Case**

21. The accused person was represented by Mr. Murunga. He was put on his defence and proceeded to make a sworn statement. He did not call any witnesses.
22. He told the court that on the material date he and his brother Paul Njoroge were in their father's residence at Kirima Village. They took breakfast together and then proceeded to the home of Daniel Nuthu, husband to PW1 who was constructing a house. There was casual work for only one person and, he, the accused was picked by the fundi because they had worked together before. His brother went back home. He worked at Nuthu's until 4:00pm. They agreed with Nuthu to meet up later for drinks.
23. He went home where they made supper with Paul. Nuthu joined them. They ate together, saved some for later and left for the Chang'aa place. That Paul had an exchange with the seller over some change. However, that was solved, he took some chang'aa in a bottle and left. He and Nuthu remained behind and the accused left about 7:00pm in the company of another by the name Waithagu.
24. Upon entering the house, he found his brother asleep on the sofa with a half-eaten plate of food. He tried to wake him up in vain. He went to sleep.
25. Later in the night he heard his brother calling him. He was telling him that he had he was missing his Ksh. 200/= and cigarettes 'nilikuwa na soo mbili na sigara wewe ndio umenipiga first aid' meaning that he was accusing him, the accused of having picked his pockets of Ksh 200 and cigarettes while he was drunk. He protested that he had done nothing of the sort. Paul then threw a glass that had chang'aa in it at him. The opening between where Paul was and where the accused was, was a window. This glass hit him in the chest. He got out of the room and entered the sitting room. Paul followed him demanding his money and cigarettes and grabbed him. In the process a fight broke out. They were fighting in the dark after Paul's phone, which was the source of light, fell.
26. That, when PW1 called out, the intensity of the fighting reduced. The accused went to open the door but Paul was coming at him with a stool. He held the stool and kicked Paul in the stomach. He fell backwards onto the floor. As PW1 was coming in, Paul pulled himself up from the floor onto the coach and said "Steve, nimeumia kichwa". He could see that he was bleeding profusely even in the dark. It is then he called using PW1's phone. He said he told their father that they had fought and Steve was injured.
27. That his father told him that they ought to know what to do after fighting. He decided to go to Mwangi Macharia's for help but found him coming to his home after having been called by his father. On reaching home Paul was not on the coach. A search led to the outhouse where he had collapsed. Mwangi brought him out from the place as they waited for Waithagu whom their father had called to come with his motor vehicle to take Paul to hospital. Accused said he got salty water to wash his face because he was bleeding. He tried to clean his brother. The motor vehicle came and they all left for the police station and the hospital. Thereafter Paul was admitted to hospital and they went home. On the 28th the accused called his Mom. Paul was still in hospital. On the 30th he called but she told him she was taking care of him so he did not have to go. However, that day at noon Nuthu told him that his father had informed him that Paul had passed on. On getting that information he proceeded to Bahati Police Station where he was placed in cells and transferred to Solai Police Station the following day.



28. The accused told the court that he regretted the events of that day because he loved his brother who he said was the closest to him in the family. That, Paul was 38 while he was 33. That both of them were living in their father's home because they were both battling alcoholism. That they had discussed it and how to put their lives in order. He said he had no reason to harm his brother, he regretted the pain he had caused his family and expressed remorse. He put himself at the mercy of the court and his family.

### **Analysis & Determination**

29. The only issue for determination is whether the prosecution has proved beyond a reasonable doubt that the accused committed the offence as charged. The offence of murder is defined at section 203 of the [Penal Code](#): -

“Any person who of malice aforethought causes the death of another person by unlawful act/or omission is guilty of murder.”

30. The prosecution is required to establish the ingredients of the offence of murder; Proof of the fact and the cause of death of the deceased. That the cause of the deceased's death was a result of the direct consequence of the accused's unlawful act or omission. Proof that the unlawful act or omission was committed with malice aforethought as defined by section 206 of the [Penal Code](#).

31. Section 206 of the Penal Code defines malice aforethought in the following terms;

- “(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.”

### **Proof of death**

32. The fact of, and cause of death is not in dispute. In particular the evidence of PW4, the medical officer, who conducted the postmortem on the deceased's body confirmed that the cause of death was as a result of severe head injury, skull fracture, multiple blunt trauma and blunt abdominal trauma consistent with homicide.

Proof that the death was caused by an unlawful act of the accused with malice aforethought

33. The law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See [Republic vs Boniface Isawa Makodi](#) [2016] eKLR where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”



34. The injuries inflicted on the deceased were inflicted in the course of a fight. The description of the manner in which the deceased sustained his injuries is very vivid both from PW1 and the accused person. The accused person kicked the deceased in the abdomen. He says the deceased fell backwards and hurt his head on the floor. PW1 also witnessed him hit him on the head with a part of a stool and kick him in the stomach.
35. These two injuries turned out to be fatal as the force in the kick to the stomach led to the rupture of the deceased's intestines and on the head, fracture of the skull. These injuries were not inflicted in self defence. The description by PW1 is that both times the accused hit the deceased he never fought back and he was not the aggressor then.
36. The accused described one incident when he had gone to open the door and the deceased was coming at him with a stool. He said he got hold of the stool. This actually disarmed the deceased but he proceeded to kick him in the stomach sending him to the floor where he hit his head.
37. Evidently the acts of the accused person fall under the description given under Section 206 of the Penal Code thus: the intention ...to do grievous harm to any person in this case to his brother was there. One does not use that much force without intending to inflict serious injury. Using a blunt object to hit the head of a person with as much force as was described in this case would be accompanied by some knowledge that grievous harm may occur ...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;
38. The words uttered by the accused in the presence of PW1 and to his father on phone are not denied. The accused person had his own anger against his elder brother. There was bitter resentment which seems to have brewed from sibling rivalry for father's attention and perhaps presumed favouritism.
39. Accused spoke of alcoholism. However, it does not seem to have been the cause of the fight that day. True both the accused and his brother had taken alcohol that night but the viciousness with which the accused inflicted injuries on his brother does not come out as alcohol induced fighting. There was more and that more is what renders his actions to have had malice aforethought and to bring the totality of his actions into the offence of murder.
40. I find therefore that the prosecution has established that the accused is guilty of the offence of Murder of his brother Stephen Njoroge Mwikio Contrary to section 203 as read with 204 of the [Penal Code](#). I find the accused person guilty and convict him accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND MARCH 2023.**

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**MUMBUA T. MATHEKA**

**JUDGE**

