



**Republic v Muya & another (Criminal Case E021 of 2020)
[2023] KEHC 20270 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E021 OF 2020
LM NJUGUNA, J
JULY 19, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

ANTONY KYOKO MUYA 1ST ACCUSED

JOSEPH MUTISYA MUINDI (DECEASED) 2ND ACCUSED

JUDGMENT

1. Antony Kyoko Muya and Joseph Mutisya Muindi were charged before this court with murder contrary to section 203 as read with section 204 of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the charge are that on the 27th day of November 2020 at Makima village in Makima sub location, Makima location in Mbeere South sub-county within Embu County, the two accused jointly murdered Bonface Muriithi Mwaniki.
2. Both accused persons pleaded not guilty to the charge and the prosecution called seven (7) witnesses in support of their case. On the 17th of May 2022, the prosecution withdrew charges against the 2nd accused person who passed away while in remand.
3. For the prosecution's case, PW1 Stephen Musyoka Mbithi testified that on October 27, 2020 he was called by the deceased to go and buy Miraa from him and when he reached he found out that the Miraa was way too little for purchase. That he returned home and after sometime, he received a call from the deceased who told him that he (the deceased) was dying. That PW1 went back to where he had left the deceased and he found another person called Njeru Maringa who told him that the people who were at the club had quarreled and they had all left the club. He asked Njeru to accompany him to go look for the deceased whom they found not far from there. He was lying down and had injuries on the forehead and on asking him what had happened he said he was assaulted by Kioko. They took the deceased to his mother's house and later to hospital where he was treated and discharged and they returned him



- home. That on the same day he received a report that the deceased had died. In cross examination it was his evidence that on the same night the accused person was in the club, he had seen him though he did not see him assault the deceased.
4. PW2 Njeru Maringa who was a neighbor to the deceased and who worked as a watchman at a bar testified that on the fateful night while he was working at around 12.30 a.m. midnight he decided to go and buy miraa. That he left behind 5 people, and among them were the accused persons herein, the deceased and Njeru. That they were quarreling and he heard the accused persons telling the deceased that he was going to see. That he went away but a few meters away the two accused persons, stood and started walking away to the market, he heard the deceased saying in kiswahili “*ni mimi umepiga na mawe*” (is it me that you have hit with a stone?). That the street was well lit and he was able to see the two accused persons running away carrying stones and the deceased was lying on the corridor with injuries on his forehead. That PW1 and PW2 took the deceased home and in the company of the mother of the deceased, took him to hospital. That later PW2 received news that the deceased had died. On cross-examination, he stated that the deceased was not drunk and that he did not actually see the accused assaulting the deceased.
 5. PW3 Mary Kalondu who is the mother of the deceased testified that on the night of the murder, the deceased called her and asked her to go and help him saying that he was dying. That she found some people outside her gate who were calling her to go out and help her son who had sustained some injuries and was bleeding profusely. That when she saw the deceased, he was calling out the names of Kyoko and Musyoka. That she, in the company of two other people took the deceased to Masinde hospital for first aid and later to Embu Level 5 Hospital where he died in the course of treatment.
 6. PW4 Penina Ndunge Kioko testified that she identified the body of the deceased to the doctor who carried out the postmortem and that she was among the people who took him to Embu Level (5) hospital. In cross examination she stated that the deceased was not talking when he was taken to hospital.
 7. PW5 Rosemary Wangari Kamau who is a pathologist testified on oath and stated that she had worked with Dr Njue who performed the post-mortem at Embu Level 5 Hospital and she produced evidence on his behalf. That the ascertained cause of death was massive head injury secondary to blunt force.
 8. PW6 Damaris Ngithi Kithaka testified that she was in the company of 5 other people including the accused persons and the deceased. That an altercation ensued and the accused and the deceased stated fighting. That they were separated but the deceased hit the accused with a stone and run away and he was pursued by the two accused persons who came back 5 minutes later but the deceased did not return. That later she learned that the deceased had been taken to hospital and he had died. The witness stated that she did not know of any grudge between the accused and the deceased.
 9. PW7 Bakari Said Mada was the investigating officer in the case and he stated that he conducted investigations in the matter and that the accused persons indeed had a fight with the deceased but nobody saw them hitting the deceased. He also indicated that there was no weapon recovered. He confirmed that mental assessments conducted on the accused persons established that they were fit to stand trial. Further, that the accused persons took themselves to the police station.
 10. The prosecution then closed its case and made an application orally to withdraw charges against the 2nd accused person. Vide a ruling dated March 9, 2023, this court found that the 1st accused person had a case to answer and placed him on his defence. He opted to give sworn testimony and he did not call any witness.



11. In his sworn testimony, he testified that he knew the deceased and they were friends and neighbors. That on the fateful night, he was in the company of the 2nd accused and his girlfriend at a bar. That when they decided to leave, the deceased was not with them but they met on the way home. That the deceased touched the 2nd accused person's girlfriend and they started fighting on the spot. He stated that he did not fight with the deceased and that it was the 2nd accused person who injured the deceased. That he learnt of the death of the deceased the following day but he took himself to the police station.
12. I have considered the evidence presented before the court both by the prosecution and the defence and in my opinion, the main issues for determination are whether the prosecution proved the case against the accused beyond any reasonable doubt in the following respects;
 - a. The death of the deceased and the cause of the said death;
 - b. That the death was caused by unlawful acts or omission ;
 - c. That the accused committed the unlawful act which caused the death of the deceased; and
 - d. That the accused had malice aforethought
13. Section 203 of the *Penal Code* provides that; "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder." In the case of *Anthony Ndegwa Ngariv Republic* [2014] eKLR the Court of Appeal sitting in Nyeri held:

"For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought."
14. On whether there was proof of death and the cause of the said death, it is not in dispute that the deceased herein died. The death of the deceased was proved by the evidence of PW3 who took the deceased to the hospital both for treatment and for the post-mortem. She is the one who identified the body of the deceased. Her testimony was corroborated by the evidence of PW5, the Pathologist who testified that the post-mortem was conducted by her colleague Dr Njue and she explained the cause of death as reported by the attending pathologist. The post-mortem report was marked as exhibit no. 1.
15. Besides proof of death of the deceased, the prosecution is expected to establish the cause of death of the deceased. The pathologist who carried out the autopsy is not the one who testified in court. However, the testimony stands by virtue of section 33(a) of the *Evidence Act* which provides:

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

 - (a) relating to cause of death

when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of



death, and whatever may be the nature of the proceeding in which the cause of his death comes into question”

16. Further, in the case of *Republic Vs Teresia Wairimu Thuo* [2019] eKLR the court held thus:

“....Indeed, a post mortem report, it appears from subsection (1) of section 77, may be used in evidence, and it may therefore be produced by a person such as the Investigation Officer in a case or any person who may have been given the report by the examining medical practitioner or by a hospital which maintains record of such reports....”
17. On whether the death of the deceased was caused by an unlawful act or omission and whose unlawful act or omission it was; even though there was no eye witness to the crime, there is no doubt that the death of the deceased was caused by the injuries he sustained on the forehead according PW1 PW2, PW3 and PW5. The injuries seen on the body of the deceased as described cannot in any way be self-inflicted. They must have been inflicted by a third party.
18. Article 26 (1) of the *Constitution of Kenya 2010* guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the *Constitution* or other written law and the evidence before the court irresistibly points to an unlawful act that led to the death of the deceased.
19. On whether the prosecution has proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased, from the evidence on record, it is clear that none of the prosecution witnesses saw the accused person or any other person assault the deceased.
20. In the circumstances, the question of circumstantial evidence linking the accused person with the death of the deceased arises. In the case of *Sawe Vs Republic* [2003] KLR 364, the Court of Appeal stated that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused.”

Additionally, In the case of *Abamad Abolfathi Mohammed and Another Vs Republic* [2018] eKLR, this Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R Vs Taylor, Weaver and Donovan* [1928] Cr App R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”



21. As already stated, the prosecution has heavily relied on circumstantial evidence to prove its case. PW2 was a watchman at Relax Bar in Makima and had reported on duty at 6pm. He knew the deceased well as they were neighbours. It was his evidence that when he went to buy miraa at 12.30 a.m., he found five (5) people among them Kyoko, Mutisya, Njeru and Muriithi (deceased) and they were quarrelling amongst themselves and he heard the two accused persons telling the deceased that “he was going to see”. He left them but a few meters away the accused persons stood and started walking away towards the market and at that point he heard the deceased saying “mimi umenipiga na mawe”. He stated that there were streetlights and he was able to see the two accused persons running away carrying stones. He looked at the deceased and found him at the corridor with injuries to the forehead. In his evidence he stated that there is no grudge between him and either of the accused persons.
22. On her part, PW3 testified that she was called about 7p.m. by the deceased who told her he was dying. She went to the scene which was not far from her home and found the deceased being held by Musyoka, Njeru and Kitheka’s son and he had injuries on the forehead and was bleeding profusely and on calling him he mentioned the names of Kyoko and Mutisya. PW1 was also called by the deceased on the material night who told him that he had some miraa that he was selling. PW1 went to Makima market to meet the deceased but he did not buy the miraa because it was little and he went home. The deceased later called him at 1.30 a.m. and told him that he was dying and his phone went off. When he went to check on the deceased, he did not find him at the club where he had left him but met PW2 who told him that people who were in the club had quarreled and all of them had left the club. He requested PW2 to accompany him to look for the deceased and they found him not far from there lying down and when they asked him what had happened he said he was assaulted by the accused persons herein whom he had seen at the club earlier that night.
23. From the evidence of those three witnesses, it is clear that the accused person and the deceased quarreled and even fought. PW3 in his evidence was categorical that he found the accused persons herein with the deceased and as he was walking away from where they were, he heard the deceased saying that he had been hit with a stone. On looking, he saw the accused persons running away carrying some stones. It was also his evidence that the accused had injuries on his forehead. This court notes that this witness had just seen the deceased a few minutes before and he did not have any injuries on him. He had just parted company with the two accused persons and the deceased and he was only a few meters away when the two accused persons started running away from the deceased and they were carrying stones. According to him, the deceased was injured on the forehead. PW5 confirmed that the deceased died due to massive head injury secondary to blunt force.
24. PW6 was a girlfriend to the 2nd accused who died before the trial was concluded. Though the accused in his defence stated that he was with her, and the deceased on the material night, their version of the story is at variance. They both gave evidence that incriminated the deceased but in my considered view their evidence was an afterthought and does not bear much weight. Further, the accused blamed the 2nd accused (deceased) for causing the death of the deceased as the deceased was said to have touched PW6. PW6 on her part did not give evidence to that effect and the court is left wondering who between the two gave the correct version in their evidence. I am not persuaded by the accused person’s defence as no questions were put to the witnesses to the effect that what caused the fight between the deceased and 2nd accused was the interest that the deceased may have expressed in touching PW5. I dismiss the accused persons defence as an afterthought.



25. 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.

26. The Court of Appeal in Bonaya Tutu Ipu & Another Vs Republic [2015] eKLR stated as follows on the prove 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 Vs 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 Vs 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.....”

27. In this case, the pathologist who testified as PW5 told the court that the deceased died of massive head injury, secondary to blunt force. The accused person must have had knowledge that the act of hitting the deceased with a stone on the head would cause his death or grievous harm. In the circumstances, I find that malice aforethought was proven by the prosecution.

28. In the end, it is my considered view that the prosecution has proved the case against the accused person beyond any reasonable doubt. I find him guilty as charged and hereby convict him.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JULY, 2023.

L. NJUGUNA



JUDGE

..... for the Accused Persons

.....for the State

