



**Republic v Mbogo (Criminal Case 3 of 2015)
[2023] KEHC 20092 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE 3 OF 2015**

LM NJUGUNA, J

JULY 5, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

KEVIN MUGAMBI MBOGO ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to section 203 as read together with Section 204 of the *Penal Code*. The particulars of the offence are that on December 12, 2014 at Githiria Village, Kibugu Location within Embu County murdered John Murimi Nthiga. On arraignment, he pleaded not guilty and a plea of not guilty was entered before the matter proceeded to full hearing.
2. PW1 Charles Gitonga Kariuki testified that he was in the company of both the deceased and the accused when a disagreement ensued over local brew. Earlier in the day, they had been invited to the house of the deceased for a birthday party but they later decided to leave the house and go to the shopping center. That on the way, and following the altercation, the accused pulled out a pocket knife and stabbed the deceased. He said that he didn't see exactly where the knife pierced. That in the process of stabbing the deceased, the accused injured his finger. PW1 took the accused for treatment at Kibugu Health Center leaving the deceased standing at the same spot. On their way, they passed by the police station where the accused made a report and got a treatment note for his injury before proceeding to Kibugu Health Center. That PW1 did not report the stabbing of the deceased neither did he mention the pocket knife at the police station. That on the way back, about 30 minutes, PW1 found the deceased lying down at the same spot where they had left him. That he (PW1) called his mother who came to the scene and the death was reported by the chief.
3. PW2 Dr Godfrey Njuki, a medical doctor testified that on December 19, 2014 he conducted an autopsy on the body of the deceased and formed the opinion that the deceased's death was caused by



cardio-pulmonary arrest due to cardiac heart failure as a result of a penetrating wound. He further produced the mental assessment report prepared by Dr Thuo stating that the accused has no mental illness and is therefore fit to stand trial.

4. PW3 Regina Karimi Nthiga who is the deceased's mother testified that on December 12, 2014 she received a call from Christine Mukami Nthiga who told her that her son had died. She proceeded to the police station and the police took her to the scene of the murder where they found the deceased lying there dead. That she did not see the murder weapon. She confirmed that the accused and the deceased were good friends and that the accused had no grudge against the deceased.
5. PW4 Kevin Mugendi testified that on December 12, 2014 he went to the deceased's home to celebrate Jamuhuri day. They engaged in drinking of a local brew and he got drunk and slept in the house. He stated that he did not know how the deceased met his death.
6. PW5 Corporal Peter Mbebi the Investigating Officer in the case, testified that as he was investigating, he got information that the deceased had prepared local brew and had invited 4 more people to indulge with him at his residence. That at around 7.00p.m, the whole party decided to leave the house and while on the way, a disagreement arose between the accused and the deceased. That the accused pulled out a pocket knife from his pocket and stabbed the deceased on the chest but in the process the accused injured his finger. That the accused in the company of PW1 proceeded to Kabugu Police station and reported that he had been assaulted and then they went away. That statements were taken from all the 4 people that were in the company of the deceased on the fateful night. A post-mortem was conducted and the cause of death was determined to be as a result of a stab wound.
7. It was his evidence that he arrested the accused together with PW1 for further interrogation and the accused admitted to have stabbed the deceased with a pocket knife that he had in his pocket. Further, that when the accused realized that he had killed the deceased, he went to the police station and reported that he had been assaulted and robbed of his Samsung phone and KSh 9,000/=. That as required by law, PW5 referred the confession to the deputy DCIO who recorded the confession. He then escorted the accused to hospital for mental fitness assessment and the accused was found to be mentally fit to stand trial. He compiled the file and preferred murder charges against the accused. The murder weapon was not recovered as the accused claimed that he threw it in a pit latrine.
8. This marked the end of the prosecution's case and the court consequently finding that the accused had a case to answer, the accused chose not to testify and the defense case was closed.
9. Article 26 of the Constitution of Kenya 2010 provides that:
 - (1) Every person has the right to life.
 - (2)
 - (3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.
 - (4)
10. It is important to note that the onus is on the prosecution to establish its case beyond any reasonable doubt that the accused is guilty of murder. Section 203 as read with Section 204 of the Penal Code under which the accused is charged provides for the offence of murder and its punishment while also providing for the conditions on how this must be achieved. This provision states:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.



204. Any person who is convicted of murder shall be sentenced to death.”

In *Anthony Ndegwa Ngari v Republic* [2014] eKLR the Court of Appeal sitting in Nyeri held:

“For the offence of murder to be proved, 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.” (emphasis added)

11. The post-mortem form marked as PEX 1 shows that the death was caused by “cardiac arrest from cardiac failure due to cardiac tamponade from stab wound”. That is to say, the cause of death was due to the stab wound. The main question for now is whether or not the accused intended to cause the death of the deceased.
12. The act of killing the deceased does not stand independent of the intent behind it for it to be referred as murder. Such intent is to be established as intended by section 203 of the *Penal Code*. Malice aforethought is defined and well explained under Section 206 of the *Penal Code* as follows:

“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.”
13. Further, the court in *Republic v Njeru & 3 others* (Criminal Case 2 of 2019) [2023] KEHC 19141 (KLR) stated as follows:

“The Court of Appeal in *Bonaya Tutu Ipu & Another v 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 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.....”

14. PW3 in his testimony stated that the accused and the deceased were friends and he (accused) did not hold any grudge against the deceased. However, PW5 testified that the accused went to the police station on the night of the incident and reported that he was assaulted and robbed in order to disguise the fact that he had actually stabbed and killed the deceased. He further stated that the accused later submitted himself to the police station and confessed to having stabbed and killed the deceased. However, much as this alleged confession was noted by the investigating officer, the same was not formally produced in court as a confession and so it cannot form part of the evidence to be considered by this court.
15. However, on record is the evidence of PW1, one Charles Gitonga Kariuki. He stated that on the 12th day of December 2014, it was the deceased birthday and he had prepared local brew called ‘mashore’. Both the accused and PW1 were in the deceased’s house taking the brew when the accused requested the deceased to add him more brew but the deceased declined and a quarrel ensued between them. That at 8.00 p.m. they left the home at Githiria village with the deceased and the accused heading to Kibugu market which is about 300 meters away. While on the way, the accused awakened the quarrel and as they exchanged words, the accused removed a pocket knife and stabbed the deceased on the chest and in the process, the accused finger was injured. It was his further evidence that there was light and that he was able to see because he was also very close to both accused and the deceased when it all happened. He accompanied the accused to Kibugu Health Center for treatment and they left the deceased standing at the scene. That he parted with the accused after treatment and on his way back home, he found the deceased on the same spot where they had left him. He called the sister to the deceased one Mukami and his (PW1’s) mother and took them to the scene. The sister tried to wake up the deceased but they noticed that he had died. On looking at him, the deceased had been stabbed on the chest. They called for help and some neighbours went to the scene. The matter was later reported to the police.
16. The evidence of PW1 was corroborated by PW2 on the cause of death. PW2 who conducted a post mortem on the body of the deceased told the court that the cause of death was pulmonary arrest due to cardiac heart failure as a result of penetrating wound.
17. On her part, PW3 the mother to the deceased confirmed that on the material day, the accused was in their house for celebration but she was not at home. That at around 8.00p.m. she was called on phone and was informed that her son had died. She went to Kibugu Police and in the company of police officers they went to the scene where the body of his son was lying. On reaching there, they found he had been stabbed on the left side of the chest.
18. PW5 carried out investigations and he was able to establish that the deceased was stabbed by the accused in the presence of PW1 on their way from the deceased home to Kibugu market and that is why he charged him with the offence of murder. The evidence on record confirms that PW1, the deceased and the accused knew each other well and they were all friends and there is no reason why PW1 would have given adverse evidence against the accused. In my view, what he told the court must have been what transpired on the night of December 12, 2014.
19. In conclusion and having considered the evidence on record, the relevant case law and the judicial authorities, I find that the prosecution has proved its case against the accused person beyond any reasonable doubt and I hereby find him guilty for the offence of murder and convict him accordingly.

Delivered, dated and signed at Embu this 5th day of July, 2023.

L. NJUGUNA



JUDGE

.....for the Accused

.....for the State

