



REPUBLIC OF KENYA



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**Republic v Ita (Criminal Case E002 of 2021)
[2023] KEHC 19142 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E002 OF 2021
LM NJUGUNA, J
JUNE 14, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

CRISPIN NYAGA ITA ACCUSED

JUDGMENT

1. The accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* and the particulars of the offence being that on 25.12.2020 at Kambaru village, Muthanu Location, Mbeere North Sub –County within Embu County murdered Catherine Mbuya Nyaga.
2. When the accused person was arraigned in court he pleaded not guilty to the charge and a plea of not guilty entered and hence the case proceeded to a full hearing.
3. PW1, DM, a minor aged 11 years old and in class 4 in Kabaruru school demonstrated to the court that he was intelligent enough and understood the need to tell the truth and to give a sworn statement. He stated that on 25.12.2020 he woke up in the morning and accompanied his parents to pick miraa in their shamba. At around 9am they went to sell the miraa at Kibaratiri market and afterwards went to Mwangaza trading center to buy some items for Christmas, her mother asked him to take the items home. Upon reaching home he put the items in the house and went to watch TV at a neighbour's home, he came back at about 11pm to find his mother lying on the ground. The witness said he did not wake her up but went to look for her sister Beatrice whom she found at the gate and went back home where they found their sister Diana Muthoni in the house. She (Diana) sent them to call the Chief who came and told them that their mother was dead. He further stated that his mother had injuries on the back of her head, but he didn't see who hit her.



4. PW2, Beatrice Wangui stated that on 25.12.2020, she had gone for Christmas party at Njeru's place and stayed there till 1900hrs. That on going back home, she found PW1 who informed her how the accused and the deceased upon returning home started quarreling over meat. That the deceased thereafter fell down on the panga and sustained injuries. She stated that in the company of PW3, they went to call PW6 who called the police who came to the scene and took away the body to the mortuary. She denied that the accused was responsible for the death of the deceased.
5. PW3, Diana Muthoni Nyaga stated that on 25.12.2020, she prepared food for the family and then, she left for a friend's place. That she went back home at 1900 hours when she found the deceased lying outside the chicken cage. She stated that she did not examine the body but directed PW1 and PW2 to go and inform PW6 what had happened. It was her evidence that, the accused was not at home. That after some time, PW6 arrived and she told them that their mother was already dead. She stated that the body was thereafter taken to the mortuary. According to her the deceased and the accused used to fight.
6. PW4, Mercy Wawira Nyaga stated that on the fateful day, she was called by PW6 who told her to go to her parents' home and that upon reaching there, she found the deceased lying outside the kitchen. That she did not check on the injuries on the body of the deceased but later on, she identified the body of the deceased to the doctor who conducted the post mortem.
7. PW5, Dr. Sheila Shavulimo testified on behalf of Dr. Andrea Mwikamba who carried out mental assessment on the accused person and found that he was fit to stand trial.
8. PW6, Julieta Cathi Njuki testified that on the material day, she was at home when PW1 and PW2 visited her place and informed her that the accused had sent them to call her because their mother, the deceased herein was not talking. That in company of Dorcas Ndama, they went to the scene where they found the deceased lying in between the kitchen and the main house. It was her evidence that the deceased had already died and that there were blood stains where she lay and further, her leg looked fractured. That she called the OCS Siakago who came and took the body away. She reiterated that the deceased and the accused had a troubled marriage and they used to fight when drunk.
9. PW7, Dr. Job Mwaniki testified that he conducted the post mortem on the body of the deceased and he formed the opinion that the cause of death was a result of cardiopulmonary failure secondary to a right temporal parietal subdural hematoma as a result of blunt force trauma to the head.
10. PW8, Sgt. Awadh Isa Mohammed, stated that on 25.12.2020, he received a call from his OCS Insp. Mwaniki to attend to a murder scene in Muthanu Sub-location in Riandu Location. That he teamed up with other police officers to the scene. At the scene, he found a lifeless body of a lady by the name Catherine Mbuya. The body was outside but within the compound. That during investigations, he established that there was a fight between the deceased and accused herein over meat and the accused hit the deceased on the head and broke her leg using a log. He stated that they carried the body to the mortuary but at that time the husband had already fled. He further stated that the blunt side of the panga was the one used to inflict the injuries and that the only person present when all this was happening was PW1 from whom he took a statement.
11. PW9, Enos Kariuki Ngari stated that on the fateful day, he was woken up by PW6 who informed him that the children of the deceased had gone to her house and had informed her that they had tried to wake up the deceased to no avail. That he went to the scene and confirmed that indeed the deceased was already dead. It was his evidence that the body had no injuries. According to him, the deceased was a drunkard but he could not tell the court what caused the death of the deceased.
12. The prosecution closed its case and in a ruling delivered on 16.11.2022, the accused person was put on his defence upon the court finding that the prosecution had established a prima facie case.



13. DW1, Crispin Nyaga Ita testified that on 25.12.2020, together with the deceased and PW1, they went to pick miraa and thereafter took it to the market and sold it at a price of Kes. 3,000, 00. That he gave the deceased an amount of Kes.1500 to buy stores for the house as he left for Mwangaza club. It was his evidence that upon returning home, he only found PW1 and therefore, took a shower and left for King'ang'ani Club where he stayed till 1.30 a.m. That upon leaving King'ang'ani Club, he went to Hill top Club and thereafter, took a motor bike back home. He stated that when he got home he called Diana who opened the door for him and he entered the house and slept. That he did not find the deceased at home but after a short while, PW6 arrived and informed him that they should go to the hospital to see the deceased. That since he was very tired and drunk, they opted to go to the hospital the following day but that was not to be as the police arrested him instead. He denied killing the deceased.
14. The defence proceeded to close its case. The court gave directions that parties do file submissions and both parties complied.
15. The prosecution submitted that the evidence adduced by the nine prosecution witnesses was not dislodged by the weak evidence of the accused who in his defence, denied everything that transpired on the material day. It was further submitted that the murder of the deceased by the accused person has been proved beyond any reasonable doubt and prayed that the accused be convicted in accordance with the law. The prosecution underscored the fact that despite PW1 recanting his testimony, the evidence on record leaves no doubt that the death of the deceased was a direct consequence of the unlawful actions of the accused person. Reliance was placed on the cases of *Daniel Odhiambo Koyo v Republic* [2011] eKLR and *Abel Monari Nyanamba & 4 others v Republic* [1996] eKLR. The prosecution thus urged this court to hold that the accused person was guilty of the offence herein.
16. The defence on the other hand submitted that the prosecution failed to prove the elements of the offence of murder in that, there was no evidence linking the accused person to the death of the deceased and further, that the only alleged witness, PW1 who testified on the occurrence of the incident gave a different version of the facts in court and as a result, there was no clarity as to who committed the offence herein. The accused relied on the case of *Sare v Republic* (2003) KLR 364 to emphasise his innocence.
17. I have considered the evidence tendered before this court by both the prosecution and the defence and the written submissions filed by both parties. As I have already stated, the accused person herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.
18. The offence of murder is defined under section 203 of the *Penal Code* in the following terms;-

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
19. As such, for the prosecution to secure a conviction on the charge of murder, it has to prove, beyond reasonable doubt the ingredients of the offence of murder against an accused persons. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as follows:-
 - a. death of the deceased occurred;
 - b. the accused committed the unlawful act which caused the death of the deceased; and
 - c. the accused had malice aforethought.
20. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused herein murdered the deceased (see



Woolmington v DPP (1935) AC 462). The standard of proof which was required of the prosecution is that of “beyond any reasonable doubt” (See *Miller v Ministry of Pensions*, [1947] 2All ER 372). The question therefore is whether the above ingredients were proved to the required standards?

21. As for the death of the deceased, the evidence by PW7 was that the cause of death was cardiopulmonary failure secondary to a right temporal parietal subdural hematoma as a result of blunt force trauma to the head. In regard to this aspect, death of the deceased was indeed proved by the prosecution.
22. 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. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defense or defense to property. (See *Sharm Pal Singh* [1962] EA 13). Going by the evidence of PW5 and the opinion she formed on the cause of death, the same was definitely not lawful.
23. As to whether the accused committed the unlawful act which caused the death of the deceased; having perused the prosecution’s evidence as presented before the court, it is noted that no prosecution witness directly saw the accused herein kill the deceased. However, PW1 testified that on the material day, his parents were not only drunk but also engaged in a quarrel for the reason that the accused wanted goat meat but there was none. That his mother, the deceased herein sustained the deadly injuries after she hit her head as a result of a fall. He denied that his father, the accused herein was responsible for the said death. In short, PW1 who allegedly witnessed the happenings herein retracted his statement in that, the initial statement that he recorded at the police station was different from the evidence that he adduced before the court.
24. The Court of Appeal in the case of *Daniel Odhiambo Koyo v Republic* [2011] eKLR, stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

“... The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In //Maghenda v. Republic [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

“The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.”

There is a thin line between a hostile and refractory witness. Both are people who display reluctance in giving evidence as required of them.

Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or is reluctance to testify...

25. Further, the same court also summarized the applicable law in *Abel Monari Nyanamba & 4 others v Republic* [1996] eKLR as follows:

“In *Coles v Coles*, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-

“ A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.”



26. In *Alowo v Republic* [1972] EA at page 324 the predecessor of the Court said:-

“The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.”

27. Again in *Batala v Uganda* [1974] E.A. 402 the court at page 405 said:

“The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.”

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt....

28. My understanding would then be that once a witness is declared hostile their evidence becomes almost worthless and is of no value to either the prosecution or the defence. The act of recanting before the court the evidence given to the police only goes to show that the witness is unreliable. In such a situation, this court is called upon to look elsewhere in search for the truth.

29. At this juncture, it is important to note that a life was lost through murder and the only remaining question is whether the prosecution successfully linked the offence to the accused herein. I will proceed to consider the evidence of the other witnesses. [See *Allan Chebore Chemosit v R* [2022] eKLR].

30. In this case, the prosecution witnesses clearly narrated what transpired on that fateful day and how the accused as result of his actions, the deceased herein lost her life. It cannot be denied that the prosecution established beyond reasonable doubt the act of unlawful killing of the deceased by the accused person but can it be equally said that the same was done with malice aforethought? As already determined, the accused person had a fight with the deceased wherein the deceased got injured and thereafter succumbed to her injuries. In the same breadth, the prosecution witnesses testified that the couple were always drunk and had a troubled marriage.

31. PW1 noted in his evidence that his parents used to threaten each other with physical violence and further, the nature of the injuries inflicted on the deceased. The same was noted that the accused hit the deceased on the head and further broke her leg. In my considered view, the accused person was determined to inflict serious injuries on the deceased which ultimately caused her death. As a result therefore, his actions point out to a well calculated intention meant to cause serious bodily harm if not death.

32. The court has considered the defence mounted by the accused person vis-à-vis the evidence that was adduced by the prosecution witnesses and in my view the same was an after thought and it does not hold water. PW1, PW2 and PW3 told the court that at 11.00 p.m. on the fateful day, the deceased was at home. Further it was the evidence of PW2 that when she went back home at 7.00 p.m. she found her father, the accused person herein at home. PW1 told PW2 that when their parents came home from Enos they started quarrelling over meat. Later in her evidence, she contradicted her evidence and stated that her father came back home at 4.00 a.m. In my considered view she was not a reliable witness and she only changed the version of the evidence to cover her father's heinous action. Further, PW4 in her evidence stated that when she was called by the sub-chief on the material night, she went home and found her father at home.



33. PW6 on her part told the court that when PW1 and PW2 went to her house to call her, it was at 8.00 p.m. and they told her that they had been sent by the accused person to call her because their mother lay outside and she was not talking. She went to the accused person's home in the company of a lady called Dorcas Ndana and they found the body of the deceased between the kitchen and the main house. She was told the accused had gone to call a Mr. Kariuki and when they went to Kariuki's place, they did not find the deceased. Looking at the pieces and the bits of the evidence from the prosecution witnesses, it is clear beyond par adventure that the accused person was at home when the deceased died. He is the one who inflicted the injuries on her after they quarreled over meat and when he realized that she had died, he fled from home.
34. The Court of Appeal in *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR stated as follows on the proof of malice aforethought;-
- “It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, CR. App. No. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in *Rex v Tubere s/o Ochen* (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:
- It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick.....”
35. As to whether the accused had malice aforethought, malice aforethought is the mental element (mens rea) of the offence of murder. Section 206 of the *Penal Code* defines it as follows;
206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -
- 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.
36. In view of the evidence that was adduced by the prosecution witnesses, I have no doubt in my mind that it is the accused person who killed the deceased. His conduct on the material day is not of an innocent person but rather it betrays his guilt.
37. In the end, I find that the prosecution has proved the case of murder against the accused person and I therefore find him guilty as charged and convict him accordingly.



38. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

