



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Nyaga & 4 others (Criminal Case 1 of 2015)  
[2023] KEHC 1828 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 1 OF 2015  
LM NJUGUNA, J  
MARCH 1, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOHN GITONGA NYAGA ..... 1<sup>ST</sup> ACCUSED**

**JAMES NGARE NYAGA ..... 2<sup>ND</sup> ACCUSED**

**DAVID NJIRU NYAGA ..... 3<sup>RD</sup> ACCUSED**

**ALFRED KARIUKI NJUKI ..... 4<sup>TH</sup> ACCUSED**

**CRYSTUS MUREITHI MUNYI ..... 5<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that on 26.12.2014 at Kune Sub location in Mbeere North Sub County within Embu County murdered Moses Nthiga Njeru. The case proceeded for trial wherein the prosecution called 6 witnesses in support of its case.
2. PW 1, Esther Muthoni Njeru stated that on 26.12.2014 at around 0930am she heard screams coming from the road. Together with her husband they ran to the road to see what was happening and upon reaching there, she found her brother being beaten by five young men whom she knew well. That they were as follows: James Ngari-2<sup>nd</sup> accused, John Gitonga-1<sup>st</sup> accused, Kennedy Kinyua (not in court), David Njiru-3<sup>rd</sup> Accused and Crystus Muriithi-5<sup>th</sup> accused. She stated that after a short while, Peter Muruthi, Alfred Kariuki and Ngari Gacamuku joined the five men and all were armed with sticks and *pangas*. That they used the sticks to beat the deceased and even when she talked to them to stop beating the deceased they could not hear her but went on beating him. It was her evidence that Ngari Gacamuku took sticks and lit a fire to burn the deceased as he lay on the ground. The deceased sustained



injuries to the head and legs. That thereafter, the deceased's father arrived and upon trying to lift the deceased, the attackers prevented him from doing so.

3. PW2, Julitha Njoki Nthiga testified that, the deceased was her husband and on 26.12.2014 at about 0900hrs the deceased told her that Crystus Murithi, James Ngari, John Gitonga and David Nthiga were calling him to the house of Michael Mugo Njagi which was about 40 meters away, to go and talk about his (Michael Mugo Njagi) case involving loss of 2Kgs golden flour, cooking fat and meat. That she followed the deceased to Mugo's house where upon reaching, she found many people who demanded from the deceased to tell them what had happened at Mugo's house. She testified that the deceased informed them that he went to Mugo's house with three people and the crowd ordered him to take them to the house of the men who had accompanied him. As he led them towards the road, Kennedy Kinyua attacked the deceased on the head with a stick and the same prompted the deceased to start running away. That the men caught up with the deceased about 2km away. He entered a small bush and jumped over a drainage and he was intercepted by another group that came from ahead of him. One Peter Muriithi hit the deceased on the head using a stick and he fell down on the drainage. In cross examination she stated that she did not see any of the men who called her husband from the house neither did she hear any one's voice. It was her further evidence that she did not identify any of the accused persons in court. It was her evidence that Peter Murithi also had a *panga* which he used to cut the deceased on the head and as the group was beating the deceased, Ngari Gacamuku brought firewood and placed on the legs of the deceased and thereafter lit the fire.
4. PW3, Silas Njeru Gatumu stated that he knew the accused persons as they were friends to his son, the deceased herein. That on the fateful day, he saw 4 men, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused persons who came to his house to pick the deceased to go with him. It was his evidence that after a short while, his son called him on phone to go to Mugo's home when they said they were taking the deceased to the police station because he had sodomised an unknown person. That Kennedy hit the deceased on the head and the same prompted the deceased to start running away; that they chased the deceased as he slowly followed them upto the place where they assaulted and thereafter lynched him. The four, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused persons were all present. At the scene, he touched the deceased and noticed he was dead; the crowd became hostile to him but later, the police came and took away the body. That on 02.01.2015 he identified the body to the doctor who performed the postmortem.
5. PW4, Jacob Nyaga Ngari testified that on 26.12.2014 at about 0830 am, he had gone to visit his In-laws. That while there, they heard screams from the lower side of the shamba near the river and upon heading there, they found seven (7) men beating the deceased herein. That since he was a visitor in the area, he didn't know them but as it was daylight he saw their faces and they were armed with *pangas* which they used to hit the deceased all over the body. The crowd numbered about 50 people, but it was the seven who were beating the deceased. In fear for his life, he left the scene and walked to the road. He didn't identify the accused persons in the dock.
6. PW5, Eleakim Kipkoech Silgich, the investigating officer in this matter recalled that on 26.12.2014 at about 10am while at Siakago Police Station, he received a call from P.C Koskei who informed him about an incident at Kambaci where a person was lynched by members of the public. In the company of four other officers, they visited the scene and found the body of a young man lying in a trench. The body had injuries to the head, the torso and the legs had burns. There were many people at the scene and some of them were wailing saying they had killed an innocent person. They placed the body in the police land cruiser and during their investigations, they were introduced to the sister and the wife of the deceased who said they knew the perpetrators who had alleged that the deceased had sodomised one Mugo. That they gave the names of John, Kennedy, James, Daniel and Crispus, who are all villagers and neighbours to the deceased. He managed to arrest John, James and David whom he couldn't identify



because it was a long time ago. He later arrested Kariuki on 29.12.2014 when he went to visit the 3 accused persons at the Siakago Police Station. It was his evidence that he couldn't remember how the 5<sup>th</sup> accused person was arrested. The witness said the accused persons didn't run away after committing the offence because they believed that the sodomy had been reported and booked at the police station. Mugo was not at the crime scene of lynching since he had gone to the hospital at that time.

7. PW6, Dr. Godfrey Njuki Njiru testified that he conducted the autopsy on the body of the late Moses Nthiga Njeru on 02.01.2015. That the body had multiple bruises at the trunk, the lower limbs were burnt from the region of the knee to the foot, there was a physical deformity of the head, there were inhalation of the burns, the skull borne had been severely crushed and multiple fractures, the brain tissue had been crushed too, the injuries to the head had been caused by a heavy blunt object. He concluded that the cause of death was due to severe injury to the head.

Further, he stated that Dr. Thuo carried out mental assessments on John Gitonga Nyaga, David Ngari Nyaga, David Njiru Nyaga, Alfred Kariuki Njuki and Crystus Murithi Munyi and in his opinion, they were all found fit to stand trial.

8. After the close of the prosecution's case, the accused persons were placed on their defences upon the court finding that the prosecution had established a *prima face* case against each of them.
9. DW 1, John Gitonga Nyaga testified that he knew the deceased who was his neighbor and further, that they went to the same school. It was his case that on 26.12.2014 together with his 2 brothers who happens to be the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons went to Michael Mugo's compound after they heard some noise. That there was a crowd of about 70 people who demanded to know from the deceased what had happened at Mugo's place but the deceased started running away and as the crowd chased him, he also followed the crowd. It was his case that after about 3km, they found the deceased's body at the river. He stated that at the scene, he found stones and sticks that the crowd used to beat the deceased. He denied participating in the murder and stated the only reason he was arrested was because he was in the crowd. He also confirmed that he did not restrain the crowd from beating the deceased and he did nothing to assist the deceased. He also conceded that the 2<sup>nd</sup> and the 3<sup>rd</sup> accused persons were at Mugo's home and present at the scene of crime only that they left the scene at different times.
10. DW2, James Ngare Nyaga testified that on 26.12.2014 at around 9:00am he left home and went to his father's house where they held a meeting. While there, they heard noises from his neighbour's home and, he decided to go and find out what was happening. On arrival he found a crowd of around 50 people with the owner of the home one Michael Mugo saying his money had been stolen and that he was also undressed. That he went back to wear a shirt as he only had a vest; but on his return, he found the deceased had run away and so he followed the crowd that was chasing the deceased who were about 1.5km ahead of him. He stated that when he caught up with the crowd, he found the deceased in the trench already dead. He stated that he did not see whether the people who were there had weapons and as he was leaving the scene, he saw his two brothers who are the co-accused in this case. He was later arrested together with his two brothers and the 4<sup>th</sup> and 5<sup>th</sup> accused persons. He denied killing the deceased herein.
11. DW3, David Njiru Nyaga stated that he knew the deceased as they were neighbours. He testified that on 26.12.2014 while in his father's house in the company of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons who are his brothers, they heard noises from Michael Mugo's house and on going there, he found about 60 people and, Mugo who was explaining to them that Moses (the deceased) had stolen his money, chapati flour and had sodomised him. The people present demanded that Moses be taken to Siakago police station. He followed them from behind and at that point, people started shouting '*mwizi mwizi*' and Moses started running away. That the crowd ran after him and later caught up with him at the river and at



- that point, the deceased was hit with a stone though he didn't know who did it. It was his evidence that at the scene, he saw the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons on the road ahead of him but did not see the 4<sup>th</sup> and 5<sup>th</sup> accused persons.
12. DW4, Alfred Kariuki Njuki stated that the deceased was his neighbour and he is also a neighbour to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. That on 26.12.2014 at around 10:30 am while tending to his cow, his neighbour's children told him that they had heard some screams: that he followed his mother upto Wanyaga's home and while there he heard some people talking near the river and he decided to go near there. He found around 40 people near the river. He testified that he saw the father to 1<sup>st</sup> – 3<sup>rd</sup> accused persons and heard that Moses had been killed. He stated that he was at the scene for about 5 minutes but didn't go near the body. He was arrested on 29.12.2014 at Siakago police station when he went to find out why the accused persons were arrested. The witness reiterated that he was not involved in the death of the deceased person who was his friend.
  13. DW1, Agnes Njoka Njuki, mother to the 4<sup>th</sup> accused person testified that on the material day at around 08:00am she was at home taking breakfast with the wife and children of the 4<sup>th</sup> accused person together with the 4<sup>th</sup> accused person. That the 4<sup>th</sup> accused person later went to look after the cows. It was her case that she later went to the market to sell the 4<sup>th</sup> accused's goat; only to come back home in the evening.
  14. DW5, Crystus Mureithi Munyi, a cousin and a friend to the deceased testified that on 26.12.2014 while on his way to work he found about 60 people at Michael Mugo's home but he couldn't identify them. He found Moses' hands tied and people were saying that he had stolen Mugo's money and he had sodomised him. They were saying Moses should be taken to the police station. That while on the way, Moses ran away and people chased him as he followed them from behind. It was his evidence that the deceased entered into a bush and the witness didn't follow further but went to work because there was a customer waiting for him but was later arrested in relation to the offence herein.
  15. DW7, Michael Mugo Njagi testified that on 24.12.2014, he picked some miraa and took it to the market and after selling it, he did some shopping. That on his way home at 2:00am, he met the deceased in the company of another man who spoke *ki-Meru* and they stole the shopping that he had bought and further sodomised him. It was his evidence that on 26.12.2014 he was at home in the morning but he was unconscious and therefore, he couldn't remember what happened. Further, he stated that he didn't know whether the accused persons were the ones who killed the deceased herein.
  16. After the close of the defence case, directions were given for parties to file their submissions and they complied with the directions.
  17. The prosecution submitted that the evidence adduced by its witnesses was sufficient to prove its case beyond any reasonable doubt. It was submitted that the accused persons herein committed the unlawful act which caused the death of the deceased herein in that, the circumstances leading to the death of the deceased herein were as a result of an assault. Reliance was placed on the case of [Republic Vs Stephen Sila Wambua](#) [2017] eKLR. It was the prosecution's case that all the accused persons were identified by way of recognition given that the offence herein happened during the day as a result, there is no possibility of mistaken identity. That the accused persons herein had a common intention to cause the death of the deceased and reliance was placed on section 21 of the [Penal Code](#) and further, the case of [Njoroge Vs Republic](#) [1983] eKLR. In regards to malice aforethought, it was submitted that the evidence tendered through the prosecution witnesses, exhibits produced and the nature of injuries sustained by the deceased were a sure proof that the accused persons herein had the necessary malice aforethought in causing the death herein. This court was therefore urged to find the accused persons liable for the offence.



18. The defence submitted that the prosecution did not prove that the accused persons herein were liable for the said death. That all the witnesses saw the deceased being beaten by a group of people; and while proof in criminal cases can be direct and/or circumstantial, it was submitted that there was no direct or circumstantial evidence linking the accused persons herein to the murder of the deceased. Reliance was placed on the case of *Republic Vs Joseph Kioko Muthoka* [2022] eKLR. That the accused persons herein should be acquitted as there was no cogent evidence linking them to the death.
19. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya. The degree/standard of prove is always that of “beyond any reasonable doubts” [See was *Miller Vs Minister of Pensions* [1947] 2 ALL ER 372 – 373].
20. In the instant case, the accused persons are facing a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. Murder is defined as “when any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” The elements of murder and which the prosecution ought to prove are;
  - a. the death of the deceased occurred
  - b. the death was caused by unlawful acts;
  - c. that the accused committed the unlawful act which caused the death of the deceased; and
  - d. that the accused had malice aforethought.
21. The question therefore is whether the prosecution adduced sufficient evidence to prove the above elements.
22. Whether the death of the deceased occurred, it is not in doubt that the deceased herein died. The prosecution witnesses testified that indeed they saw the body of the deceased. In the same breadth, PW6, Dr. Godfrey Njuki Njiru testified that he conducted the autopsy on the body of the late Moses Nthiga Njeru and formed the opinion that the cause of death was due to severe injury to the head.
23. As to whether the death was caused by unlawful acts, under Article 26 of the *Constitution of Kenya* 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by the law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See Sharm Pal Singh [1962] EA 13 and *Daniel Nzioka Mbuti & Another Vs Republic* (*supra*).
24. It is quite evident from the several pieces of evidence above and especially that of PW 6 that the cause of death was a result of severe head injury. As such, the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful.
25. As to whether the accused persons committed the unlawful act which caused the death of the deceased, I have perused the prosecution’s evidence as presented before this court, and I note that some of the prosecution witnesses saw the accused persons taking part in beating the deceased herein. PW 1, PW2, and PW3 testified that they were at the scene where the accused persons herein and others not before the court killed the deceased and thereafter, set him ablaze.
26. As to whether the accused persons had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder.



27. In *Republic Vs Stephen Sila Wambua Matbeka* [2017] eKLR it was held;

The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic Vs Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the *Ogelo Vs Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of *Ernest Bwire Abanga Onyango Vs Republic* [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

28. From the foregoing evidence, it is without doubt that the deceased met his death after he was assaulted and fatally injured by a group of villagers or mob of people. This was a typical case of what is referred as “mob justice” and such act is criminal. Any person participating in it commits an offence and must invariably be held responsible for the consequences of his unlawful action.
29. The prosecution having established without dispute that the deceased was murdered in a “mob justice” incident, the issue arising for determination in this case is whether the accused persons or any one of them was positively identified as having been part of the mob of villagers who assaulted and fatally injured the deceased.
30. On whether the accused persons committed the unlawful act which caused the death of the accused, the case therefore turns on the identification of the accused persons as the offenders, hence criminally responsible for the death of the deceased. In that regard, identification evidence must always be treated with caution. It must be free from error or mistake because a witness might be mistaken even if he is honest [See, *Joseph Onyinkwa Nyariki Vs Rep* (2019) eKLR].
31. Further, consideration ought to be given to the prevailing circumstances at the material time and scene of the offence. In that regard, whether favourable conditions and adequate opportunity existed for the identification of the offenders herein.
32. Even so, in such cases caution must still be taken in order to rule out the possibility of mistaken identity. The learned defence counsel, submitted that the charge was not proven against the accused persons beyond reasonable doubt thereby implying that the prosecution evidence of identification was insufficient, contradictory and or unreliable. In the case herein, reportedly, the deceased was killed for having allegedly stolen from Michael Mugo and thereafter sodomising him.
33. From the evidence on record, the prosecution witnesses categorically enumerated how the accused persons together with others not before this court killed the deceased after luring him from his house. Of importance to note is the fact that the accused were neighbours and/or friends of the deceased and as such, people who were well known to one another in the said village. Further, the incident occurred during broad day light and the recognition evidence was that of eye witnesses who were in close proximity hence the possibility of mistaken identity was highly unlikely. [See *Benson Mugo Mwangi Vs R* [2010] eKLR; See *Republic Vs Florence Kola, Carol Kola & another* [2021] eKLR].



34. The prosecution submitted that the accused persons were placed at the scene of the offence by the prosecution witnesses, thereby implying that they were in the group of people who assaulted and caused the death of the deceased. In situations where the death of the deceased is attributed to “mob justice” or “mob injustice”, it is difficult if not impossible to pinpoint which person in the mob administered the killer or fatal blow. In the circumstances, a common intention by the assailants to assault and kill the deceased or to take the law in their own hands may be lacking.
35. However, a common intention may be drawn from the presence of the assailants at the scene of the offence, their action and even the omission of any of them to disassociate himself or herself from the assault.

Section 21 of the Penal Code provides that:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

36. It was undisputedly established that the deceased herein was murdered by a mob of people comprising of his village mates. Each of the villagers who took part in assaulting and killing the deceased was as guilty as the other for the murder.
37. In *Rex Vs Tabula Yenka s/o Kirya & others* (1943) 10 EACA 51, it was stated that:-

“To constitute a common intention to prosecute an unlawful purpose .....it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omissions of any of them to disassociate himself from the assault.”

[Also See Eunice Musenya Ndui Vs R [2011] eKLR].

38. Additionally, their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased. See *Stephen Ariga & Another Vs R* [2018] eKLR. Equally, it established malice aforethought on the part of the defendants. [See Section 206 of the Penal Code].
39. After considering all the evidence, I am satisfied that the case against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> accused persons has been proved beyond any reasonable doubt. They are guilty of murder contrary to Section 203 as read with section 204 of the Penal Code. I so find and convict them accordingly.
40. As for the 4<sup>th</sup> accused person, I note that he was not among the people who went to Michael Mugo’s home and he is said to have joined the crowd at the scene later on. The only witness who mentioned him is PW1 and the circumstances under which he is said to have been identified cannot be said to have been free of possibility of error. Secondly, there is no evidence that he participated in beating the deceased, and therefore, this court gives him the benefit of doubt and he is hereby acquitted under Section 306 (2) of the Criminal Procedure Code.
41. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1<sup>ST</sup> DAY OF MARCH, 2023.**

**L. NJUGUNA**



**JUDGE**

