



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYANDARUA
CRIMINAL CASE NO. 23 OF 2023

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL NGUGI NJENGA.....ACCUSED

JUDGMENT

1. Samuel Ngugi Njenga is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 28th day of November 2020, at Gathima village, Passenga location, in Nyandarua Central Sub-County of Nyandarua County, Simon Ng'ang'a Mburu.
3. It was contended by the prosecution that the accused and his wife went home drunk. The accused picked a quarrel with his mother over land and threatened to harm her. An alarm was raised, and when the deceased responded, the accused fatally injured her.
4. In his defence, the accused argued that he was too drunk. He said he knew nothing
5. The issues to be determined are:
 - a) Whether the accused inflicted the fatal injuries on the deceased;
 - b) Whether the defence of intoxication is available to him; and
 - c) Whether the offence of murder was established against the accused.
6. Gladys Waithera (PW1) is the mother of the accused. Her evidence was that the accused and his fiancée returned home intoxicated. The two were unruly. At one point, the accused lit a gas cooker and threatened to burn her and his fiancée (Wambui). However, the accused's fiancée turned off the gas cooker. The accused then took her (PW1) outside and demanded a title deed. When Wambui sensed danger, she screamed. This drew the deceased to the home.

The deceased asked the accused why he was demanding the land, when it clearly belonged to his mother. The accused asked the deceased why he made the call. He went behind the house. Wambui called her to be a witness to what had happened. She saw the deceased lying down, bleeding.

7. PW2 stated she was living with the accused. They had been together for four months. PW1 described her as the accused's fiancée. The accused referred to her as his wife. The prosecution did not attempt to inform the court of the status of the relationship between PW2 and the accused. Section 127 of the Evidence Act provides as follows:

(1) In civil proceedings, the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that –

(i) the person charged shall not be called as a witness except upon his own application;

(ii) save as provided in subsection (3) of this section, the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged;

(iii) the failure of the person charged (or of the wife or husband of that person) to give evidence shall not be made the subject of any comment by the prosecution.

(3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged –

(a) with the offence of bigamy;

(b) with offences under the Sexual Offences Act (No. 3 of 2006);

(c) in respect of an act or omission affecting the person or property of the wife or husband of such a person or the children of either of them, and not otherwise.

(4) In this section “husband” and “wife” mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”

8. The relationship often called "come-we-stay" is regarded as a marriage. I believe that, in criminal cases, how long they have been together is irrelevant. Some rulings suggest that a spouse's privilege not to testify against their partner only applies if a marriage is proven. I disagree with this view. It is now well known that many such relationships last for years before entering a traditional marriage contract or solemnizing it in church. It is not the courts' role to decide if they are legally marriages; instead, the parties' intent should be the determining factor.
9. In this case, although the accused did not raise this issue and the prosecution did not ask the court to decide on it, I will give the benefit of the doubt to the accused and expunge PW2's evidence from the record. For the avoidance of doubt, I will not consider her evidence in my findings.
10. Samuel Njihia Wanyoike (PW4) is a neighbour of the residence where the incident occurred. His testimony indicated that the deceased called him around 7 p.m., requesting assistance to settle an issue at the neighbour's house. Before he reached the scene, he saw the deceased and the accused fighting over a machete. He then saw the deceased fall and cry out for help.
11. Dr. George Biketi (PW6) testified that his post-mortem examination of the deceased's body revealed a stab wound that reached the heart. He concluded that the cause of death was fatal haemorrhage.
12. Although the accused denied involvement in the death, the record contains overwhelming evidence that he inflicted the fatal injuries on the deceased.
13. The prosecution must establish the presence of malice aforethought to secure a conviction based on the evidence on record. In **Black's Law Dictionary, 10th Edition**, malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

14. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

15. Both the prosecution and the defence agree that on the material day, the accused was drunk. Section 13 (4) of the Penal Code provides:

Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

16. 6. In this case, I find that because of the drunken state, the accused did not form the intention to kill the deceased.

17. Based on the analysis of the evidence, I conclude that the prosecution has not proven the accused guilty of murder. However, they have proven the lesser charge of manslaughter beyond a reasonable doubt. Accordingly, I reduce the charge from murder to manslaughter. The accused is acquitted of murder but found guilty and convicted of manslaughter under Section 202 read with Section 205 of the Penal Code.

Delivered and signed at Nyandarua, this 2nd day of December 2025

**KIARIE WAWERU KIARIE
JUDGE**