

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 33 OF 2017**

**REPUBLIC.....ODPP**

**-VERSUS-**

**NYAMALA KAMETI.....ACCUSED**

**JUDGMENT**

- 1. Nyamala Kameti**, the Accused, is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. Particulars of the information were that on 15<sup>th</sup> May, 2017, at Kibera Laini Saba in Kilimani area within Nairobi County, murdered Caroline Mutano Mutie.
- To prove the case, the prosecution presented seven (7) witnesses. **PW1 Virginia Mwikali Mutie**, testified that the deceased, her sister and the Accused met at a pub where she used to work. Thereafter, they cohabited for 2 months and they lived with the deceased's minor child.
- That on the fateful day they were drinking at the Baba Koome Pub and they left going home at 7.00pm. At 11.00pm the Accused rang her alleging that the deceased had burnt herself and they were on the way to Kenyatta National Hospital (KNH). She went to KNH and found the deceased being attended to by medical practitioners. From

her own observation, the deceased was badly burnt on the face including the arms.

4. The Accused was holding her hand and she was able to communicate verbally. The deceased told her that she was burnt by hot water meant for ugali that was very hot by the Accused who wanted to destroy her face. She waited upon her until she was taken to the Intensive Care Unit (ICU) but died three weeks later.
5. She testified, further, that while at the hospital the Accused told her that the deceased drunk paraffin and set herself ablaze but the doctor disputed the theory saying that had that been the case, the deceased would not have made it to hospital.
6. **PW2 John Mutie Kapila** the father of the deceased received information regarding what had transpired from PW1. He travelled to Nairobi from Kitui on 7<sup>th</sup> June, 2017 on learning of the deceased's death and found the body at the mortuary. He caused the matter to be reported to the police and subsequent arrest of the Accused.
7. **PW3 Hannah Munyiva Muge** the mother of the deceased received information regarding the deceased's hospitalization from her father, PW2 and she travelled from Kitui to Nairobi - KNH where she found the deceased and per her observation she had burns all over her body. That she spoke to her and pointed at the Accused as the person who burnt her.

**8. PW4 No. 2015086595 PC William Ayungo** arrested the Accused and escorted him to the Capitol Hill Police Station.

**9. PW5 Dr. Kizzi Shako** stated that she examined the Accused and found he had a healing injury on the neck, scratch marks, healing lacerations on the left ring finger and healing burns on the side of the left hand. And, he was fit to stand trial. On cross examination she stated that the suspect had a burn but she did not determine the cause of death.

**10. PW6 No. 74701 Sergeant Peter Kosgei** investigated the case and caused the Accused to be charged. His investigations established that if the deceased had poured kerosene on herself and lit the fire, the whole house would have burnt down. He dismissed the Accused as having been untruthful for he did not seek assistance or make a report as required. The arrest of the Accused was not made immediately as he went missing. On cross - examination he stated that he recorded a statement from Beatrice a neighbour who stated that on hearing screams for help she responded only to be told by the Accused to keep off.

**11. PW7 Dr. Edwin Walong,** a pathologist, holder of Masters in Human Pathology; Bachelor of Medicine and Bachelor of Surgery and a specialist in recognition pathology, conducted the postmortem on the body of the deceased. She had extensive burn wounds that were dressed. He concluded that the cause of death was kidney failure due to

severe burns, 2<sup>nd</sup>/3<sup>rd</sup> degree burns. The area predominately burnt was the face, anus, frontal side.

- 12.** On cross examination he stated that the burn injuries were on the face, neck, chest and abdomen thus the frontal aspect of both upper limbs and the distal digits on the back of the fingers. That there were no obvious injuries on palms hence the burns may have been inflicted by hot fluids most likely boiling water.
- 13.** That the injuries may have been inflicted from the front. On the issue of the kidney injury, the doctor stated that it occurred within 7 days and was acute; the structures could be injured following reduction of blood in the body.
- 14.** Upon being placed on his defence, the Accused acknowledged the deceased as a girlfriend he could have married as a second wife. That he enrolled her 9-year-old son at a school that his nephews were attending and from school he would even stay at his brother's house.
- 15.** That on the fateful date, he found the deceased drinking at the Baba Koome Pub hence he could not tell how much alcohol she had taken. That on leaving the pub - they stopped along the way so as to buy vegetables. And, all over a sudden, he saw her fighting a mama mboga amidst an allegation that she had stolen her Kshs.50/- but he persuaded her to leave. Upon arrival at home, she continued eating her 'muguka' (khat) as he finished his Miraa (different type of 'Khat').

- 16.** On finishing that, she took Kerosene and poured on herself but he snatched her. He asked what she wanted to do and she said she wanted to burn herself. Being big-bodied she pushed him and he fell down. She set herself ablaze that he struggled, pulled up the dress she was wearing and put out the fire. That she had burnt on the upper part of the body. She told her to call her sister but again he decided to do it himself.
- 17.** That he applied flour mixed with water on her body. Then she begged her not to tell her sister what she had done hence they decided to go to KNH. On reaching the hospital, the motorbike operator helped him wheel her inside the hospital and he told the doctor that the deceased had burnt herself. The doctor sought to know more about the flour. And on inquiry, the deceased told him that he (Accused) had poured on her hot water. That the doctor sought to know how come the kerosene was smelling.
- 18.** That he caused both parents to visit the house and he even showed them the burn injury that he sustained on the left hand. That during the period of three (3) weeks that the deceased was in hospital he paid her visits and when her parents proposed that he meets the expenses incurred he was very ready, save that he did not have money hence he told them to pay and he would refund the same. That two (2) days prior to her demise, he did not go to hospital because her mother advised him to look for money. He was required

to get some Kshs.4,000/- for infusion. Then Kshs.1,500/- for medicine but she died the same night.

**19.** Further, that for the two (2) months they cohabited, the deceased used alcohol and smoked cigarettes. That following her death he was told to hold a harambee to raise money. Therefore, he hired speakers. But, he later learnt that PW2 had the original documents. This was followed by his arrest. When he rang him, he told him to forget all about the bill at the hospital.

**20.** On cross examination, the Accused stated that when the act happened, they were just the two (2) of them inside the house. That the deceased was wearing a nylon dress and on pulling it he got burnt. He admitted that when PW1 and even PW3 arrived the victim was still communicating and she told them that it was hot water that burnt her not paraffin. He denied the allegation that the story of Mama Mboga was an afterthought. He denied the allegation that they quarreled on the material night, but admitted that one Beatrice recorded a statement stating that they quarreled.

**21.** The Accused called a witness, DW1 Martin Kameti, his father who stated that he was called by Nyamala to go see the lady he was cohabiting with. He travelled to Nairobi, went to Kibera, then hospital where the lady was admitted. She was in Intensive Care Unit (ICU). That she was talking but her eyes could hardly open. Her eyes were swollen. She told him to ask the Accused how she got burnt. He explained that she

burnt herself with kerosene. That she disagreed with other lades and the Accused separated them but when they reached the house, being drunk and having chewed miraa, she doused herself with kerosene and lit fire. That the Accused took water to put out the fire. That he talked to the parents of the lady when she died and they were to settle the matter under the Customary Law. But, he learnt of the arrest of his son and they were informed that the matter would be settled in court

**22.** On cross examination he said the deceased had burns on the face, chest and abdomen while the Accused had non-serious burns on the fingers. That Nyamala said Caro (deceased) burnt herself with hot water. That he was on the bed then and he did not tell him if they were cooking.

**23.** At the close of the defence case parties tendered written submissions. It is submitted by the defence that not a single element of **Murder under Section 203 of the Penal Code** has been proved. That there is not scintilla of evidence establishing malice aforethought; no proof of intention; no deliberate act, no unlawful act and there is no chain linking the Accused to the case.

**24.** It is urged that the prosecution seeks to criminalize proximity. that there is no forensic residue or circumstantial evidence capable of meeting the legal threshold under **Woolmington v DPP and Sawe v Republic [2003] KECA (KLR).**

- 25.** That there is no way a man who exposed himself to danger, stayed by the deceased through pain and chaos, who involved the family and medical personnel and did not discord could have harboured malice or murderous intent. And, without malice aforethought, the charge collapses.
- 26.** On the question of *actus reus* it is submitted that the prosecution utterly failed to prove that the Accused committed such an *act*. The Accused maintains that injuries sustained by the deceased were self-inflicted. That the prosecution failed to tender medical evidence (P3, clinical assessment) indicating that the deceased was ever treated for burns attributable to hot water. That the court in **Ndung'u Kimanyi v Republic [1979] KLR 282** held that where the cause of injuries is disputed the prosecution must adduce clear, cogent and credible medical evidence linking the Accused to the harm. And, suspicion, however strong, cannot substitute for proof. Also relied on is the case of **Sawe v Republic (supra)**.
- 27.** The defence further relies on the case of **Republic v Taabu [2016] eKLR** where the High Court held that where the deceased caused her own fatal injury, and no positive unlawful act by the Accused is established, criminal liability cannot attach to the bystander regardless of the proximity.
- 28.** That dying declaration relied on by the prosecution is misconceived because the deceased died three (3) months

later from a medical complication, kidney failure whose causal connection to the burns has not been medically established.

**29.** That as held in **Pius Jasunga v Republic [1954] 21 EACA 331** a dying declaration must be made in hopeless expectation of death, such that a person fighting for life in hospital for a prolonged period as the deceased did cannot be a settled expectation of death.

**30.** Further, that according to the case of **Choge v Republic [1985] KLR 1**, the rule of practice is that a dying declaration even when admissible must be corroborated.

**31.** Lastly, that medical evidence by the pathologist failed to establish causation as it was uncertain.

**32.** On its part the State through learned prosecution counsel Ms. Ogweno submits that the prosecution was obligated to prove 3 ingredients as held in **Anthony Ndegwa Ngari v Republic [2014] eKLR** that;

- “i. That the death of the deceased occurred.***
- ii. That the accused committed the unlawful act which caused the death of the deceased; and***
- iii. That the accused had malice aforethought.”***

That through evidence of PW1, PW2, PW3, PW6 and PW7 and a postmortem tendered proved that the deceased died due to acute kidney injury due to 49% surface area and 2<sup>nd</sup> and 3<sup>rd</sup> degree burns.

**33.** That the deceased told PW1, PW2 and PW3 that the Accused poured on her hot water, a statement that amounts to a dying

declaration which is admissible under **Section 33(g) of the Evidence Act**. Reliance is placed on the case of **Stephen Mutoria v Republic [2013] eKLR** where the Court of Appeal, Nyeri, stated that;

***“When the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and 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.”***

**34.** That PW1 and PW3 were specific that the deceased intimated to them that she was burnt by the Accused with hot water. The allegation by the Accused that the deceased burnt herself using paraffin and a match box was an afterthought. Therefore, the Accused caused the death of the deceased.

**35.** On malice aforethought the prosecution adopted the definition in **Nzuki v Republic (1993) KLR 171** and urged that the vicious nature in which the Accused poured hot water on the deceased was indicative of malice aforethought as defined under **Section 206(b) of the Criminal Procedure Code**. And, further relied on the case of **Lucy Mueni**

**Mutava v Republic, Msa Cr. Appeal No. 52 of 2013,**

where the Court of Appeal in Mombasa held that the Accused having not complained of any injury during the incident to warrant a vicious attack, the Appellant acted with malice aforethought.

**36.** Finally, that the prosecution's evidence is overwhelming hence dislodges the explanation offered by the Accused that the deceased burnt herself which makes him guilty.

**37.** I have duly considered evidence on record and rival submissions. The Accused is stated to have contravened **Section 203 of the Penal Code** which provides thus;

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

**38.** In **Anthony Ndegwa Ngari v Republic [2014] KECA 424** the Court of Appeal stated that;

***“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.”***

**39.** As to whether death occurred, this is not in dispute. Both the State and defence are agreeable that after the act, the victim was hospitalized having suffered burns. Subsequently she died. A postmortem was conducted on her body. Her lifeless body was identified by PW2 John Mutia Kavila, her father and another, to PW7 the Doctor who performed the postmortem. The pathologist upon examination conducted concluded that the cause of death was acute kidney injury due to 49% surface area 2<sup>nd</sup> and 3<sup>rd</sup> degree burns. This was proof beyond reasonable doubt of the fact of death.

**40.** It is the prosecution's case that the act which caused the death was committed by the Accused while the defence argues that the unlawful act (actus reus) was ignited by the victim (deceased). There were only two (2) people inside the house where the act occurred hence evidence to be explored would be circumstantial in nature. This is indirect evidence that requires some inference to be connected to it so as to reach the conclusion.

**41.** The incident occurred on 15<sup>th</sup> May, 2017 while the report was made to the police on 09/06/2017 by the kin of the deceased hence there was no evidence of the scene having been visited for a possibility of obtaining substances for toxicological analysis. Therefore, the only evidence on record the

State/Prosecution relies on to connect the Accused to the offence is the question of a dying declaration.

**42.** The argument advanced by the defence is that what was alleged to have been stated by the victim was not admissible since she did not die immediately. That a dying declaration must be made in hopeless expectation of death.

**43.** In **Choge v Republic (1985) KLR 1** the Court of Appeal stated that;

***“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”***

**44.** In **Republic v Aboi (Criminal Case E013 of 2022) [2025] KEHC 1803 (KLR)** which is persuasive the court stated that;

***“The Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR, rendered itself on the principles of dying declarations thus;***

***“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.***

***Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to***

***the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge v. Republic (supra):***

***“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a***

***conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”***

**45.** It is urged that the declaration in the instant case would not have been so since the victim died some 90 days later. Evidence adduced by the prosecution is that upon the act occurring on the night of 15<sup>th</sup> May, 2017, the Accused called PW1 at or about 11.00pm and on arrival at the hospital, the victim/deceased told her that if she died she had been burnt by the Accused. When PW3 visited the deceased by then she could communicate. She repeated the allegation by stating that the Accused who was her lover burnt her. She said that she asked the Accused and sought to know why he burnt the deceased who confirmed that they were lovers and further said that there was no dispute between them, but did not deny burning her. And, that the deceased made the statement in the presence of the Accused. This evidence was not refuted. Further, the Accused himself said the victim made the same statement to the doctor at the outset.

**46.** Evidence adduced by PW1 was that while at the pub the deceased was only drinking coca cola (soda) a soft drink and on being cross - examined, it was not suggested to her that the deceased was imbibing alcohol. The deceased is stated to

have passed on 7<sup>th</sup> June, 2017 which was some three weeks later.

**47.** At the point of stating that she was burnt by the Accused she believed that death was imminent. It is not strictly required that she must have hopelessly expected that death was impending. Clearly, the statement related to the cause of death.

**48.** It is however argued that as opposed to the allegation that the deceased was burnt with boiling water, she burnt herself with fire having poured on herself some kerosene. Looking at the position and extent of burns/injuries sustained by the deceased, they were extensive burns involving the face, neck, fore chest, upper limbs, abdomen and the frontal anal side. On cross - examination, Dr. Walong said that the burns were inflicted by hot fluids, most likely boiling water and from the front side. In examination the doctor said that had she poured water on herself, burns would have been expected to be on the back of the head but this is a case where the injuries were concentrated on her chest and upper back.

**49.** Evidence on record establishes consistency with external occasioned injuries as opposed to alleged self-inflicted injuries, which corroborates what the deceased stated. The evidence links the Accused who was with the deceased to the act and this court finds and holds that the Accused did commit the unlawful act.

**50.** This brings us to whether the Accused acted with malice aforethought. **Section 206 of the Penal Code** defines malice aforethought 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.***

**51.** In **Wanyonyi v Republic [2025] KECA 1642 (KLR)** the Court of Appeal stated that;

***“On malice aforethought, Section 206 of the Penal Code defines malice aforethought to include amongst others:***

***a. an intention to cause death or grievous harm;***  
***b. knowledge that the act will probably cause death or grievous harm.***

***In the case of Hyam v DPP (supra), the House of Lords held that malice aforethought is established where the accused knew it was highly probable that the act he or she was undertaking would result in death or serious grievous harm. The act of boiling water and pouring it on a sleeping person’s head was inherently dangerous and likely to cause grievous harm. The appellant’s knowledge of this consequence is inferred from the nature of the act. The trial court rightly found that malice aforethought was thereby proved.”***

**52.** In **Republic v Vickers [1957] 243 664** Lord Goddard stated that malice aforethought is either an express intention to kill or implied where a voluntary act the Accused intended to cause grievous bodily harm to the victim and the victim died as a result.

**53.** The Accused’s state of mind at the time was not brought up. He argues that prior to reaching home the deceased fought a mama mboga and he restrained her. A suggestion that the

deceased was agitated; although the allegation was brought up late in time such that it could not be interrogated by the State/Prosecution.

**54.** After the act he did take the victim to hospital. It is argued that his conduct was not consistent with that of guilt. That he should be viewed as a rescuer but not an assailant with a guilty mind.

**55.** The Accused loved the victim and did act by escorting her to hospital for medical attention. This was after the act where he acted recklessly as he must have known that by pouring on the victim boiling water he was likely to cause at least grievous harm on her person. This unlawful act did qualify as malice aforethought.

**56.** He acted with some indifference to human life therefore his subsequent conduct of taking the deceased to hospital does not negate his conduct of existence of some intention to at least cause grievous harm at the time the unlawful act was committed. However, this court views it as a mitigating factor, which is not a defence to be offence.

**57.** The upshot of the above is that the prosecution has proved the case against the Accused beyond reasonable doubt, he is guilty and accordingly convicted for the offence of murder as charged.

**58.** It is so ordered.

**Dated, signed and delivered virtually this 17<sup>th</sup> day of March, 2026.**

.....  
**L.N. MUTENDE**  
**JUDGE**