



**Republic v Kariuki (Criminal Case 9 of 2020)
[2023] KEHC 17502 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL CASE 9 OF 2020
CM KARIUKI, J
MAY 18, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

PAUL MAINA KARIUKI ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63 Laws of Kenya.
2. Particularly on May 10, 2020 at Gatami Muhotetu area, in Laikipia West Sub County, within Laikipia County, murdered Daniel Gacheru Njahi.
3. He pleaded not guilty, and the matter went into full hearing.
4. The prosecution called seven (7) witnesses to prove its case at the close of the prosecution case.
5. The accused was put on his defense, where he tendered sworn testimony.
6. The parties were directed to canvass their final argument via submissions which they field and exchanged prosecution submissions.

Prosecution Submissions

On the fact of the death of the deceased

7. The prosecution submitted that information (the charge sheet stated that the deceased had been murdered on May 10, 2020. Though no postmortem was produced due to the Court declining to grant the prosecution an adjournment, which had been sought, the accused, in his testimony, stated that he heard people outside his homestead on a fateful night. On suspicion that they were thieves, he



opened his door and threw a rungu which hit somebody who was eventually found in front of his gate with injuries but later died.

8. This person was eventually found to be the deceased to wit Daniel Gacheru Njahi.

11. On the cause of death of the deceased

9. Despite no postmortem being produced, the accused indicated that he had a rungu that he threw at the deceased, which hit him on the ribs, and injuries eventually caused his death. However, the evidence from the prosecution witnesses is that both the accused and the deceased had been seen arguing before the actual assault took place.

On whether an unlawful act or omission on the part of the accused person caused the said death

10. PW 4, an eye witness, testified that on a fateful night, while in the company of the deceased had a person by a homestead. Where they could take some change; when they reached there, they found some people taking the brew, and at around 18.40hr, they proceeded back home.
11. Later, he saw Daniel (the deceased) arrive with Muthoni. They started to quarrel with the accused, armed with a metal. The accused threatened to hit Daniel with the metal bar and, after that, hit Daniel on the back, and Daniel collapsed. After that, the accused ran into his house. PW2 and another called Wallace joined in giving Daniel (the deceased) first aid.
12. When placed on his defense, the accused gave sworn testimony and stated that on a fateful night, he heard people outside his homestead, and because there was rampant cattle theft, he thought those were thieves.
13. He opened the door, went outside, chased the people he claimed were armed, and threw a rungu with a nut at them.
14. He later learned that the rungu had hit somebody, causing injuries, and somebody was found at his gate who later succumbed to the injuries.
15. Thus, he pleaded that it was self-defense for his safety and properties.
16. In the premises, if the Court does not find that the State did not prove malice aforethought, which is a critical element of a murder trial, then I urge this Court to consider reducing the charge to that of Manslaughter and convict him accordingly.

Accused /Defence Submissions

(a) On Whether the prosecution could prove its case beyond a reasonable doubt.

17. It is submitted that, according to some witnesses, the deceased succumbed to injuries from being hit with a blunt object. However, no postmortem report was produced in Court.
18. The question arises whether the accused person committed the unlawful act. It is submitted that the burden lies with the prosecution to prove the charges against the accused person beyond any reasonable doubt. This burden does not shift to the accused person. In the circumstances, the prosecution must adduce evidence to prove the three ingredients of murder under section 203 of the penal code. These ingredients are: the accused person committed an unlawful act or omission. The execution of the illegal act or omission caused injury to the deceased person causing the death of the dead. Finally, the accused person had intended to either cause death or grievous harm to the deceased person at the time of the unlawful act or omission.



19. The prosecution called eight (8) witnesses in total. All the prosecution witnesses never saw the accused persons kill the deceased. Some witnesses said they found the dead near the accused person's homestead when they were coming from a drinking spree. PW 4, Stephen Muthui Ngatia, allegedly saw the accused hit the deceased. However, PW1 stated that the only person who witnessed the incident was Muthoni and nobody else.
20. PW 4 and PW 6 came from a chang'aa drinking spree. PW 4 stated that the deceased and a lady, namely Muthoni, who was not called as a witness, entered a homestead it was. He further confirmed that it was dark and that the homestead was near a forest.
21. It is difficult to tell how PW4 identified the accused, considering that he just learned about the accused there.
22. The accused did not run away; he would have been expected to run away if he had committed the offense. It appears that the accused was arrested because the incident happened near his homestead; furthermore, just because a metal rod was allegedly recovered in his house does not necessarily mean that it is the weapon that committed the crime. It is not unusual to find a metal rod in a homestead, especially in Laikipia, where cattle rusting is rampant.
23. If the alleged metal rod had blood, the investigation officer would have to take the same to the Government Chemist for DNA profiling to confirm that the blood on the metal rod belonged to the deceased person.
24. The prosecution relied entirely on circumstantial evidence. The prosecution must establish the elements in *Joan Chebichii Sawe v Republic* [2003] eKLR for the honorable Court to rely solely on circumstantial evidence.
25. In *Republic v Kelvin Mukuba Wambui* [2020] eKLR, in acquitting the accused person, this Honourable Court was guided by the Court of Appeal case *Joan Chebichii Sawe v Republic* [2003].
26. Guided by *Abang'a alias Onyango v Republic* – Criminal Appeal 32/1990.
27. The Court of Appeal stated in *PON v Republic* [2019] eKLR that:

"In a case founded on circumstantial evidence, missing links like those we have identified can create sufficient doubt which will entitle the court to acquit for lack of evidence to the standard required."

(b) Whether the accused committed the unlawful act which caused the death of the deceased

28. According to the testimonies of several witnesses, no one saw the accused persons hit the deceased person. All their evidence was what they were allegedly told by a lady, namely Muthoni and PW 4 Stephene Muthui.
29. It is also important to note that the metal rod mentioned was never produced as an exhibit.
30. The prosecution had ample time to organize such an examination. But unfortunately, the evidence adduced by the prosecution never ascertained whether the accused committed the injuries that caused the deceased's death.
32. The prosecution relied on hearsay to accuse the accused of the charge.



c) Whether The Prosecution Evidence Was Free Of Any Doubt, And If Any Existed In Whose Favour, The Same Should Be Resolved.

33. The State must prove each element of the charged crime with evidence that convinces you of the accused's guilt. It is not enough for the State to show that the accused is probably guilty. The accused must not be convicted on speculation or suspicion.
34. In section 107(1) of the *Evidence Act*, that:
- (1) "Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist."
35. In *JOO v Republic* [2015] eKLR
36. Muthoni was not called a witness. She was the last person who was with the deceased. In addition, the doctor who conducted the postmortem on the deceased's body and the investigation officer did not testify.
37. These witnesses were supposed to come and fill in the gaps the other secondary witnesses had left.
38. That failure to call material witnesses by a party should conclude that if such evidence were called, the same would be adverse to the party not calling the same. The same conclusion should be drawn in this matter. No explanation was given as to whether there was any difficulty or expense that was being faced by the prosecution to avail the said witnesses to Court.
39. However, it is trite law that all evidence in the resgestae of a case must be placed before the Court for a just determination of such a case failure to call such evidence is fatal to the case for the prosecution.

Issues, Analysis, and Determination

40. After going through the material to wit, the proceedings and the submissions, before the Court, I find Issues for determination are;
- i. Whether the prosecution proved its case beyond any reasonable doubt.
- ii. Whether the accused committed the unlawful act which caused the death of the deceased
- iii. Whether the prosecution evidence was free of doubt and if any existed in whose favour same should be resolved.
41. On the first issue, whether proof of death was established, the defense submitted that, according to some witnesses, the deceased succumbed to injuries from being hit with a blunt object. However, no postmortem report was produced in Court. In rejoinder, the prosecution submitted that, though no postmortem was made due to the Court declining to grant prosecution an adjournment, which had been sought, the accused, in his testimony, stated that he heard people outside his homestead on a fateful night. On suspicion that they were thieves, he opened his door and threw a rungu which hit somebody who was eventually found in front of his gate with injuries but later died.
42. PW 4, an eye witness, testified that on a fateful night, while in the company of the deceased had a person by a homestead. Where they could take some change; when they reached there, they found some people taking the brew, and at around 18.40hr, they proceeded back home.
43. Later, he saw Daniel (the deceased) arrive with Muthoni. They started to quarrel with the accused, who was armed with a metal bar. The accused threatened to hit Daniel with the metal bar and, after



that, hit Daniel on the back, and Daniel collapsed. After that, the accused ran into his house. PW2 and another called Wallace joined in giving Daniel (the deceased) first aid.

44. When placed on his defense, the accused gave sworn testimony and stated that on a fateful night, he heard people outside his homestead, and because there was rampant cattle theft, he thought those were thieves.
45. He opened the door, went outside, chased the people he claimed were armed, and threw a rungu with a nut at them.
46. He later learned that the rungu had hit somebody, causing injuries, and somebody was found at his gate who later succumbed to the injuries.
47. Pw2,4 and the accused concur that the victim's death occurred, and as the prosecution states, it resulted from an attack with a metal bar; the accused says he hit the victim with a rungu, and he succumbed to the injuries. However, given the no-production of the postmortem due to denial of an adjournment, the issue is whether the Court can infer the cause of death to have been proved as occasioned by the accused assault on the victim.
48. This conclusion can safely be reached without a medical doctor's evidence. The deceased died at the spot where he appeared to have been assaulted, and as such, there was nothing to lead to doubts as to whether the injuries sustained would have caused the death or something else. I, therefore, find that the death of the deceased resulted from the injuries he suffered due to the attack with a blunt object such as rungu, admittedly used as a weapon by the accused. Reliance is made on *Republic v WOO* [2020] eKLR, where the Court held;

“In my humble view, therefore, even in the absence of medical evidence as to the cause of the death of the deceased, the evidence of PW1, PW2, and PW3 is all consistent as to the appearance of the body of the deceased at the time they went to the scene. Their evidence was that the deceased was lying down, he had been cut on the neck/ slaughtered on the neck, and there was blood (he was lying in a pool of blood). This evidence, in my opinion, suggests that the deceased must have died out of the injuries inflicted on his neck. This conclusion can safely be reached even without a medical doctor's evidence. Furthermore, the deceased died at the spot where he appeared to have been slaughtered, and as such, there was nothing to lead to doubts as to whether the injuries on the neck would have caused the death or something else. I, therefore, find that the death of the deceased resulted from the injuries he sustained on the neck.”

49. On whether an unlawful act or omission on the part of the accused person caused the said death PW 4, an eye witness, they have testified that on a fateful night, while in the company of the deceased, they had a person by a homestead. Where they could take some change; when they reached there, they found some people taking the brew, and at around 18.40hr, they proceeded back home.
50. Later, he saw Daniel (the deceased) arrive with Muthoni. They started to quarrel with the accused, armed with a metal. The accused threatened to hit Daniel with the metal bar and, after that, hit Daniel on the back, and Daniel collapsed. After that, the accused ran into his house. PW2 and another called Wallace joined in giving Daniel (the deceased) first aid.
51. When placed on his defense, the accused gave sworn testimony and stated that on a fateful night, he heard people outside his homestead, and because there was rampant cattle theft, he thought those were thieves. So he opened the door, went outside, chased the people he claimed were armed, and threw a rungu with a nut at them.



52. He later learned that the rungu had hit somebody, causing injuries, and somebody was found at his gate who later succumbed to the injuries.
53. Thus, he pleaded that it was self-defense for his safety and properties.
54. In the premises, the prosecution urges the Court that if it does not find that the State did not prove malice aforethought, which is a critical element of a murder trial, then consider reducing the charge to Manslaughter and convict him accordingly.
55. It was upon the prosecution to prove their case against the accused person beyond a reasonable doubt, and that burden does not shift to the accused person to exonerate himself. Thus, it is incumbent upon the prosecution to prove that the unlawful act or omission was committed with malice.
56. The prosecution evidence is that pw4 saw Daniel (the deceased) arrive with Muthoni. They started to quarrel with the accused, armed with a metal. The accused threatened to hit Daniel with the metal bar and, after that, hit Daniel on the back, and Daniel collapsed. The accused ran into his house.
57. On the other hand, the accused narrates that he opened the door and went outside, chased the people he claimed were armed, and threw a rungu with a nut at them. He later learned that the rungu had hit somebody, causing injuries, and somebody was found at his gate who later succumbed to the injuries.
58. He thus pleaded that it was self-defense for his safety and properties.
59. Both sides' evidence concurs that malice aforethought is absent. However, the assault took place at the compound of the accused, where after a quarrel with trespassers, he used a rungu to attack one of them, believing their presence was with ill motive.
60. Thus, the Court holds that the accused did not have malice aforethought but is found guilty of the lesser offense of Manslaughter. The accused is thus convicted of the offence of manslaughter accordingly.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18TH DAY OF MAY 2023

.....

CHARLES KARIUKI

JUDGE

