



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Nthiga (Criminal Case E005 of 2021)  
[2023] KEHC 19140 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E005 OF 2021  
LM NJUGUNA, J  
JUNE 14, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETERSON NJIRU NTHIGA ..... ACCUSED**

**JUDGMENT**

1. Peterson Njiru Nthiga, the accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that: On January 21, 2021 at Mufu Village in Embu East Sub-County within Embu County murdered Diaz Njue Gakithia. The prosecution called a total of 6 (six) witnesses in support of its case.
2. PW1, Francis Ileri Paul, an assistant Chief of Njeruri Sub-Location testified that on January 21, 2021 in the morning at around 0830 a.m. he received a call from the Kaithege Sub Area, one Mr. Karanja who informed him about a body that he had found in a shamba. The witness proceeded to the scene and saw the body near a Macadamia tree. The body had no visible injuries apart from a swollen face. He informed the OCS Runyenjes and went ahead to state that he saw the accused on that day. The witness testified that he asked the owner of the farm where the body was found who also happens to be the mother of the accused person if she knew what had happened, and she stated that the previous night the deceased and the accused had a confrontation. That he thus arrested the accused on the following day on January 22, 2021.
3. PW2, Caesar Njiru Muriuki testified that on January 21, 2021 at around 0900 hours he was called by his friend called Rhitos who told him there was a crowd that was seen gathering in a shamba and that the deceased had been found lying dead. That he called the sub-area namely Karanja who told him he was already aware. It was his evidence that he proceeded to Runyenjes police station where he recorded his statement. He stated that he could not tell what caused the death of deceased neither could he tell whether the accused was responsible for the same.



4. PW3, Nancy Wangari Kathangu, testified that on January 21, 2021 at around 5pm while on his way home, she heard some noise coming from their father's farm; and she went to see what the issue was. That she found the deceased and the accused fighting. The deceased was on the ground bleeding from the mouth. The witness asked the accused what was happening, and he told her that the deceased had stolen his nuts an allegation which the deceased denied but conceded that the alleged stolen nuts had previously fallen down and that he only picked them. That the accused picked a stick to hit the deceased but she stopped him from doing so. That she thus left the two of them but only came to learn of the death of the deceased the following day.
5. PW4, Dr. Moses Maina testified that he conducted an autopsy on the body of the deceased The body had bruises on the face with swelling and bruises on the upper hands, the ribs were fractured on the right side of the chest and had haematoma, there was also laceration of the liver with bleeding into peritorial cavity and that the injuries were caused by a blunt object. He formed the opinion that the cause of death was due to excessive internal bleeding from trauma.
6. PW5, Antony Njagi, an elder in Kirege area stated that on January 21, 2021 at around 0830 a.m. he was called by Mr. Samali on phone and he informed him about a body that he had found within his business premises. That he visited the scene and found the body of the deceased herein. He called the assistant chief to whom he passed the information. It was his evidence that the deceased was a watchman in a nearby shamba. Upon his own investigations, on the deceased's last movements, he found that the deceased spent the previous day with Mr. Njiru (accused) herein harvesting nuts and thereafter sold them at Runyenjes. He called the deputy OCS who came and took the body to the mortuary.
7. PW6, PC. Rose Wamaitha, attached at DCI Runyenjes, who was the investigating officer in this case stated that on 21.01.2021 together with the OCS and the DCI team, they visited the murder scene. That they found the body on a shamba belonging to one, Elizabeth Kiere the mother to the accused person. Upon carrying out investigations, she discovered that the deceased had quarreled with one Peterson Njiru on January 20, 2021 about macadamia which the accused had claimed the deceased stole. That on January 21, 2021 Nancy Wangari found the deceased lying on the shamba with blood in the mouth and Peterson was standing beside him. Peterson wanted to hit the deceased with a stick, but Nancy took it and kept it in the house and advised Peterson to report to the police. The next day the deceased was found lying on the same shamba, and the body was taken to Embu Level 5 mortuary. The accused was arrested the following day by the assistant chief. The mental assessment was conducted on February 3, 2021 at Embu Level 5 hospital where Peterson was found fit to stand trial. The report was produced by the investigating officer as exhibit 3.
8. After the close of the prosecution's case, the accused herein was placed on his defence and he gave sworn statement. It was his evidence that on the January 20, 2021 while at work he was called by the sub area and upon arriving home he found the deceased in the shamba helping him to harvest macadamia. Together with the deceased, they took the macadamia to Runyenjes market where they sold and he paid him his dues and went back home. On waking up the following morning, he was called by the sub chief who requested him to accompany him to the shamba where the deceased was found lying. It was his testimony that they were in good terms with the deceased and that the deceased used to help him with menial jobs. He denied the evidence by Nancy that he fought the deceased and further allegations by his mother that he was seen quarreling with the deceased the previous evening. The accused also denied that he showed Nancy the 2 kilos of macadamia that the deceased had allegedly stolen. He stated that he was arrested because he was the one who was last seen with the deceased working on his farm.
9. After the close of the defence case, directions were given on filing of submissions and both parties complied with the said directions.



10. 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 *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].
11. In the instant case, the accused person is 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 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.(See *Anthony Ndegwa Ngari v Republic* [2014] eKLR).
12. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
13. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. Dr. Moses Maina who conducted post mortem on the body of the deceased formed the opinion that the cause of death was as a result of excessive bleeding from a trauma caused by a blunt object. As such death was proven.
14. 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 law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. [See *Guzambizi Wesonga v Republic* [1948] 15 EACA 63]. The post mortem report by Dr. Moses Maina stated that the cause of death was as a result of internal bleeding from trauma. 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.
15. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution’s evidence as presented before the court. I note that no prosecution witness saw the incident in which the deceased herein died. From the evidence on record and as already stated, no witness saw the accused kill the deceased herein and as such, the prosecution is relying on circumstantial evidence.
16. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually thus the court has to weigh the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused should be considered. In drawing these inferences, the court must have regard to the common cause of nature and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of the proved facts. In deciding the sufficiency of circumstantial evidence, for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt. [See Court of Appeal decision in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR].



17. In this case, PW3 testified that while on her way from the quarry, she found the deceased and the accused fighting and that the deceased was on the ground bleeding from the mouth and upon asking the accused, he told her that the deceased had stolen his nuts an allegation which the deceased denied. That the accused picked a stick to hit the deceased but she stopped him from doing so. Further, PW6 also testified that upon carrying out investigations, she discovered that the deceased had quarreled with one Peterson Njiru on January 20, 2021 about macadamia which the accused had claimed the deceased stole. That on January 20, 2021 Nancy Wangari found the deceased lying on the shamba with blood in the mouth and Peterson was standing beside him.
18. Further, there is evidence that the accused person was the last one to be seen with the deceased in his shamba and this evidence is corroborated by the evidence of PW3.
19. The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is therefore expected to provide an explanation as to what happened. Having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the accused herein has a duty to give an explanation of how the deceased met her death.
20. In the Indian case of *Ramreddy Rajeshkhanna Reddy & another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

21. The accused in this case was thus required to offer a plausible explanation. Sections 111(1) and 119 of the *Evidence Act* provides as follows:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”



“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

22. In the circumstances of this case, it is my view that the accused person’s defence failed to offer any plausible explanation. Weighing his evidence and that of PW3, the evidence of PW3 is more believable and going by her evidence, it is the accused person who inflicted injuries that caused the death of the deceased.

23. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused person herein who unlawfully caused the deceased’s death.

24. Finally, on the question of whether there was malice aforethought on the part of the accused, the Court of Appeal in the case of *Joseph Kimani Njau v R* (2014) eKLR held as follows:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.....”

25. In the instant case, PW4 who testified that the body of the deceased had bruises on the face with swelling and bruises on the upper hands, the ribs fractured on the right side of the chest and haematoma; laceration of the liver with bleeding into peritorial cavity and of the injuries were caused by a blunt object. He formed the opinion that the cause of death was due to excessive internal bleeding from trauma. In regard to the above, there is no doubt that the accused person must have intended to cause the deceased grievous harm or death.

26. 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.

27. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14<sup>TH</sup> DAY OF JUNE, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the State

