



REPUBLIC OF KENYA



**Republic v Mungai (Criminal Case 3 of 2018)  
[2023] KEHC 1940 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL CASE 3 OF 2018  
RM MWONGO, J  
MARCH 10, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MARY NJERI MUNGAI ..... ACCUSED**

**JUDGMENT**

**Background and Evidence**

1. Mary Njeri Mungai, the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The brief facts are that on the November 15, 2015 at Syndicate Estate in Gilgil sub-county within Nakuru County, she murdered Emily Mumbi Thiarara.
2. The evidence in the case was adduced by seven (7) prosecution witnesses. Three of them, PW1, PW2 and PW5, were eyewitnesses at the scene of the incident. The court, after hearing all the prosecution evidence, found the accused had a case to answer. She testified by giving a sworn statement and was cross examined. The evidence in the case is as follows.
3. Prior to November 15, 2015, Mary Njeri Mungai (accused) and PW1 Mark Njamura Thiarara, had been in a relationship as girlfriend and boyfriend, for about three years. They had no children. According to Mark, he cut off relations with Mary Njeri because his sister Emily, the deceased, had sired a baby with Duncan Mungai, the accused's brother.
4. On that date, November 15, 2015, PW1 Mark, his sister Emily – that is the deceased – and their mother, PW2 Jane Wanjira, were heading home at about 5.00-6.00pm. Mark then got a call from PW5 Susan Wangari, the accused's mother, who wanted to see Emily's (deceased's) three-month old baby. The baby was her grandchild by her son Duncan Mungai, the accused's brother. They decided to pass by the Accused's home where she was with her mother.



5. What is significant is what happened when they reached the accused's home. According to Mark, he remained outside the house as his sister Emily and his mother went into the house. Emily was carrying the baby whom she took to the accused's mother Susan Wangari. A little while later he heard noises and a commotion. Shortly thereafter, he saw his Emily and the deceased come out of the house arguing and fighting. He rushed to separate them and saw that the accused, Mary, had a knife. In that moment, the accused stabbed his two left fingers. He did not see the accused stab Emily but noticed Emily had a lot of blood dripping down her clothes. Then he saw Emily fall. When he tried to raise her, she appeared helpless.
6. Jane Wanjira (PW2), who is Mark and Emily's mother, testified she was in the car with Mark and Emily, when the call came from Emily's mother in law Susan Wangari who wanted them to pass by so she could greet the baby. According to Jane, when they got to the accused's home, she, Jane, carried the baby to Susan Wangari (PW5) who was seated outside. A man called Ben Kabu, PW4, also joined her and Susan. According to Jane, Mark and the accused remained behind and met the deceased. Shortly after they sat, they heard the accused and deceased arguing at the Accused's boma. Jane heard the deceased tell the accused that there would be no day when she (the accused) would marry into the family.
7. Jane went towards them as they went round the house and saw Mark separating the accused and deceased. She also saw Susan stand and shout  

“for how long will you people go on fighting and arguing?”.

Susan then picked a stick and hit Mark with it saying he was the cause. Mark fell down. When he stood up, he pushed Susan who lost balance and fell. Jane stated that she then heard the accused, Mary, shout: “Woooi umeua Mama yangu” as she ran into the house.
8. According to Jane, the accused then came running out, headed to her daughter Emily the, and they started fighting. She said it was getting dark. Then she saw Mark trying to separate the accused and Emily, and suddenly saw Emily fall. When she looked at Emily, there was blood flowing from her face mouth and clothes. She ran to the roadside and called out for help. She saw an Anti-Stock theft vehicle passing by and she stopped it. She told them there was a problem with her daughter. They came to assist, and took the deceased to Gilgil Hospital emergency room. Jane said she saw her daughter try to talk at the hospital but she passed on.
9. PW5 Susan Wangari, testified that she was the accused's mother and deceased's mother in law. She lived at Syndicate in her two roomed house. On November 15, 2015, she was at her house at about 4.00pm when the deceased's mother (Jane Wanjira, PW2) came with another man. She said that they asked for some 'pombe', home brewed beer, which she served. As they were drinking, the deceased (Emily), brought her a child, and another child was brought to the Jane. they were all outside and the accused was in another room.
10. Shortly thereafter, Emily went round the house. Suddenly, they heard an argument break out. Concerned, she handed over the baby she was holding and went to see what the argument was about. In the house she met Mark, Emily and PW4 Bernard Kabu, and her daughter Mary, the accused.
11. According to Susan, the accused was asking for money from Mark. She separated them and took them. The accused returned into the house and shortly thereafter, a fight broke out between the Mary and Emily. She, Susan, was then hit and fell down unconscious. She did not know what happened next, and when she regained consciousness she was inside the house. It was then she heard people say “*amekufa*.”



12. According to Susan in cross examination, both Mark and Emily had been drunk, but Mary, her daughter, does not drink. Emily was the wife of her son Duncan; and in the argument she heard differences about money, but not about relationships. other than about and the
13. PW4 Bernard Kabu, was also at the scene. His brief testimony was that he was a Sergeant with the Army based at Gilgil. On that day, he had come to Syndicate to eat supper. At about 6.30pm, he heard 'nduru' or screams rent out in the neighbourhood, so he went, so he went to see what was going on.
14. He found a crowd milled at a boma where he saw the deceased lying on the ground bleeding and with stab wounds. He knew the deceased, as Emily. He saw her brother Mark, whom he also knew, trying to get her up. He heard people saying that the accused had stabbed Emily. He also knew the accused, Mary. Shortly thereafter, a government vehicle arrived and he helped Mark and the deceased's mother carry Emily into it. He accompanied them to the hospital.
15. In cross examination Bernard said that he knew Emily as family friends, but he only knew the accused from seeing her.
16. Following an unopposed application by the state, under sections 33 and 77 of the [Evidence Act](#), Dr Ngulungu was allowed to testify on behalf of his intern Dr Salim who conducted the postmortem on the deceased's body. Dr Ngulungu knew Dr Salim's handwriting and they consulted together before Dr Salim left for further studies.
17. Dr Ngulungu PW-6, testified that Dr Salim. conducted the postmortem on November 15, 2015. The body was identified by PW2 and PW2. He testified that on examination of the body, it was pale due to blood loss. That the deceased had a 2 cm by 1 cm cut on her face and a deep wound on the left shoulder and into the upper lobe of the lung resulting in massive blood loss. He concluded that the cause of death was massive blood loss and lung compression, hypotension leading to cardiac arrest. The postmortem report was produced as PExhibit 1
18. The last prosecution witness was Chief Inspector Joseph Njunge who testified as PW 7. He stated that on the material day he was at Gilgil police station as an Inspector at in charge of petty crime and general investigation. On that day, while at home at around 9.30pm, he received a report of a murder. He went to the station and found the report in noted in OB No 47 of 2015 November 2015 recorded at 21:26. It was reported by Eve Wambui, sister to the deceased, Emily Mumbi. The deceased had been stabbed several times by a known person, Mary Njeri, the accused. The report indicated that the deceased died while undergoing treatment at Gilgil Sub-County Hospital.
19. Accompanied by two other officers he went to the scene of crime, a two roomed iron sheet house, at Syndicate Estate. There were eyewitnesses and relatives of both the deceased and accused. The house was poorly lit and he only managed to see a few blood stains on the floor and window pane. He was unable to recover the murder weapon. He proceeded to the mortuary where he saw the deceased with stab wounds on the upper arm and back of the body. The body was soaked in blood.
20. PW7 managed to arrest the accused on February 9, 2018 after she had been arrested for creating disturbance where she threatened to stab a neighbour.
21. Mary Njeri, the accused, was put on her defence and opted to give sworn testimony. She availed no witnesses in support of her case.
22. The accused testified that she was in their house with her 4 month old baby when PW1 and the deceased came in. The deceased had a bad relationship with the accused's brother who was the deceased's lover. She stated that they entered the house through a back door. Shortly thereafter, the deceased started insulting her by calling her a prostitute. She got miffed and could not take the insults anymore so



- she decided to go outside. They followed her out and an argument ensued leading to the deceased to slapping her.
23. The deceased proceeded to the front of the house where she found her mother (Susan) and the deceased's mother Jane). She continued to insult her saying that her son did not belong to PW1, the brother, and that she could also not be married into their (deceased's) family. The deceased hit her and she fell to the ground and while on the ground PW 3, the deceased's older sister, sat on her while the deceased bit the accused's lower lip. The deceased then stabbed her with a sharp object on her left hand.
  24. Enraged, the deceased then went for the accused's mother and hit her. She fell down unconscious. She struggled to stand up to go rescue her mother. After that she found herself in hospital.
  25. In cross examination, Mary reiterated that her relationship with the deceased was not good as the deceased always disturbed and insulted her. She testified that the deceased wanted her to leave or separate with her brother, PW1, as she wanted their relationship to work out at the expense of the relationship with PW 1. She testified that the problem that particular day was that her son was not the biological son of PW1. She testified that she tried to avoid the deceased, and that she did not know why she was being implicated of stabbing the deceased. She asserted that the fight was between 3 people namely herself, the deceased and PW 1.

### **Parties' submissions**

26. The prosecution's submissions were that on the material day, the accused person had an argument with the deceased person and her family; that shortly thereafter she picked a knife and stabbed the deceased; that this resulted in massive blood loss to the deceased and death. The accused then ran away and went into hiding for 2 and a half years upon which she was arrested by sheer luck when she had been picked up by police on allegations of threatening to stab a neighbour.
27. The prosecution urged that their seven 7 witnesses gave clear, concise, and corroborative evidence resulting in proof beyond reasonable doubt as to the accused person's guilt. Upon being put on her defense, the accused gave a sworn statement that did not counter our prosecution evidence against her. The prosecution prays the court to find her guilty as charged, convict her and sentence her accordingly.
28. The accused submitted that the evidence of PW1, PW2, PW3 and PW4 should be disregarded since they are immediate family members to the deceased, whilst PW4 confessed that he is a close family friend to the family of the deceased. Taking into account the circumstance of the death, it turned out that their testimonies tend to favor the deceased at the expense of the accused herein. Their evidence should therefore be interpreted in that context.
29. The defence Counsel argued that for the State to secure a conviction in the offence of murder, three (3) ingredients must be established beyond a shadow of doubt. These were laid out in Criminal Case (Murder) 9 of 2015 (Consolidated with Criminal Case Murder 18 of 2015)- *Republic v Francis Patu Simpanoi Alias Korio & Philip Mwaura Timalo* as follows:
  - i. Death must have occurred
  - ii. The accused must have committed an unlawful act which caused the death of the deceased.
  - iii. The accused had malice aforethought Counsel submitted that since the death occurred the latter two ingredients were the ones in focus.
30. As to whether the accused committed an unlawful act, counsel stated that the answer was in the negative; that there was indeed a fight or altercation; that no one, not even PW1 who was in the centre of the fight, testified seeing the accused stab the deceased; that PW2 who testified she saw the knife



drop, when put to task in cross examination, admitted that she had never recorded that fact in her statement

31. As regards malice aforethought, defence counsel stated that there was no evidence of the same or of a motive to kill. Counsel argued that had the deceased and her family members not showed up at the accused's home and made provocation through incessant insults and assaulting the accused's no one might have died. Counsel referred to *R v Nedride* (1986) 1 WLR 1025 where it was stated:

“...the existence of malice aforethought is not a question of opinion by the court but one which the prosecution must prove beyond reasonable doubt by the law of evidence”

### **Analysis and Determination**

32. The ingredients necessary to prove the offence of murder were re-stated in Criminal Appeal No 352 of 2012 *Anthony Ndeewa Nsari v Republic* [2014] eKLR by Visram, Koome and Odek, JJA as follows:
- a. That the death of the deceased occurred;
  - b. That the accused committed the unlawful act which caused the death of the deceased
  - c. That the accused had malice aforethought.
  - d. The death of deceased occurred
33. This point is not in dispute. The prosecution, through PW6, Dr Titus Ngulungu testified that the deceased's body was examined on November 15, 2015. He testified that the deceased's body was pale due to blood loss. That the deceased had a 2cm by 1 cm cut on her face and a deep wound on the left shoulder and into the upper lobe of the lung resulting in massive blood loss. He concluded that the cause of death was massive blood loss and lung compression, hypotension leading to cardiac arrest. The postmortem report was produced as PExb 1.

### **Whether the accused commit an unlawful act**

34. It is not in doubt that there was a fight at the accused's home; it is not in dispute that the fight involved the deceased, the accused and PW1. Throughout the hearing none of the evidence presented before court asserted that the accused was seen stabbing the deceased or anyone at all. All the eye witnesses presented by the prosecution in court did not see the accused stab the deceased.
35. PW1 said that he saw the knife but did not see the accused stab the deceased; PW2, the deceased's mother, testified that she saw the accused dropping a knife, yet all through the fracas she was present and never testified that she had seen any knife. When cross examined, she confirmed she never recorded in her statement having seen any knife. It is curious that if she had indeed seen a knife that fact would not have stood out in her memory and she would have stated so as a critical matter in her statement. Did she, in her pain at losing her daughter, insert this alleged fact to get an answer to justify the death?
36. It is also not clear at all if the knife was there, and who actually brought it to the scene, although it is likely to have been the accused. On her part, the accused testified that while she was on the ground and PW1 Mark having sat on her and whilst Emily, the deceased, was biting her in her lower lip she, the accused, was stabbed by the deceased using a sharp object.
37. Nobody knows whether this sharp object is a knife or anything else. Strangely enough, the Investigation Officer testified and confirmed that the murder weapon was not recovered. These inconsistencies about an alleged knife which the prosecution asserts must have been the murder weapon, raises some doubts as to whether it is the accused who that stabbed the deceased.



38. PW1 testified that when he first heard the argument, it was the accused and deceased that came out of the house arguing and fighting. He saw the accused with a knife, and when he tried to intervene, the accused stabbed him on his fingers. In cross examination, he stood by his evidence that he saw the accused with the knife but did not know where it came from.
39. PW2's first glance at the fight was when she went around the house and saw Mark separating the accused and deceased; that PW5 (Susan) even picked a stick and hit Mark to separate them; that Mark pushed Susan to the ground; that the accused ran into the house screaming that they had killed her mother, and came back to fight with the deceased; and that it was then that the deceased fell and never rose again alive.
40. Throughout the fight, it is not particularly clear that anyone saw who caused the wounds on the deceased that led to her death. According to the accused, when she engaged with the deceased there was the additional resentment, humiliation and annoyance she felt when she saw her mother had been knocked down to the ground. This led her to use extra strength and force, as she got up from underneath Mark who had sat on her, to rescue her mother.
41. I believe the evidence of PW1 that the accused had a knife; it appears that she got hold of it when, as testified by PW2 Jane, the accused ran to the house screaming that her mother was being killed and came back to fight with the accused. It was in that fight that PW1 got his fingers cut by the accused, and it was with that knife that in all probability she stabbed the deceased. From the evidence adduced, there is no other explanation as to how the deceased was stabbed during the undisputed melee that occurred at the house.
42. Accordingly, I find and hold that the accused committed the unlawful act of stabbing the deceased. This explains, in my view, why the accused disappeared from the scene and went into hiding for two years before she was eventually arrested.

### **Malice aforethought**

43. The final element that needed to be proved beyond reasonable doubt is whether the stabbing was actuated by malice aforethought on the part of the accused. The ingredients of murder were explained in the case of *Roba Galma Wario v Republic* [2015] eKLR where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

Section 206 of the *Penal Code*:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-

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.”

44. It is not in doubt that there existed tension between the accused and the deceased on account of the broken relationship between her and Mark as ex-lovers. There was also the complication arising from the allegations by the deceased that the accused’s baby was not his which was the way in which his sister was getting back to the accused.
45. I do not see these complications in the relationship as giving rise to an intention and plan to get rid of the deceased through the stabbing. The fight appears to have started because of taunts related to the complications in the relationship. But it appears that the accused’s real anger was stirred by the fact that her mother had been knocked to the ground whilst she herself was being crushed underneath her former lover and being bitten by the deceased.
46. I accept the testimony that she, the accused, fought her way out from being in the receiving end, ran to get a knife, as testified by PW2, and returned to the fight and stabbed the deceased who, to her, was one of the perpetrators of her’s and her mother’s present misery and pain.
47. The accused put up the defence of provocation. Counsel properly argued that the accused lacked any motive to plan to kill the deceased. He alleged provocation and self defence citing in support of that defence the case of *R v Henry Obisa Auko* [2018] eKLR where the court stated:
- “In instances of provocation and self defence, the accused does not assume any burden of proving his innocence. It is for the state to prove that the accused person was not provoked or that he did not act in self defence. The state must disprove the defence of provocation or self defence and it must discharge this burden beyond reasonable doubt”
48. In her cross examination, the accused admitted that there had been differences between the deceased and her for about a year arising from:
- “Emily’s abuses [which] were too much for me. She called me a *malaya* (prostitute), [and] that my son was not her brother’s son and I won’t get married in their house”
49. As regards her disappearance after the fight, she stated that
- “I did not go to the police station because I was afraid. I went underground until 2018. I was afraid for my life, because I heard that Emily had died. I did not know how those who saw me fight with her would treat me”

## Conclusion

50. I am satisfied that the accused’s conduct is exactly how one who is afraid of being implicated would act. It does not in my view, necessarily implicate guilt resulting from an intention to kill. The state has not placed any material in evidence to draw an inference on direct or indirect malice on the part of the accused to kill the deceased as required under section 206 of the Penal Code. The death that occurred during the brawl was not shown through evidence in any way to have been intentional. It is not known who exactly stabbed the deceased in the instant case, although the great probability that it was the accused, was shown.



51. Further, once the defences of provocation and self defence were raised, it was for the state to disprove the accused defences of provocation and self-defence. The state has not discharged that burden.
52. In conclusion, I find and hold that the prosecution did not prove malice aforethought against the accused person.
53. Accordingly, I find that the accused caused the death of the deceased without malice aforethought. I therefore convict her for manslaughter under section 202 as read with section 205 of the [Penal Code](#).
54. The accused shall granted time to present her mitigation before sentencing on a date to be given by the court.
55. Orders accordingly.

**DATED AT KERUGOYA THIS 10<sup>TH</sup> DAY OF MARCH, 2023.**

**R MWONGO**

**JUDGE**

**In the presence of:**

1. Mr Karanja for the Accused
2. Mr Atika for the State
3. Accused - Present at Naivasha Women's Prison
4. Q Ogutu Court Assistant

