



**Republic v Kathiomi (Criminal Case E019 of 2021)
[2023] KEHC 20123 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E019 OF 2021
LM NJUGUNA, J
JULY 12, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

PETER NJUE KATHIOMI ACCUSED

JUDGMENT

1. Peter Njue Kathiomi alias Peterson Fundi the accused person 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 March 24, 2021 at Karitu village, Kyeni East Location in Embu sub county within Embu county murdered Charles Munene Kathiomi. Upon arraignment in court, he pleaded not guilty and the case proceeded to trial wherein the prosecution called five (5) witnesses in support of its case.
2. PW1, Dr Moses Maina testified that on March 31, 2021 he conducted postmortem on the body of Charles Munene Kathiomi. It was his evidence that the body did not have any external injuries and on opening the body it had a depressed skull fracture and in the brain there was an extensive epidural hematoma. In his opinion, the injuries were caused by a blunt object and the cause of death was head injury due to blunt trauma.
3. PW2, Eunice Gathoni Maina, a resident of Nyeri and working at Mwai Kibaki Hospital testified that on March 24, 2021 at 2100 hours, the accused called the deceased from the house but on following up, she found the accused in the company of his family members amongst them, Grace Wanja (his mother), his wife, Mutembe and Murangiri who were beating the deceased. That there was sufficient electricity lighting outside their house and she could clearly see the sticks they were using to beat the deceased. The deceased was bleeding from the nose and mouth and his face was swollen. She called Martin Mugendi and Mary Njeri, who are siblings of the deceased, who were able to receive him and took him to hospital. She stated that the accused used to insult her and the deceased a lot due to family



issues that surrounded them, being that they are a polygamous family. It was also his evidence that she attended the post mortem of the deceased on March 31, 2021 at Kieni Mission Hospital.

4. PW3, Martin Mugendi Njeru testified that on March 24, 2021, he was called by the wife of the deceased (PW 2) who informed him that his brother (the deceased) had been called from the house and she left like there was something amiss. At the scene he found the accused who was in the company of his mother (Grace Wanja) and his brother Edward Murangiri holding the deceased to the ground and they were beating him. The witness said he was able to see what was happening as there was sufficient lighting in the area. The accused was beating the deceased using a piece of wood and he was coughing blood. The witness together with the deceased's wife took the deceased to hospital using Edward's motorbike. He died on March 27, 2021 while undergoing treatment at Chuka Hospital.
5. PW4, Mary Njeri Njeru testified that on March 24, 2021 at about 0930pm he was in the company of his brother Martin Mugendi when Eunice went to their house and called her. She told them to go and see the deceased who was being beaten. At the scene, they found Grace Wanja, wife to the accused, Edward Murangiri and Wilson Mutembei lying on the deceased who was on the ground and he had an injury on the head. The witness testified that the deceased said that it was the accused who beat him and further that the accused and Wilson had sticks.
6. PW5, Sgt Samuel Onyamasi, the investigating officer in this case, testified that he recorded statements from several witnesses and in the process learnt that there was a land dispute in the family of Kathiomi who had two wives and the wives had two(2) sons to the 1st wife and four (4) sons to the second. He had subdivided the land equally between his two wives. On the material day, the accused who was in constant quarrel with the deceased had called the deceased from his house and started fighting him and was joined by his family members who included his mother, the brother and the wife to his brother. The deceased was taken to hospital but died 3 days after. That he called the accused to the station with his brothers, but they didn't turn up until their mother was arrested. The witness stated that he was present during the postmortem on the March 31, 2021. He produced the post mortem report and mental assessment report of the accused person conducted on May 7, 2021.
7. After the close of the prosecution's case, the accused person was placed on his defence upon the court finding that the prosecution had established a *prima facie* case against him.
8. DW1, Peter Njue Kathiomi, the accused person herein testified that he is a step brother of the deceased and that their father had two wives each with six (6) children. That they all live in the same compound and there are seven (7) houses on the land that their late father owned and which he divided equally between the houses. He told the court that there is a land dispute between the two families which has brought animosity between them to the extent that they do not talk to each other.
9. He stated that on the material day he was at work at Karurumo where he operate a bodaboda and went back home at 9.00p.m. He stated that earlier in the day, his wife had called him on phone regarding a boundary dispute. As they were watching television with his wife, the deceased went to his house and when he opened the door for him, the deceased pulled him outside. That he found Martin Mugendi, Mary Njeri Gathoni, the deceased's wife. They started beating him and at that point his wife raised alarm and his brothers came to rescue him and it became a family fight. He testified that it was dark and that the wife of the deceased had sticks. That after the fight, the deceased lay on the ground screaming and he was taken to hospital by his brothers. He stated that he did not beat the deceased and he could not tell who beat him. He was arrested after three (3) weeks together with other five (5) members of his family.
10. DW2, Grace Wanja Kathiomi testified that the deceased was her son and that her husband had two wives. It was her evidence that on the material day, she heard screams from the accused's wife prompting



- her to go outside to check on what was happening. That upon getting out, she found Martin and Njeri beating the accused. That while there the wife of the deceased said he had died. The deceased was rushed to hospital but died after three days. On cross examination she stated that there was a boundary dispute involving the accused and the deceased and that both were not in talking terms.
11. At the close of the defence case, the learned counsel for the defence chose to adopt the submissions dated December 8, 2022 and in addition submitted that there are serious doubts as to who and how the deceased died. He urged the court to resolve the doubts in his favour and acquit him.
 12. I have considered the evidence adduced herein by the prosecution witnesses and the defence proffered by the accused person. The main issue for determination is whether the prosecution has proved its case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.
 13. Under section 203 of the *Penal Code*:

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
 14. For the prosecution to secure a conviction on a charge of murder, it has to prove four main elements against an accused person. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as follows:
 - (a) That the death of the deceased occurred;
 - (b) That the death was due to an unlawful act or omission;
 - (c) That it was the accused who committed the unlawful act or omission which caused the death of the deceased; and
 - (d) That the accused had malice aforethought
 15. On whether there was proof of death and the cause of the said death, the death of the deceased was proved by the evidence of the prosecution witnesses and specifically by PW1 who conducted post mortem on the body of the deceased.
 16. As to the cause of the deceased’s death, PW1 Dr Moses Maina in his testimony stated that the cause of death was head injury from blunt trauma.
 17. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. Article 26 of the *Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except as provided for by the law. In *Gusambizi Wesonga v Republic* [1948] 15 EACA the court stated:

“ Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”
 18. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained as was detailed by PW1. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that the death was justified in any way under the law. Further, the evidence presented before court irresistibly points to an unlawful act that led to the death of the



deceased following an assault. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.

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 onset, the burden of proof lies on the prosecution throughout the trial and that burden does not shift to the accused person even if the accused chose to remain silent as that is his constitutionally guaranteed right. See article 50(2) (i) of the Constitution. In addition, the accused has the right not to give any self-incriminating evidence. See article 50(k) of the Constitution.
20. PW2 in her evidence stated that she saw the accused person, his mother and the wife of the accused beating the deceased person using sticks and that the deceased was bleeding from the mouth and his head was swollen. She stated that it was the accused who went and called the deceased from his house. PW3 also testified that he went to the scene and found the deceased herein being beaten by the accused, his mother and Edward Murangira. That the deceased was lying on the ground unconscious. On re-examination, he reiterated that when they took the deceased to the hospital, but informed the doctor that the deceased was hit by a motor cycle so that the hospital could agree to admit him. PW 4 corroborated the evidence of PW2 and PW3 to the effect that the accused herein together with his wife and other members of the family beat the deceased person. She stated that the deceased had injuries on his head and upon asking him to stand, the deceased could not stand as he was unconscious. Though in cross-examination she stated that she did not witness the fight, it was her evidence that she found the accused and his wife surrounding the deceased. PW5 testified that he learnt that there was a land dispute in the family of Kathiomi who had two wives and the wives had two sons to the 1st wife and 4 sons to the 2nd. He testified that he had arrested five persons but following the directions by the direction of Public Prosecution, he preferred charges against the accused person only. He stated that there existed land dispute between the two families and especially between the accused and the deceased as they share the boundary. That it was the accused person herein who called the deceased and started the fight.
21. The court has considered the defence that was proffered by the accused person. According to him, it is the deceased who called him from his house and he is the one who started the fight before the other family members joined in. He called his mother as the only witness yet there were other witnesses whom he could have called but he chose not to call them for his own reasons. I find that the prosecution have proved the case against the accused beyond any reasonable doubts.
22. According to PW1 who carried out post mortem on the body of the deceased herein he formed an opinion that the cause of death was head injury from blunt trauma. It is trite that malice aforethought can thus be inferred not only from the weapons used to inflict injuries but also the nature of the injuries inflicted on the deceased resulting to death. The accused herein thus caused the death of the deceased herein.
23. 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.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....**for the Accused**

.....**for the State**

