

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CRIMINAL CASE NO. E054 OF 2021

REPUBLIC.....

PROSECUTOR

VERSUS

JOSEPH NJOGU MWANGI.....1st ACCUSED

**NAOMI MUKIRI PETER.....2nd
ACCUSED**

JUDGMENT

A. INTRODUCTION

- 1.Both accused persons were 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 6th day of June 2021 at Landless within Thika West, Sub- County, Kiambu County they murdered one “**DAVID OYETU KAMAU.**”
2. Both accused persons denied the charge faced and pleaded not guilty. The case proceeded to full trial with the prosecution calling nine (9) witnesses in support of their case.

B) PROSECUTION CASE

3.PW1 Burington Ndungu Gaitho stated that the deceased was his landlord at landless area. On 07.06.2021 at around 7.00pm he was at the matatu stage and was about to go to his residence, when one Kariuki came to the said stage while hysterical and informed them that his landlord had been found murdered in his house. They rushed to the scene and upon entering the deceased house, found him lying face down on the mattress, which was heavily blood stained. Thereafter, they did go to Makogeni police station to reported that incident and later recorded his statement with the DCI.

4. Under cross examination, he confirmed that he knew the 1st accused as he would commonly see him at the bus stage, but on the material, day had not seen him. He also knew the 2nd accused and had seen her severally with the deceased, but she too was not at the murder scene.

5.PW2 Alex Mwaura Matha also confirmed that he resided with Landless area in Thika and worked as a tout. On 06.06.2021 he woke up as usual and went to work at the Bus stage. Later in the day, he met the deceased, 2nd accused and one lady known as Easter, slaughtering a goat and also saw them going to buy Alcoholic drinks but did not join them. The following day in the evening, their friend, Kariuki came to the stage and told them that David had been found dead at his house. They rushed to the scene of

crime and later proceeded to report the incident at Makongeni police station.

6. PW2 further confirmed that prior to the incident, on one occasion, while they were at the matatu stage with the 1st accused and the deceased, he heard the 1st accused warn the deceased to leave his wife alone and noted that after the murder incident, both accused had moved away from Landless area. Under cross examination he confirmed that he and the deceased resided within one Plot and it is the same place that he saw the deceased and the 2nd accused slaughter a Goat on 06.06.2021 at 08.00 am but was not aware of the circumstances that lead to his death.

7. **PW3 Harry Kamau** confirmed that the deceased was his son and came to know both accused persons after his death. On 07.06.2021 at about 8.30pm he was called by the deceased mother, one Juliet Wairimu (PW5), who asked him if he had heard any news concerning his son. She then proceeded to give him a phone number and upon calling the same, he was informed that his son had passed on. He called a few friends and proceeded the crime scene, where he found the deceased body lying on a mattress, with blood splattered all over. He also saw a blood-stained knife on the window seal and also noted that the deceased household items were also scattered all over. Later, he identified the deceased body to the doctor, who conducted the post mortem.

8.PW4 Martin Chege Kimani, stated that he was a resident of Ruiru, but previously resided at Landless in Thika, where he engaged in casual work to sustain himself. On 06.06.2021 he woke up and left for work at about 8.00am and later in the evening, went with the deceased to “*Spicy Club*”, where they found both accused persons. They stayed at the club until about 9.00pm, when the deceased told him that he had a guest, and excused himself to go meet the said guest. He remained behind at the club for another 30 minutes or so and retired back to his house.

9. On the following day he left for work as usual and later in the evening at about 6.00pm returned home to go pick his jacket, since it was quite cold. When he reached near his residence, he met other common friends and asked them if they had seen the deceased, but they all replied in the negative. After picking his sweater, he decided to pass by the deceased house to check on him. He knocked the door and did not get any response. He opened the said door and walked in, while calling out the deceased name. When he went to the bedroom, to his shock he discovered the deceased body lying on his mattress, which was on the floor. He was half necked, lying while facing up and was holding a knife embedded near his neck.

10. He raised alarm, and was joined by neighbours and other members of the public, before he left to report the incident at Makogeni police station. He later learned that the

deceased and the 2nd accused had an affair, though both accused stayed together. It is alleged that this had led to disagreements between the deceased and the 1st accused and was probably the motive behind the murder. Under cross examination, PW4 stated that he believed that the deceased had a lady visitor and that is why he left the club before than him. He also confirmed that on 06.06.2021 he had witnessed as the 2nd accused abuse the deceased and was also not sure if the deceased had recorded any complaint with the police regarding the threats on his life by the 1st accused.

11. **PW5 Juliet Wairimu**, confirmed that she was the deceased mother. On 07.06.2021, in the evening at about 8.00pm, she did receive a call from one of her tenants, who told her to urgently come to Thika on the following day. Shortly thereafter, she received another call from her friend, "*Mama Kuria*", who told her that she was hearing rumors that her son had died. She called PW3, and requested him to go check on what had transpired and after a short while, he did call her and confirmed the sad news. PW5 further testified that she knew the deceased girlfriend known as Nancy and did not know both accused persons.

12. **PW6 Duncan Kariuki**, confirmed he was the deceased opposite door neighbour, and on 06.06.2021 had been requested by his father to go look after his house, which was about 20 minutes' walk from his residence, since he was travelling out of town. On the following day, he came back in

the morning, cleaned his house and stay in. Later at about 2.00pm -3.00pm, he heard commotion within their plot and when he came out, he found a crowd outside the deceased house. He joined them and discovered that his neighbour (the deceased) had been murdered. He informed their other friends, including PW4, who went and reported the incident at Makogeni police station.

13. From general inquires made, it was established that the deceased and the 1st accused shared a girlfriend (the 2nd accused) and their disagreement had boiled to the fore, especially when they were drunk, as the 1st accused would constantly warn the deceased against hitting on his girlfriend, but the deceased would retort that it was the 2nd accused, who would come to his house and it was not him chasing after her. This had created a grudge between the two and they thus suspected that the 1st accused must have been the one who stabbed the deceased.

14. Under cross examination PW6, confirmed that it was PW2 who had told him that the 1st accused had expressed bitterness with the deceased for interfering with his relationship with the 2nd accused person and had issued a verbal warning that he would one day harm the deceased, if the opportunity arose. Further, on several occasion, he would see the 2nd accused come, visit the deceased and wash his cloths/clean his house, but did not know who fatally stabbed the deceased.

15.**PW7 Dr. Ruth Wangari Kahiru**, from the government chemist office, confirmed that they did receive samples (blood-stained blue T-shirt, finger nail sample, rib cartilage and blood-stained knife) brought by Pc George Lemomo, who requested them to generate the DNA profile. Upon examination, it was confirmed that the blood extracted from the T -shirt (Item N) and knife (Item J) matched the DNA profile generated from the finger nail sample marked (Item G). She proceeded and produced her report dated 20th July 2022.

16.**PW8 Dr. John Mathaiya**, confirmed that he was the County Pathologist-Kiambu County and had on 10.06.2021 received a request from Makogeni police station to undertake a post mortem examination to establish the cause of death of the deceased herein. The body was identified by PW3, the deceased father and *Annah Mumbi Maina*, the deceased Aunty. On examination he found that the body had several stab wounds on the neck, chest and shoulders all ranging between 0.5cm to 2,5cm in depth. Some of the said wounds had penetrated the upper lobe of both lungs and caused massive internal bleeding. One wound had also penetrated into the deceased heart. The cause of death was thus established to have been caused by multiple stab wounds caused by a sharp object leading to severe hemorrhage.

17. **PW9 CPL Francis Munyao**, confirmed that he was the investigation officer and after the incident had been

reported, they did go to the crime scene and stated to investigate the murder. The evidence revealed that the 1st accused had disagreed with the deceased, while at a club within Makogeni, and told him to keep off his wife. After commencing investigations, they had gone to the accused known residence, but discovered that they had moved out, but later managed traced them within Landless estate, and placed them under police custody, to assist with investigations. They later opted to charge both of them with the offence faced, as they had the motive to kill the deceased. They had also moved out immediately the murder occurred, which signified their guilt.

18. Under cross examination, PW9 confirmed that the deceased was murdered at night but there was no eyewitness to the incident. Investigations had also established that the 2nd accused was involved in a romantic relationship with both men and this created a motive for the murder. The 2nd Accused was also with the deceased on the material day, together with a third person known as Steve and thus had an obligation to explain what had transpired, leading a life being lost.

19. The prosecution closed their case and upon considering the prosecution evidence, the court placed both accused on their defence.

C. DEFENCE CASE

20. The 1st Accused (DW 1) opted to give sworn evidence and confirmed that he resided within Landless estate and knew the deceased. On the material day he had woken up and went to work until about 7.00pm, when he came back, and while buying cigarettes at the local shopping center met his wife, the 2nd accused person and they took a boda boda ride to their residence. On the following morning, he was informed of a murder incident within their vicinity, but he did not bother to find out what had occurred and proceeded to his work station.
21. Later, after a few months he was arrested over the murder, but denied committing the said offence. He was categorical that he did not know the deceased, did not know where he resided and that they were not friends, thus had no grudge or motive to harm him. He had therefore been wrongly charged and urged the court to acquit him of the charge faced. Under cross examination he denied threatening the deceased nor was it within his knowledge that the deceased was having an affair with his wife.
22. DW2 Naomi Mukiri Peter, also gave sworn evidence and stated that she knew the deceased as her client, who would engage her services to wash his cloths/house and would be paid for the service rendered. In relation to what PW2 had stated, she was categorical that on the material evening she was not a guest of the deceased and further denied having an affair with the deceased at any point in time. On the material night she was at home with her husband, and it was

inconceivable that she would leave her house to visit the deceased and return back to her house on the same night. Due to the nature of their engagement, she was also aware that the deceased had several girlfriends, that she had met at his house and thus could not join the mix, having known his escapades.

23. She reiterated, that she did not meet the deceased on 06.06.2021 and certainly was not involved in his unfortunate demise. Under cross examination DW2, confirmed that at the time of the incident, she was no longer working for the deceased and reiterated that at no point did they have an affair as alleged.

D. DETERMINATION

24. 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 persons herein murdered **DAVID OYETU KAMAU**, the deceased herein.

25. **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.”

26. 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".

27. 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.***

28. I will now proceed to interrogate each issue.

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

29. It is common ground that **DAVID OYETU KAMAU** died on the night of 06.06.2021 into the morning of the following day having sustained sixteen (16) stab wounds all over the body, but especially to his Chest, shoulder and neck. This was confirmed by all prosecution witnesses, who viewed the body at the scene of crime. **PW8 Dr John Mathaiya** also produced the post mortem report dated 10.06 .2021, wherein he confirmed that the deceased died as a result of multiple stab wounds caused by sharp object -leading to severe hemorrhage

30. Death and its cause were thus proved.

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

31. From the evidence adduced, it is clear that none of the witnesses saw any of any of the accused stab the deceased, but it was alleged that the deceased was engaged in an illicit love affair with the 2nd accused person, who was in a come with stay relationship with the 1st accused. PW2 confirmed this allegation and stated that prior to the murder incident, the 2nd accused, in his presences had warned the deceased to keep off his wife. PW4 also supported this assertion and stated that earlier on the material day, the deceased and 1st accused had disagreed and exchanged harsh words while playing pool.
32. PW6 also confirmed that the deceased and the 2nd accused shared a girlfriend (the 2nd accused person), a fact known to both of them and on several occasions the 1st accused person had warning the deceased against hitting on his girlfriend, but he would retort that it was the 2nd accused person, who would come to his house and that he was not the one chasing after her. PW9, the investigating officer picked up on this que and stated that after the murder incident, the accused persons had immediately moved out of their known residence, which was a sign of guilt and had to be traced before they were arrested.
33. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established a certain threshold to be met if a conviction is to be based

thereon. In Sawe -vs- Rep [2003] KLR 364 the Court of Appeal held.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

34. In Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on

circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

35. Finally, In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990 (UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,***
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***

(iii) (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

36. Though the evidence presented did prove that there was a love triangle involving the deceased and both accused persons, which had created animosity between the deceased and the 1st accused, PW4 was clear in his evidence that on the material night they did go to, "Spicy club", where they met both accused persons enjoying their evening. That stayed at the club until about 9.00pm, when the deceased excused himself, stating that he had a visitor, which PW4 assumed was a lady. He did not see the accused again, until his lifeless body was discovered the following evening.

37. This evidence contradicts that of PW9, who stated that on the material night, the deceased, 2nd accused and one person known as Steve were seen drinking together, at a local club near the deceased home. Unfortunately, despite the strong suspicion, the prosecution evidence has evidential gaps. The recovered knife was not dusted for finger prints, the accused movements were not established from "spicy pub" where PW2 saw them, and the guest the deceased was to receive and/or Steve were not traced to

record their statements clarifying the final movement and interactions of the deceased.

38. In this case, there is strong suspicion that the 1st accused must have had a hand in the deceased demise, since he held a grudge over the deceased illicit affair with his wife (the 2nd accused person) however as was held by the Court of Appeal in **Sawe -vs- Rep [2003] KLR 364**:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

39. In **Mary Wanjiku Gichira s. Republic, Criminal Appeal No 17 of 1998**, the same court held that:

“suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused’s freedom and at times life.”

D. DISPOSITION

40. In the circumstances herein, I do find and hold that circumstantial evidenced adduced, cannot sustain and/or support the charge herein, and it has not been proved beyond reasonable doubt that it is the accused persons herein who caused fatal injuries upon the deceased.

41. The accused persons are therefore discharged and set free, unless otherwise lawfully held.

42. It is so Ordered.

Judgment, signed at KIAMBU this 21st day of APRIL, 2026.

FRANCIS RAYOLA OLEL
JUDGE

Judgment read and delivered in open court on this 21st day of APRIL 2026.

In the presence of:-

.....**Accused**

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

.....**Court Assistant**