



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mwago (Criminal Case 13 of 2019)
[2025] KEHC 7198 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL CASE 13 OF 2019
GL NZIOKA, J
FEBRUARY 26, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMUEL KARIUKI MWAGO ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge are that on the night of 21st and 22nd March 2019 at Mirera in Naivasha Sub-County within Nakuru County, jointly with others not before court murdered Stephen Ndegwa.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution's case is that on the night of 22nd March 2019, between 12.00 and 12:30 am, (PW1) Paul Munene Nyaga, his wife (PW3) Edith Waruguru and their son (PW4) Martin Ndungu Munene were asleep when they were woken up by a barking dog. That they heard someone shouting "Martin, Martin" and a loud bang on the gate.
3. That (PW1) Munene and (PW3) Edith went to find out what was happening and found Stephen Ndegwa (herein "the deceased) outside the broken gate. That the deceased informed them that there were people who were chasing him and wanted to kill him.
4. PW1 Munene and PW3 Edith, testified that with the assistance of moonlight and lights from a building near their compound, they saw two people outside their gate whom they identified as; uncle Ben also known as Irungu, and Simon wa Mama Ann, also known as Samuel, the accused herein.
5. That PW1 Munene asked the accused and uncle Ben what they wanted at his home and they said they had escorted the deceased to their compound as he told them that he was sleeping there. That PW1 Munene told them that the deceased was not sleeping there and neither was he in his compound.



6. That both uncle Ben and the accused seemed agitated, more particularly uncle Ben, who was demanding that the deceased be come out of (PW1) Munene's compound. However, after about an hour of argument the accused and uncle Ben left heading towards the Railway.
7. That after about 20 to 25 minutes, uncle Ben returned insulting the PW1 Munene and his family members and demanding that the deceased be brought to him. However, (PW1) Munene and his son (PW4) Martin, who also came out to attend to the noise, managed to chase uncle Ben away from their compound. He was escorted about 100 metres away and as (PW1) Munene and the son (PW4) Martin returned to their house, they met the accused coming from the Railway line direction and inquired from him what he wanted. That the accused stated he had been sent by Mama uncle Ben/Mama Irungu to take back uncle Ben so he could stop making noise.
8. It is the prosecution's case that, the deceased's naked body was discovered on the morning of 22nd March 2019 in a shallow ditch near the Railway line. That (PW2) David Kimani Mwaura and (PW5) John Macharia Mwaura, deceased's brother and identified the deceased's body, which was taken away by police officers to the mortuary and investigations commenced.
9. That on the same day, PW9 No. 75858 Corporal James Kimwtich, the Investigating Officer in the company of PC Tufoss and PW7 No. 235224 Chief Inspector Simon Kamore, visited the deceased's house and found that the door had been broken down and there was bloodstains on the ground. That they recovered a torn and blood stained T-shirt. According to these officers, a fight had ensued and the deceased killed in his home before his body was dumped at the Railway line.
10. Be that as it may, the post mortem was conducted on 2nd April 2019, by (PW8) Dr. Titus Ngulungu who noted that the deceased had multiple bruises on the head, limbs and back, linear bruises on the anterior aspect of the neck, bruises on the mouth and nose in line with smothering, and that the head was swollen.
11. Further, the lungs had collapsed due to intensive pressure thereon. He concluded that the cause of death was asphyxia with multiple soft tissue injuries in keeping with smothering and trothing mode of homicide.
12. Similarly, (PW6) Susan Ngugi attached to the Government Chemist testified that she received blood sample in a vacutainer marked "A" belonging to the deceased, blood sample in a vacutainer marked "B" belonging to the accused and a blue T-shirt in a khaki bag marked "C". That she was requested to analyse the same and ascertain the presence and origin of any biological evidential materials and she examined them accordingly. That she found that, the T-shirt was moderately stained with blood of human origin.
13. That she conducted a DNA test on the T-shirt and found DNA profile generated matched the DNA profile from the blood sample marked "A" belonging to the deceased with a probability of random match of 1 in 8.58x10¹⁸.
14. At the conclusion of the prosecution case, the court ruled the accused had a case to answer and placed him on his defence. He testified vide a sworn defence and stated that on 21st March 2019, he left his place of work and went to Mirera to assist his mother who was selling soup and hooves. That at around 6:45pm, he went to collect a cup from one Njeri after delivering soup to her. That he met uncle Ben who requested they take alcohol but he declined. That at about 9:00pm, the deceased in the company of Baba Ndegwa and Githumbi went to the club and ordered for soup which he delivered to them and at 10:00pm the deceased, Baba Ndegwa and Githumbi left together. That Githumbi returned back to the club and called uncle Ben and they went out.



15. That he then left the club at 11:00pm and while on the way he heard uncle Ben screaming and rushed to the scene where he found (PW1) Munene and his son (PW4) beating uncle Ben and noted (PW1) Munene's gate was broken. That, he asked uncle Ben to leave but uncle Ben refused stating that (PW1) Munene and his family had taken Ndegwa. That uncle Ben eventually left.
16. That he asked (PW1) Munene to release the deceased but PW1 refused and said that the deceased will stay at his place and he left. That he learnt of the deceased's death the next day and was arrested at his house. That he has never seen uncle Ben again.
17. At the conclusion of the formal hearing of the case, the prosecution chose to rely on the evidence adduced, while the defence filed submissions dated, 25th July 2024, wherein it is submitted that there was no direct evidence linking the accused to the murder of the deceased. That, the only reason the accused was arrested and charged was because he was seen on the night of the offence and he seemed to know uncle Ben.
18. That the rule of thumb is that before the court convicts on circumstantial evidence, that evidence must be so compelling as to lead only to the inference of guilt. The accused cited the case of *Musili Tulo vs Republic* [2014] eKLR where the Court of Appeal discussed the threshold to be met before the court can rely on circumstantial evidence.
19. That the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; it should be of definite tendency unerringly pointing to the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all probability the accused committed the crime and that in order to ascertain whether or not the inculpatory facts put forth by the prosecution are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.
20. The defence submitted that it was possible that the deceased was attacked by PW1, PW3 and PW4 after he disturbed their peace. That, there was evidence that the deceased entered their compound but there was no explanation on when and how he came out, and whether he was alive or not.
21. Furthermore, it was possible that the deceased was attacked by uncle Ben who disappeared yet the police never informed the court what steps they took to trace the uncle Ben. That, in light of the above, the circumstances are not compelling enough to lead to the accused, as the one who committed the offence.
22. The defence further submitted that, the prosecution has failed to establish any mens rea as why the accused would want to kill the deceased. The case of, *Republic vs Micheal Muriuki Muniyiri* [2014] eKLR was relied on where the court quoted section 206 of the *Penal Code* which stipulates circumstances when malice aforethought is deemed to exist.
23. That the prosecution is required to show that at the time of the offence the accused was motivated by malice aforethought. However, the prosecution has not discharged its burden having failed to establish an intention to cause the death or serious injure the deceased. Further that such injury led to the death of the deceased. The defence urged the court to acquit the accused.
24. At the conclusion of the case, I note that offence of murder that the accused is charged with is provided for under section 203 of the *Penal Code* as follows: -

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



25. Pursuant thereto, the ingredients of that offence have been 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.
26. In the instant case, the occurrence of the death of the deceased was confirmed by his brothers (PW2) David Kimani Mwaura and (PW5) John Macharia Mwaura at the scene where the deceased's body was found and more so when the body was removed from the ditch by CID officers.
27. PW5 Macharia, also testified that he was able to identify the deceased as his toes which were normally bent. In addition, PW8 Dr, Ngulungu confirmed that he conducted a post mortem on the body of the deceased therefore occurrence of death is not in dispute.
28. On the cause of death, the post-mortem report by Dr. Ngulungu reveals that, the deceased had bruises on the mouth and nose in keeping with smothering, the lungs were collapsed, the neck had bruising and haemorrhage, and the brain showed features of raised ICP. The doctor concluded that the cause of death was asphyxia with multiple soft tissue injuries in keeping with smothering throttling mode of homicide. PW2 Mwaura also testified that the deceased face was full of blood, while PW5 Macharia stated that noted that the deceased's head was swollen. Thus, the cause of death is well established.
29. The key question is whether the accused murdered the deceased. From the evidence of (PW1), (PW3) and (PW4), it is stated that the deceased rushed into their compound, saying that there were people who wanted to kill him and ran through their compound. That the following morning his body was discovered in a ditch near the Railway line.
30. It suffices to note that no one saw the accused kill the deceased as such there is no direct evidence as to who murdered the deceased. Consequently, the prosecution case is based purely on circumstantial evidence.
31. The law on circumstantial evidence is settled. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the Court of Appeal stated as follows: -

“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.” (emphasis mine)
32. The parameters for admission of circumstantial evidence were well settled in Rex vs. Kipkerring Arap Koske & 2 others [1949] EACA 135 as follows;

“In order to justify a conviction 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 hypothesis than that of his guilt and the burden of



proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

See also *Sawe versus Republic* [2003] KLR 354, *Musili versus Republic* CRA No.30 of 2013 (UR) and *Abanga Alias Onyango versus Republic* CRA. No. 32 of 1990 (UR)).

33. In summation, based on the afore case law, it is settled that, before any conviction is based on circumstantial evidence, that evidence must be adequate to prove the case beyond reasonable doubt.
34. In that regard, the court will admit circumstantial evidence if it meets the following criteria: -
 - a. The evidence is logically connected to the case.
 - b. The evidence must prove or disapprove a fact relevant to the case.
 - c. The evidence should be reliable, trustworthy with minimal chance of falsehood.
 - d. Its potential to influence a decision should not outweigh the probative value.
 - e. The evidence should not be hearsay
35. To revert back to this matter, PW1, PW3 and PW4 testified on the night of 22nd March 2019 at around midnight when the deceased went into their compound shouting that there were people who wanted to kill him, they saw the accused and one uncle Ben outside their gate. It is the evidence of; PW1 and PW3 that they were able to identify the accused and uncle Ben with the aid of moonlight and light from a neighbouring building.
36. Further, they were able to recognize the accused as they come from the same village and have known him since he was a child. Furthermore, PW1 stated that they were working together in the same village. Finally, the accused admitted in his evidence in chief that indeed he was at (PW1’s) residence on the night the deceased was murdered.
37. In his own words the accused stated as follows: -

“I left the club at 11:00pm. While on the road I heard screams. I realized the scream was of uncle Ben. I went to the scene. I found Paul Munene and his family were there. His son had a whip. They were beating uncle Ben. I did not see Ndegwa. I realized the gate of Paul Munene was broken down.”
38. Based on the foregoing, there is no doubt that the accused was at the residence of (PW1) on the night of the offence. However, the question that arises is; on that night what was the accused doing at the home of (PW1) Mr Munene. The evidence of PW1, PW3 and PW4, is that the accused was with uncle Ben chasing the deceased with intent to hurt him (as stated by the deceased), but the accused states that he had gone to request uncle Ben to leave PW1’s compound.
39. Pursuant to the afore, there is need to interrogate the whole evidence further. In that regard it suffices to note that, there is no evidence that there was bad blood between the (PW1), (PW3) (PW4) and the accused. That issue did not arise in cross-examination of the prosecution witnesses or accused’s evidence in chief. Therefore, there is no reason why (PW1), (PW3) and (PW4) would lie against, frame or implicate the accused in the offence.
40. Further, it is also noteworthy that the accused testified that there is a possibility that the deceased was killed by (PW1) Munene and his family as he entered his compound and never left. However, that



allegation is countered by the evidence of (PW9) the Investigating officer, that the deceased was not murdered at the railway line where his body was discovered but was killed at his house.

41. The Investigation officer thus testified that when he visited the deceased's house, he found bloodstains, a torn and bloody t-shirt, and that the door to the house was broken. Consequently, that evidence exonerates (PW1) Munene and his family members from the murder of the deceased.
42. Further evidence by the prosecution witnesses (PW1) (PW3) and (PW4) is that uncle Ben who was extremely agitated demanding that the deceased be released to him. This is fact is also supported by the accused's own evidence that uncle Ben refused to leave PW1's compound without the deceased. Furthermore, the evidence of (PW1), (PW3) and (PW4) is that the second time they saw they accused, he was coming from the direction of the Railway line, where the body of the deceased was found in a ditch near the railway line. The question is, what had he gone to do there other than dump the body?
43. In light of the evidence before the court, there is no other conclusion apart from the fact that the accused had a hand in the death of the deceased.
44. The last question to consider is whether the accused had malice aforethought. The provisions of section 206 of the [Penal Code](#) gives the circumstances when malice aforethought is deemed to exist and states 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.”

45. 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.”

46. 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).
47. In the instant case, it is in evidence that the deceased told (PW1), (PW3) and (PW4) that there were people who wanted to kill him. Indeed, the next morning the deceased was found murdered and his body thrown in a ditch. Furthermore, the court notes that the deceased had ran away from his assailants, however, his assailants did not give up but proceeded to the deceased home and killed him. The fact that deceased stated that people wanted to kill him and he was found murdered the following morning clearly proves malice aforethought.
48. Similarly, Dr. Ngulungu concluded that the cause of deceased’s death was asphyxia with multiple soft tissue injuries in keeping with smothering and throttling and from the detailed injuries sustained, the deceased was choked or strangled till he could not breath, an indication of intent to kill.
49. Consequently, it is the finding of this court that the circumstances of this case clearly supports the element of malice aforethought.
50. In conclusion all the evidence and/or circumstances of this case prove beyond reasonable doubt that the accused was involved in the offence herein. Therefore, I find the accused guilty as charged and accordingly convicted him.
51. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF FEBRUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Chepkonga for the State

Mr P. K. Njuguna for the accused

Accused present physically

Mr. Komen: court assistant

