

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CRIMINAL MURDR CASE NO. 39 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL NGUNJIRI NJAMBI.....
ACCUSED

JUDGMENT

A. INTRODUCTION

- 1.The accused person was charged with the offence of murder contrary to **section 203 as read with section 204 of the Penal Code (Cap 63)** of the Laws of Kenya. The particulars of the offence were that on the 13th day of September 2019 at about 2300hrs at Ituramiro centre in Gatundu South Sub-location within, Kiambu County murdered **“ZAKARY KIHUGA NDIRANGU.”**
2. The accused person denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling six (6) witnesses in support of their case.

B) PROSECUTION CASE

3.PW1 Samuel Mbugua Maina testified and stated that he resided within Ituramiro centre and engaged in boda boda business. On the material night at about 10.30pm he was still at Ituramiro shopping Centre, waiting for customers and decided to go buy sugar before heading home. While at the shop he heard a commotion and upon checking, saw the deceased assaulting with a lady. When members of the public tried to intervene, the deceased turned on them, assaulted them and demanded that they mind their own business.

4. As this happened, the lady being assaulted got a chance to escape and sought refuge inside a bar, with the deceased in hot pursuit. The bar revelers, specifically the accused and three other people came out and started to assault the deceased. It was during this altercation, that he specifically saw the accused stab the deceased with a beer bottle on the neck, after which he fell down and started to cry for help. Since the deceased was his customer, he rushed to help him and together with his friend (Simeon) rushed him to Karato level 4 hospital, where first Aid was administered and were referred to Gatundu Level 5 hospital, where the doctor on duty confirmed that he had already passed on.

5. From the hospital, he went and reported the incident at Gatundu police station, and accompanied the said police officers to the hospital and scene of crime. Later on, the same night/early morning he assisted the police in rounding up all the assailants, who were all well known to him, since

they all come from the same village. Under cross examination PW1 confirmed that both the accused and the deceased were his friends and were persons well known to him, but was not aware if any grudge persisted between the two.

6. He reiterated that the deceased was assaulting a certain lady known as “*Shiko*”, and when “*Nderitu*” intervened he turned and started to assault him, giving “*shiko*” an opportunity to escape by running into the bar. After realizing that “*shiko*” had escaped, the deceased picked up fight with “*Ndiki*” and it is at that point that the accused and three other revelers came from the bar and proceeded to assault the deceased. PW1 affirmed that he recognized and knew all the assailants, and referred to them by their nicknames. The incident has also occurred about 40m away from where he was, and the shopping centre was well light by security/street lights hence visibility was clear. In reexamination, PW1 again confirmed that he saw the accused stab the deceased with a bottle on his neck.

7. **PW2 Ruth Wanjiku Gatitu**, confirmed that on the material night, she was at work at “*Praise Bar*” within Ituramiro shopping center and after she had closed her business, went to “*Zubeka bar*”, where she saw the deceased who was her boyfriend, and decided to take off. The deceased followed her and in the process of running away, she fell and the

deceased started to assault her. One “*Mbugua*” and “*Dick*” tried to intervene, but this infuriated the deceased and he turned his anger on them and stated to fight them. She took that opportunity and dashed into, “*Neresa club*” where she sought refuge and the waitress therein, one “*Njeri*” opened for her the back door and she escaped to her house.

8. The deceased followed her to the house, but she refused to open the door and later after he had left, she called her friend, “*Njoroge*”, and used a different route to Gateway estate, where she spent a night at a friend’s house. While there, her friend called “*Brenda*” called her and informed her that the deceased had been stabbed but she opted not to come back to the shopping Centre. The following day at about 9.00am as she opened her business, she was informed that the deceased had passed on. PW2 further confirmed that she did not see who stabbed the deceased but was told that it was the accused, who had stabbed him. After the incident, she too was arrested to help with investigation and spent 14 days in police custody before being released.

9. Under cross examination, PW2 confirmed that the deceased was her boyfriend and was unhappy that she had gone to the club, with him. She reiterated her earlier evidence and further confirmed that “*Brenda*” had told her that the deceased fought with several persons before he was fatally stabbed.

10. **PW3 Samuel Mwangi Wanjiku** also confirmed that on the material evening, at about 9.00pm he and his friend, “Wando” went to “Westgate club” and after about one hour opted to retire early. While enroute home, they found a crowd of people outside “Munyuini Dispensary” and saw the deceased and the accused fighting. In the process, he witnessed as the accused used a broken beer bottle, to scratch the deceased on his neck. He left the scene and proceeded home and later, while slept was woken up by the police and arrested to go assist with investigations.

11. **PW3** further clarified that where the fight took place had ample street light and therefore, he clearly saw what transpired during the said fight. Under cross examination he confirmed that his nick name was “ Washosho”, but denied fighting the deceased on the said night.

12. **PW4 Patrick Ndirangu Waregi**, confirmed that the deceased was his nephew and that on 17.09.2019, he and the deceased father Paul Ndirangu, went to Gatundu level 5 hospital, to identify the deceased body before the autopsy was undertaken. After the said process was complete the doctor informed them, that the deceased had died as a result of excessive bleeding, caused by a severed vein on his neck.

13. **PW5 Cpl Collins Otieno** from DCI confirmed that at the time of the incident he was based at DCI Gatundu and was assigned to investigate the incident. They immediately

proceeded to the incident scene and gathered that the victim had been subjected to mob justice and had been rushed to hospital, where he was pronounced dead on arrival. Fortunately, the bodaboda rider (PW1) provided them with the names of those who had assaulted the deceased and took them to their respective homes, where they arrested five suspects.

14. Upon further investigation, it emerged that it was the accused who had stabbed the deceased and he thus made the decision to charge him with the offence faced before court. Under cross examination he confirmed that he detained five suspects including the accused, *Timothy Gikonyo Mwangi, Simeon Karanja, Sawuel Mwangi, John Nderitu Kimani and Ruth Gatitu*, and that some of them turned into prosecution witnesses after investigations were complete. During investigation, he did visit the scene of crime but did not take photographs of the same. He reiterated that the decision to charge was based on the evidence gathered during investigation, which pointed to the accused as the person, who inflicted the fatal injury.

15. **PW6 Dr. John Mathaiya**, the Kiambu county pathologist confirmed that he did the post mortem on the deceased body on 17.09.2019, after it was identified by the deceased uncle and father. He established that the deceased had injuries to the face, neck and defence arm injuries. The major injury was on the neck which had a laceration measuring 8.5cm by 3cm and had exposed major blood vessels. He established

that the cause of death was due to the injury inflicted on the deceased neck, which cut off the vein.

16. The prosecution closed their case and upon considering the prosecution evidence, the court placed the accused person on his defence.

C. DEFENCE CASE

17. The Accused (DW1) opted to give sworn evidence and stated that on the material day he did go to Thika town to buy stuff for his children and came back home at about 8.00pm. He went to their local club, "Nerest pub" with his friend, Timothy Gikonyo, and took alcohol until about 11.00pm, when they noticed that there was commotion outside the said club, but did not get involved. After about 30mins, the club owner came and requested them to leave as he wanted to close down.

18. When they left the club, he saw a lot of people outside, but did not see any fight going on and proceeded to his home. On 14.09.20219, he was arrested from his house in the morning and was detained at Gatundu Police station in connection with the said murder incident. He alleged that he was tortured, while in the police custody as they wanted him to confess to the murder, but he held on to the truth, which was that he never fought with the deceased, he did

not know him, had nothing in common, thus had no reason to fight him.

19. Under cross examination, DW1 denied PW1 and PW3 assertion that he fought with the deceased and/or that he stabbed him on the neck using a broken bottle, insisting that the said evidence was not true. The accused did not call any witnesses and opted to close his case at that point.

D.DETERMINATION

20. I have read through and considered the evidence adduced by both parties and given due consideration to the submissions filed by both Counsels. The question that arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused person herein murdered **ZAKARY KIHUGA NDIRANGU**, the deceased herein.

21. **Section 203 of the Penal Code** defines the offence of murder as follows:

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

22. In ***Joseph Kimani Njau vs Republic (2014) eKLR***, the Court of Appeal, in concurring with an earlier finding of that

Court (but differently constituted) in **Nzuki vs Republic (1993) KLR 171**, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i. The intention to cause death;***
- ii. The intention to cause grievous bodily harm;***
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55".

23. The Court of Appeal at Nyeri in **Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014]**

eKLR, also summed up the elements of the offence of murder as follows: -

- a. the death of the deceased and its cause;***
- b. that the accused committed the unlawful act which caused the death of the deceased; and***
- c. that the accused had malice aforethought.***

24. I will now proceed to interrogate each issue.

(i) The death of the deceased and its cause.

25. Every homicide is unlawful unless authorized by law or is excusable under the law. **See Sharma Pal Singh [1962] EA 13, see also Guzambizi Wesonga v Republic [1948] 15 EACA 63** where the court held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defense or in defense of property.”

26. It is common ground that **ZAKARI KIHUGA NDIRANGU** died on 13.09.2019 at around 2300hrs at Ituramiro centre, within Gatundu Sub County, Kiambu having sustained a fatal stab wound to his neck, which severed his blood vessels. This was confirmed by all prosecution witnesses, who went to the scene of crime. **PW4 Dr John Mathaiya** also produced the

post mortem report dated 17.09.2019, wherein he confirmed that the deceased died as a result of exsanguination due to vascular injury of the right neck blood vessels due to both sharp and blunt force trauma to the neck consistent with homicide.

27. Death and its cause were thus proved.

(ii) Whether it has been proved that the accused committed the unlawful act which caused the death of the deceased:

28. PW1 and PW3, were both physically present at Ituramiro Centre on the material night and vividly described, how the deceased attacked and physically assaulted his girlfriend (PW2), which forced other revelers to intervene. The deceased started to fight them and, in the process, they saw the accused stab the deceased on the neck with a broken beer bottle. The accused was their village mate, thus a person well known to them and also at the said Centre, there was ample street and security light, and they were thus certain about what they saw.

29. The accused in defence, admitted that, on the material night he was at "Nerest club" and heard commotion outside the said club, but did not go outside to find out what was happening. He later left the said club at about 11.30pm and

retired to his house, and was arrested on the following morning. I do find that the accused defence, is untruthful in light of the direct and positive evidence presented by PW1 and PW3, which proved that he was the one who inflicted the fatal injury on the deceased.

30. The accused in his submissions also averred that PW1 and PW3 were arrested and detained after the said incident and that their statements implicating him were recorded, while in custody and thus raised serious doubt as to the voluntariness of their statement, possible coercion, motive to shift blame and shield themselves from prosecution. In my assessment both PW1 and PW3 were honest and coherent witnesses, whose evidence remains unimpeached. It should also be noted that the said issues raised in the submission were not raised in cross examination and thus are raised as an afterthought.

31. I therefore find and hold that it is the accused who committed the unlawful act which caused the death of the deceased.

(iii) Malice Aforethought

32. Having found that the prosecution has proved *actus reus*, the other issue for determination is whether malice aforethought can be inferred from the prosecution's evidence presented. The offence of murder is complete when "*malice aforethought*" is established. **Section 206** of the **Penal Code**, provides that:

“(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.”

33. The term "malice" refers to a person's intent to injure or kill another person. Malice can either be "expressed" or "implied." Malice is expressed when someone deliberately intends to take someone else's life. Malice is implied when a person is killed, yet no proof exists that the killer was provoked. Implied malice may also exist when a crime is committed by someone who is said to have a "depraved" or "malignant" heart. "Intent to kill" is another way of saying malice aforethought, or mens rea. Mens rea is a Latin term that refers to a defendant's intention to commit a crime, as opposed to the actual crime itself. Mens rea is concerned only with the defendant's mind set, not with his ultimate actions. An intent to kill does not need to be specifically expressed by the killer. It can be inferred based on the killer's actions. For

example, malice aforethought can exist if someone shoots another person with a gun. However, just because someone shoots another person, that does not intent to kill. Perhaps he was just trying to defend himself, or to stop the person he shot from harming someone else, and he accidentally killed that person in the process.

34. It is sufficient to say that the mental element required by **section 206 of the Penal Code** can be equated to broad guidelines set out in the case of **Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:**

“The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted.”

35. In **Hyam v DPP {1974} A.C.** the Court held inter alia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

36. In the present case based on the analysis of the injuries inflicted, it is clear that the accused did not have any other intention other than to murder the deceased as he directly stabbed him on the neck, thereby severing his blood vessels. It is my finding that accused person knew or ought to have known that his action would result in death, and it can be safely inferred from the nature of the injury inflicted on the deceased that the accused person's action was premeditated.

37. In the circumstances, I am persuaded beyond reasonable doubt that the prosecution has proved their case, and specifically, the presence of malice aforethought on the part of both the accused, too, has been proved.

E. DISPOSITION

38. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the Information of murder against the subject herein, **ZAKARY KIHUGA NDIRANGU**, beyond reasonable doubt and accordingly convicted him under **section 215 of the Criminal Procedure Code**.

39. Sentencing will await the filing of a pre-sentence report by the probation and aftercare services department, within the next 21 days.

40. It is so Ordered.

Judgment, signed at KIAMBU this 22nd day of APRIL, 2026.

**FRANCIS RAYOLA OLEL
JUDGE**

Judgment read and delivered in open court on this 22nd day of April 2026.

In the presence of:-

.....**Accused**

.....**For O.D.P.P**

.....**Court Assistant**