

**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. E011 OF 2021**

REPUBLIC.....

.....PROSECUTION

VERSUS

DAVID MWANGI

MWAI.....1<sup>ST</sup>

ACCUSED

RAPHAEL NJIRU MWAI.....

.....2<sup>ND</sup> ACCUSED

**JUDGMENT**

1. The accused were arraigned before court on 6<sup>th</sup> July 2021 charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the charges are that on 10<sup>th</sup> June 2021 at Miharti village in Kipipiri Sub-County within Nyandarua County murdered Peter Kiragu Mwai.

3. The charge was read to both accused and they pleaded not guilty to the same. The case proceeded to full hearing. The prosecution called a total of seven (7) witnesses. The defence relied on the evidence of the accused persons alone.
4. The prosecution case is that, the accused and the deceased were brothers and lived in the same plot. That on the night of 10<sup>th</sup> June 2021 at around 10:00pm, (PW1) Jemimah Wanjiku, a sister to the accused and the deceased, was in her house when she heard screams. That she went out and found that the deceased lying on the ground and the accused beating him on the back with wooden bars. That she screamed for help and the accuseds ran away.
5. That (PW1) Jemimah's husband (PW2) John Mwangi Maina, and (PW3) Esther Njeri Njoroge responded to the scream for help and found the deceased lying on the ground badly injured. That (PW2) John lifted took him to

his house and when he inquired as what had happened the deceased informed him that he had been assaulted by his three (3) brothers including the accused herein.

6. That the following day 11<sup>th</sup> June 2021 the 1<sup>st</sup> accused went to the sister's (PW1) Jemimah's house complaining that she had prevented him from finishing his work the previous day. (PW1) Jemimah called (PW3) Njeri to help but when she arrived, the accused picked a wooden bar and advanced to towards Njeri who then ran away and went to call the accused's mother. That the 1<sup>st</sup> accused returned to deceased's house and beat him.
7. In the meantime, (PW6) John Kamau and the deceased's mother went to the deceased house and found him on the floor. At the same time, the 1<sup>st</sup> accused was there full of rage and very bitter saying: "nitaua yeye niende jela Maisha" (I will kill him and go to jail for life) but was chased away by the father.

8. That the deceased was taken to Maruge Dispensary, treated, given medicine, and returned home but died on 13<sup>th</sup> June 2020. A report of the death was made to police the vide Police Occurrence Book (OB) No. 13/6/2021 and (PW7) No. 235632 Chief Inspector Daniel Ojwang assigned to investigate the case.
9. On 13<sup>th</sup> June 2021, the Investigating officer in the company of Corporal Munyao and PC Musau visited the scene and although the body had already been taken to the morgue, they noticed signs of a struggle and a broken jembe believed to be the weapon of murder and blood-stained clothes produced as (Pexh 2 and 3) respectively.
10. In the meantime, (PW5) Dr. Alex Mwaura attached to J. M Kariuki Memorial Hospital conducted the post mortem on the deceased's body which revealed haemorrhage in the eyes, embalming incision on the left thigh, bruising on the right cheek, the posterior aspect of both legs

bilaterally, on the left side of the chest and above the left shoulder, a wound on the left elbow and presence of vomit around the mouth.

11. On internal examination, there were black spots on the lungs associated with smoking, mild discolouration of liver associated with chronic alcoholism, bleeding below the scalp consistent with trauma to the head at the parietal region with resultant intracranial haemorrhage consistent with blunt head injury. The doctor concluded that the cause of death was cardiac arrest due to head injury and suffocation - external haemorrhage.

12. That the witnesses interviewed revealed the accused persons had beaten the deceased and the accused were arrested. At the conclusion of the investigations, the accused were charged accordingly.

13. At the conclusion of the prosecution case, the court ruled that each accused had a case to answer and placed them on their defence. The accused gave similar

evidence stating briefly that, on 10<sup>th</sup> June 2020 they went to a club after work. That the deceased joined them late and ordered more drinks.

14. However, the deceased had a disagreement with one Peter Maina and as a result the owner of the club threw them out of the club, while the accused remained in the club drinking. That when they went home, they found the deceased lying down in a trench totally drunk with injuries to the head and leg, took him to his house and attended to his injuries.

15. That the next day the deceased was taken to the hospital and the accused left for work. That when they returned home, they found the deceased with their mother and only complained of a headache. However, the following day, they were informed that the deceased had died.

16. The accused denied committing the offence herein and argued that there was no bad blood between them and

the deceased and therefore they had no motive to kill him. Further, the deceased never made a report to the police that they had assaulted him. The 1<sup>st</sup> accused further stated that the deceased always got into fights when he got drunk but did not fight with them.

17. In cross examination the accused denied recording any statement in which they alluded to being involved in the offence, wherein (PW7) C. I Ojwang was recalled after the close of the defence case and confirmed that he recorded statements from the accused under inquiry without coercion. That they signed the statements.

18. That, the accused stated in the statements that the deceased returned home and locked himself in the house and put on loud music and then refused to open the gate for them despite several pleas and even as one Kamau pleaded with the deceased. C.I Ojwang produced the 1<sup>st</sup> accused statement of inquiry as (PEXh5) and the 2<sup>nd</sup> accused's as (PEXh6).

19. At the conclusion of the trial, the parties filed their submissions. The prosecution in submissions dated 12<sup>th</sup> February 2025 stated that the ingredients of the offence of murder were laid out by the Court of Appeal in the case of; Antony Ndegwa Ngari vs Republic (2014) eKLR as, the death of the accused occurred and the cause of death, the accused committed an unlawful act that led to the death, and he had malice aforethought.

20. The prosecution submitted that, the fact the deceased died was supported by witness accounts of; (PW1) Jemimah, (PW3) Njeri and (PW6) Kamau and corroborated by the evidence of (PW5) Dr. Mwaura who conducted the post mortem. That the doctor also established the cause of death, as cardiac arrest due to head injury and suffocation.

21. That the actions of the accused persons in assaulting the deceased on the head with pieces of wood caused his unlawful death. Further (PW1) Jemimah and (PW3)

Njeri witnessed the accused assaulting the deceased. Furthermore, despite the accused denying committing the offence, it is evident from their statement under inquiry (P.Exh 5 and 6) that they are the ones who assaulted the deceased. That the statements under inquiry were detailed and gave particulars that would only be within the accuseds' knowledge.

22. Further, they did not raise any objections to the production of the statements under inquiry which would have allowed the court to conduct a trial within a trial to establish if the statements were taken voluntarily.

23. The prosecution relied on the case of; Thomas Mwanzia Komo vs Republic [2015] eKLR where the Court noted that the appellant gave a detailed statement of particulars which would only be within his knowledge and nobody else.

24. The prosecution further submitted that the accused persons had malice aforethought and the necessary

mens rea when they assaulted the deceased and referred to the case of Republic vs Richard Itweka Wahiti [2020] eKLR where the Court held that it was evident from the severity of the injuries inflicted on the deceased that the accused intended to cause death or grievous harm and thus malice aforethought was self-evident\_

25. That, the accused persons knew or ought to have known that assaulting the deceased with pieces of wood on the head would result in his death or would cause grievous harm. Further, from the weapon used, part of the body targeted, the severity of the injuries and manner the deceased was murdered show the accused had malice aforethought and had formed the intention the intention to cause death.

26. That in addition, the accused testified that they found the deceased lying down at the gate with injuries to the

head and leg which means that the deceased posed no threat to them

27. The prosecution submitted that it has proved the ingredients of the offence of murder to the required standard to establish that the accused caused the death of the deceased.

28. However, the accused persons in joint submissions dated 25<sup>th</sup> February 2025, submitted that the prosecution had the responsibility to tender evidence to demonstrate the ingredients of the offence of murder in order to obtain a conviction.

29. That, from the evidence tendered there is no proof that the accused persons planned to harm or kill the deceased. That the death was accidental as the deceased fell in a ditch and was injured supported by the fact that the accused had to wipe blood off the deceased's head.

30. That it is possible that the confrontation that (PW1) Jemimah witnesses was when the accused persons attempt to carry the deceased back to his house but as the deceased was drunk and rowdy he was resisting the attempt.
31. Further the prosecution has failed to establish any bad blood between the deceased and the accused persons and if they meant to harm him thus malice aforethought has not being established.
32. Furthermore, the accused persons did not try to run away from the residence after the incident which affirms that they had nothing to do with the incident and cannot be said to have stemmed from guilty. The accused referred the court to the case of; *Republic vs Kipkering Koske 1949 EACA 135 at Page 136* where the Court of Appeal established the factors the court ought to consider before relying on circumstantial evidence to convict an accused person.

33. Finally, the accused submitted that they have established a proper defence which casts doubts on the prosecution's case and are therefore entitled to benefit from the same. That their defence was not debunked and there is no evidence of foul play and/or malice aforethought,

34. At the conclusion of the case, I note the accused is charged with the offence of murder provided for under section 203 of the Penal Code which states follows: -

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

35. The ingredients of that offence are settled through several court's decision including the decision of the Court of Appeal in Joseph Githua Njuguna vs Republic (2016) eKLR, where the ingredients were stated as: a) proof of occurrence and cause of death, b) whether the

death was lawful or unlawful, c) proof of commission of the offence by the accused and d) malice aforethought.

36. In the instant matter there is no dispute as to the occurrence of the death and the cause thereof.

37. The issue to determine is who caused the death of the deceased and in particular whether it was the accused who killed the deceased. The evidence of (PW1) Jemimah is that she witnessed a fight between the deceased and the accused. All of them are her brothers. That she saw the accused were beating the deceased using wooden bars. That the accused ran away when she screamed for help and people responded.

38. That the first accused returned the following day and accused attacked her of preventing him from finishing his work and attacked the deceased again. The witness said in her evidence in chief that "I was seeing everything".

39. It suffices to note the afore evidence of (PW1) Jemimah was corroborated by the evidence of (PW3) Njeri who testified that she witnesses the first accused accost (PW1) Jemimah and when she went to help the accused who was armed with a wooden bar chased her away. That at that time the first accused had a knife and said he wanted to finish the deceased.
40. Similarly, (PW2) Maina that testified that he inquired from the 2<sup>nd</sup> accused why they beat the deceased and he said they were disciplining him for he was disturbing them.
41. In addition, (PW6) Kamau testified that when he went to the deceased's home after screams he found the deceased lying on the ground injured while the first accused full of rage and very bitter saying "nitaua yeye ni ende jela maisha" (I will kill him I go to jail for life).
42. The evidence of these four witnesses clearly proves that the accused assaulted the deceased.

43. Furthermore, it is in evidence they were armed with wooden bars which they used to assault the deceased. This is corroborated by the evidence of Dr. Mwaura that the deceased suffered bruises on the eyes, left thigh, right cheek, both legs at the rear, chest, and above the shoulders. Of great significance is the bleeding under the scalp consistent with trauma on top of the head from a blunt object. The evidence is that the accused were armed with wooden piece of wood which is a blunt object.

44. Consequently, the accused defence that they were helping the deceased does not hold water in the light of the afore evidence. Notably, the accused denied ever recording any statements yet they did and the statements were produced as exhibits. In the said statements they allege that they beat the deceased to discipline him as he was drunk and generally a nuisance. The contents of the statements support the

evidence of (PW2) Maina that when he asked the 2<sup>nd</sup> accused why they beat the deceased he said that they were disciplining him for disturbing them.

45. As a result of the aforesaid, I find that the accused committed the offence herein.

46. The next issue is whether they had malice aforethought. The provisions of section 206 of the Penal code stated that: -

*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.*

47. The law is also settled that malice aforethought entails.

The Court of Appeal in *Odio v Republic [2024] KECA 1544 (KLR)* stated that:

*“20. Malice aforethought may be express or implied. Express malice aforethought refers to when a deliberate intention is manifested to take away the life of a person unlawfully. Implied malice aforethought applies when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice*

*aforethought must be proved. Malice aforethought cannot be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice aforethought, no other mental state need be shown to establish malice aforethought. In Nzuki vs. Republic [1993] eKLR, this Court defined malice aforethought as:*

*...a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of Regina v Vickers, [1957] 2 QB 664 at page 670. An intention connotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs*

*which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of Conliffe v Goodman, [1950] 2 KB 237.*

48. Furthermore, in the case of; Tubere s/o Ochen {1945} 12 EACA 63 the court in considering whether there was malice aforethought, stated that the trial court should look out for characteristics such as; the nature of the weapons used, the manner it was used to inflict the injuries, the parts of the body targeted whether vulnerable or not, the nature and gravity of the injuries, and the conduct of the accused before, during and after the incident. (See also Dafasi-Magayi v Uganda {1965} 1 EA 667).

49. In this matter there is evidence that the accused were heard to say that they were disciplining the deceased because he used to disturb them when drunk and

indeed there is evidence that the accused was rough when drunk. So the accused must have nursed the idea of getting rid of him once and for all. This is supported by the fact that the first accused returned the following day in “rage and very bitter” and said he could beat the deceased and go to jail for life.

50. Furthermore, after assaulting the deceased, they left him for dead and it is the neighbours who assisted the deceased to go hospital. Again the deceased died shortly after the assault an indication that he sustained serious injuries and even more so on the head, a delicate part of the body.

51. It is the finding of this court that the accused committed the offence they are charged with and I find them guilty as charged and convict them accordingly.

52. It is so ordered.

Dated, delivered and signed this 8<sup>th</sup> day of April, 2026

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms. Chepkonga for the State

Mr. Wairgei for the accused persons

Accused persons present physically

Ms. Hannah: Court Assistant