



**Republic v Mwendwa & 3 others (Criminal Case 19 of 2020)  
[2024] KEHC 14128 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE 19 OF 2020  
LM NJUGUNA, J  
NOVEMBER 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**FREDRICK MURITHI MWENDWA ..... 1<sup>ST</sup> ACCUSED**

**JANE WANYAGA NJERU ..... 2<sup>ND</sup> ACCUSED**

**FERANJIA MUTHONI ..... 3<sup>RD</sup> ACCUSED**

**SARAH MBUYA ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are on 09<sup>th</sup> October 2018 at Ciambuğu village, Riandu location in Mbeere North sub-county, within Embu County, the accused persons murdered Stanley Irungu. The accused person pleaded not guilty and a plea of not guilty was duly entered for each of them before the matter proceeded to full hearing.
2. PW1, Jane Bibi Wanjau, the deceased’s mother testified that the accused persons are her neighbours and that the 3<sup>rd</sup> accused is the mother of the 2<sup>nd</sup> and 4<sup>th</sup> accused. She stated that she was at home with her daughter Gladys and while they were watching 7.00 p.m news, they heard a knock on the door. That when Gladys opened the door, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons and one Muthanji entered and the 2<sup>nd</sup> accused demanded to see the deceased, saying that he had stolen beans from her house. She told them that the deceased had gone to pick miraa and they said that once they find him, they will teach him a lesson regardless of whether the stolen beans would be returned. She stated that she asked them not to do anything bad to the deceased but they went away making noise and insisting that they will teach the deceased manners since he had stolen beans and phones from their house.



3. That 30 minutes later, they heard noises outside and she sent Gladys to check, and she found out that the 4 accused persons were beating the deceased. That when she went outside, she saw fire and Gladys was screaming asking them why they had burned the deceased. She stated that she knew it was the accused persons because they had threatened to teach the deceased a lesson. That she called a driver friend of hers who helped them to take the deceased to Embu Level 5 Hospital through Siakago Police Station, where he was admitted for treatment. That the deceased was referred to Kenyatta National Hospital where he died while undergoing treatment the following day. That while the deceased was on the way to hospital, he kept asking why Murithi had done that to him.
4. On cross-examination, she stated that the 1<sup>st</sup> accused, did not go to her house that day and that it was the 2<sup>nd</sup> accused who claimed that her beans were stolen by the deceased. That Gladys told her that the 1<sup>st</sup> accused wanted to burn the deceased and when she went outside, she heard the 1<sup>st</sup> accused's voice at the scene. That it is her and her daughter Gladys who put out the fire, and not the 1<sup>st</sup> accused. That when she went out, the deceased was running away towards another shamba while he was burning. That there was a land dispute between her and the 1<sup>st</sup> accused, but the boundary was realigned to her satisfaction. She stated that she did not see the accused being beaten by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons but she saw someone running while burning but she does not know who started the fire. That when they were on the way to the hospital, the deceased did not mention the 3<sup>rd</sup> and 4<sup>th</sup> accused persons.
5. PW2 was Gladys Wanjiku, sister to the deceased who stated that she was at home with PW1 at 7PM when they heard a knock on the door and when she opened, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused and one Muthanji entered. That they complained that the deceased had stolen beans and some mobile phones from them and they demanded that PW1 pays them. That PW1 told them that she would pay after the deceased arrived home. That she overheard them telling PW1 that they had sent some men to go and find the deceased so that they can teach him a lesson but PW1 told them to report the theft to the police if it was true. That they left at around 9PM and soon afterwards, she heard unusual noises and women's voices outside.
6. It was her testimony that when she went to check, she found the 2<sup>nd</sup> and 4<sup>th</sup> accused together with Muthanji beating the deceased with sticks and his head was swollen. That the deceased was standing and they were all beating him at the same time with sticks used to crush beans, and she tried to stop them by promising to repay their stolen goods. That the 1<sup>st</sup> accused who was a friend of the deceased was also at the scene but when she asked him to help, he declined. That she ran back to the house to ask her mother for the store keys so that she can take the beans to go and repay and in the process, she heard the 1<sup>st</sup> accused asking for petrol.
7. She stated that by the time she was returning with 10kgs of beans, she found the 1<sup>st</sup> accused forcing the deceased to drink petrol out of a jerrycan and immediately he drank it, the 1<sup>st</sup> accused lit a matchbox, setting him ablaze. That the 1<sup>st</sup> accused grabbed the beans and threw them at the deceased who was now running while on fire as she (PW2) threw sand at him to stop the fire. She heard her mother saying that the 1<sup>st</sup> accused has killed the deceased just like he had always said he would. She stated that when the accused persons heard PW1 speaking, they all ran away. That she and her mother arranged to take the deceased to Embu Level 5 Hospital. That the deceased was treated before being referred to Kenyatta National Hospital where he died while undergoing further treatment. That she does not know who bought the petrol but she heard the deceased crying and asking why Murithi did that to him yet he was his friend.
8. On cross-examination, she stated that besides the accused persons, no other people were present that night. That she saw the accused persons beating the deceased and the 1<sup>st</sup> accused calling for petrol and



- forcing the deceased to drink it. She stated that the 1<sup>st</sup> accused and the deceased were like brothers but he had earlier threatened to kill the deceased. That a crowd gathered when they had already put the deceased into a motor vehicle and were taking him to hospital. On cross-examination, she stated that it was the 1<sup>st</sup> accused who asked for the petrol but all the accused persons were beating the deceased simultaneously. That she was the only one who witnessed the incident before the accused persons took off after they were done.
9. PW3 was Mary Muthoni Mburu, the deceased's aunt, who stated that she identified the body of the deceased for postmortem purposes. The body of the deceased was transferred to Gakwegori Mortuary.
  10. PW4 was P.C. Farah Mohammed of DCI Mbeere North who testified that the incident was reported by PW1 and PW2 while on their way to take the deceased to Embu Level 5 Hospital after the incident. That the deceased died while undergoing treatment at Kenyatta National Hospital where he had been referred. That following the death of the deceased, DCI took over investigations which led to arrest of the accused persons and their arraignment. He stated that the postmortem was conducted at Kenyatta National Hospital and the accused persons' mental assessment was done at Meru Hospital. He produced the mental assessment reports authored by Dr. Mwikamba Andrew who assessed all the accused persons and found them fit to stand trial. On cross-examination, he stated that he was not the original investigating officer and his testimony is based on the findings of his predecessor who has since left service. That he did not visit the scene but the police reports show that the accused persons were at the scene on the day of the incident. That there was no recovery of a jerrycan with petrol. He stated that it was not true that the deceased was killed by a mob. That he did not participate in the investigations but he took over the matter from P.C. Brian.
  11. PW5 was Dr. Bernard Media who conducted postmortem at Kenyatta Hospital Mortuary and he produced the postmortem report for the deceased. He observed that the deceased had 2<sup>nd</sup> degree burns on different parts of his body including the upper and lower limbs. That the deceased also had signs of inhalation burning in the respiratory system. That there were 68% total surface burns making a total degree of burns 78% which was the cause of death. On cross-examination, he stated that he could not ascertain the circumstances surrounding the death but he was told that the deceased had been beaten and then set on fire. That in his report, he did not document any other injuries other than the burns, which were determined to be the cause of death.
  12. After the close of the prosecution's case, the court found that the accused persons had a case to answer and they were placed on their defense. The court explained section 211 of the Criminal Procedure Code to the accused persons. The 1<sup>st</sup> accused opted to give unsworn evidence while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons opted to remain silent.
  13. DW1, the 1<sup>st</sup> accused person, in his defense, denied committing the offence. He stated that the charge against him was motivated by an existing land dispute. That the deceased was his friend and he did not see him that day.
  14. After the close of the defense case, the 2<sup>nd</sup> accused filed her written submissions as all the other parties expressed that they did not wish to file any submissions.
  15. It was her argument that the prosecution witnesses failed to establish a strong case that would warrant her conviction. She relied on the case of Ronald Nyaga Kiura v Republic [2018] KEHC 5030 (KLR). She argued that the testimony of PW1 amounts to hearsay since she was informed of the happenings outside by PW2. That the testimonies of PW1 and PW2 contradict one another and none of them saw the deceased being set on fire. further reliance was placed on the case of AHM v Republic [2022]



KEHC 12773 (KLR) where the court relied on the Nigerian case of David Ojeabuo v. Federal Republic of Nigeria [2014] LPELR 22555CA in which the court of appeal discussed contradictory evidence

16. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
17. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. Section 203 of the Penal Code provides:
  - “203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
18. In the case of Republic v W.O.O. [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were rehashed, as guided by the Court of Appeal in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, as follows:
  - “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.”
19. The first element is death and cause of death. Through the testimony of PW5, it was established that the cause of death was due to 78% burns. He observed that the deceased had surface burns all over his body and inhalation burns in the respiratory system.
20. The second element is to prove that the accused persons were responsible for inflicting the fatal injuries upon the deceased. PW1 testified that she was at home with PW2 at around 7.00 p.m when they were visited by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons and one Muthanji, the 3<sup>rd</sup> accused’s son. That the 2<sup>nd</sup> accused alleged that the deceased had stolen beans, phones and phone batteries from her and they demanded to see him and for the stolen items to be repaid. PW1 told them that she would repay the stolen items once the deceased arrived home.
21. PW2 said that while the visitors were talking with PW1, she overheard them from the kitchen saying that they had already sent men to find him and bring him so that they can teach him a lesson. PW1 testified that she tried to talk to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons out of doing anything to harm the deceased and that they should report the theft to the police but 3<sup>rd</sup> accused said that even if they were to report, they must beat the deceased a little bit, to teach him a lesson.
22. Both PW1 and PW2 testified that a while after the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons had left their house, PW2 heard unusual noises and when she went to check, she heard the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused person’s voices and they were beating the deceased. That in the course of beating him, the 1<sup>st</sup> accused made the deceased to drink petrol from a jerrycan and then he lit a matchstick, setting the deceased on fire. PW2 is the one who informed PW1 of what was happening and she testified that when PW1 went towards the scene, they all ran away, leaving the deceased running while he was on fire. PW1 and PW2 tried to put off the fire and they took the deceased to hospital.



23. In his defense, the 1<sup>st</sup> accused person denied the charges against him and stated that the deceased was his friend whom he did not see on that day. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons opted to remain silent. The 2<sup>nd</sup> accused person filed her submissions in which she discredited the prosecution's evidence, terming it as contradictory and insufficient. From the evidence, PW1 and PW2 are the key witnesses who can place the accused persons at the scene, inflicting fatal injuries on the deceased. Their testimonies are consistent with each other's and I do not find any inconsistency. In fact, I find the same to be believable because PW2 testified that the deceased was made to drink petrol and this was corroborated by PW5 who said that the deceased had inhalation burns.

24. PW2 witnessed the whole ordeal happening and she identified the 1<sup>st</sup> accused as very close friend of the deceased who is the one who lit the fire. She also stated that she saw the accused persons beating the deceased all over, before he was set on fire. The accused persons are neighbours to PW1 and PW2 and they knew them too well. Pw2 heard the accused voices at the scene when they were beating the deceased and she had heard them when they went to their house looking for the deceased threatening to teach him a lesson for stealing their beans and mobile phones and batteries. There is overwhelming uncontroverted evidence placing the accused persons at the scene, beating the deceased simultaneously. However, PW5 did not document any other injuries besides the burns which were concluded to be the cause of death. It could be argued that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons did not inflict the fatal injuries upon the deceased. However, I am guided by the provisions of section 21 of the Penal Code which provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

25. When the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons visited PW1 looking for the deceased, they expressly told her that they wanted to beat him and teach him a lesson. Their common intention was established and the 1<sup>st</sup> accused person joined them later to beat the deceased and then set him on fire. In my view, all the accused persons are to be held liable for the death of the deceased since they had the common intention jointly. This means that even though it is the 1<sup>st</sup> accused who set the deceased on fire, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons were present at the scene in joint intent with the 1<sup>st</sup> accused to cause harm to the deceased, which harm led to his death.

26. The next element to establish is whether from the evidence, the accused bore malice aforethought. As I have stated in my previous paragraph, the accused persons had a common intention to harm the deceased and they proceeded to do so. In the case of *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held;

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In *Ogelo v Republic* [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206(1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of



killing. See the case of Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

27. In this case, the deceased suffered 68% surface burns and a cumulative 78% burns which led to his death. He was made to drink petrol before he was set ablaze, which act led to inhalation burns. Even though no murder weapons were recovered, neither was the petrol jerrycan recovered as evidence, it is my view, from nature of fatal injuries that, the accused persons intended to kill the deceased.
28. Lastly, as I conclude, I do take note of the fact that the 1<sup>st</sup> accused, in denying the charges against him, mentioned that there is a land dispute with PW1. PW1 also stated that there was a land dispute but it was resolved to her satisfaction. It is my view that, that is a separate issue and here, the court has considered the evidence at hand, finding it sufficient to hold the accused persons criminally accountable for the death of the deceased.
29. Therefore, I find that the prosecution has proved the offence against the accused persons beyond reasonable doubt. This court finds them guilty of the offence of murder contrary to section 203 of the Penal Code, and hereby convicts each of them accordingly.
30. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

