



REPUBLIC OF KENYA



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**Republic v Ndathe (Criminal Case E016 of 2021)  
[2025] KEHC 7435 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE E016 OF 2021  
HI ONG'UDI, J  
MAY 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ELIJAH CHEGE NDATHE ..... ACCUSED**

**JUDGMENT**

1. Elijah Chege Ndathe hereinafter referred to as the accused is charged with the offence of Murder contrary to section 203 as read with section 204 of the penal code. The particulars being that the accused on the night of 21<sup>st</sup> and 22<sup>nd</sup> day of December, 2020 at Kawago Farm Njoro sublocation, Njoro subcounty within Nakuru county, murdered Beatrice Muthoni.
2. He denied the charge and the matter proceeded to full hearing with the prosecution calling seven (7) witnesses. In his defence he gave a sworn statement of defence without calling any witness.
3. Jane Wamaitha Ndathe the mother of the accused testified as PW1. It was her evidence that on 20<sup>th</sup> December, 2020 the accused and his wife (the deceased) came to her at around 6 (not indicated whether it was am or pm). They left their two children with her. They did not show up until the next day at 7.00pm and they were drunk. She heard them fighting and called a neighbor Njoroge (PW2), who came. The accused closed the gate and told them to go away.
4. The fight between the accused and deceased did not stop so she called neighbours but they refused to come. She went back to PW2 to inquire what the accused had told him. As they spoke the accused arrived with a panga. They wrestled the panga from him and it was given to PW2's son who gave it to her and she threw it away behind the house. The accused fought with PW2 who later left for his house. She waited until 11.00pm when it was all quiet before going to sleep.
5. The next morning at 7.00am she saw a message on her phone saying "Mangaliwe auwa Watoto". She went to the accused's house and found the iron sheet removed, and she called neighbours who came.



- The house was burnt. Police were called and they came, and they found the deceased's burnt body. While still at the scene the accused called her and told her he was at Elburgon and she should take care of the children. The accused's house had electricity.
6. In cross examination he said he lived with the accused's family on the same compound. She denied there being issues with the land left behind by the accused's father. She did not know who burnt the house but she confirmed that the accused assaulted the deceased.
  7. PW2 – Joseph Njoroge Munyiva testified that on 21<sup>st</sup> December 2020 at 7.50 pm he arrived home at Njoro when he found PW1 waiting for him. She told him the accused was beating the deceased. Upon being persuaded he went to their gate and called the accused who came demanding to know what he wanted. He accused PW2 of having an affair with the deceased and chased him away. PW1 came again to his place.
  8. Soon thereafter the accused arrived at PW2's home while armed with a panga threatening him for having an affair with his wife. Later PW2 heard the accused quarrelling with his son (Samuel). He went and snatched the panga from him. He took him upto their gate and warned him. The gate was closed, and he went back to his home which is 200 meters away.
  9. The next morning, he called PW1 but there was no response. He went to Nyumba Kumi who referred him to the police and they went to Kisima AP Camp with another witness. This witness is the one who told him about the burnt house.
  10. In cross examination he said he had never witnessed the accused conduct himself in the manner he did. He said when he left the accused at their gate he did not know if the deceased was in the house.
  11. PW3 – Nahashon Mbugua Njuguna an uncle to the accused stated that on 22<sup>nd</sup> December, 2020 at 7.00am he was called by PW1 who told him that the accused had burnt the house and disappeared. PW3 went to the scene and found the house burnt to the ground. There was some smell emanating from therein. He got his cousin Njoroge and they went to the AP Camp and thereafter to the Njoro police station where they made a report and returned to the scene. They were able to see a totally burnt body.
  12. In cross examination he said the accused had issues with the mother PW1. PW4 Dr George Biketi conducted the post mortem on the deceased's body. He found the cause of death to be 100% burns to the body. Those who identified the body were Nahasion Mbugua and John Ng'ang'a. Samples of the body parts were taken, for examination.
  13. PW5 – John Ng'ang'a Kiere stated that the accused is his nephew. On 22<sup>nd</sup> December, 2020 he was home in Kiambu when his brother Peter Waweru came to his home. He informed him of accused's presence after killing his wife. Peter Waweru reported the matter at Kagwe patrol base. The accused who appeared confused was brought to sleep at his place. He slept in the same room with his son. Police came for him that night. He later saw the body at Egerton and it was in a very bad state.
  14. In cross examination he said the accused is his brother's son. He confirmed that the accused did not relate well with his parents. When brought to his house the accused was drunk.
  15. PW6 – No.92589 Detective CPI Joseph Njogu the investigating officer stated that on 22<sup>nd</sup> December, 2020 while at Njoro DCI's office they were informed by DCIO of a murder case. Officers including Sergeant Andrew Samoe visited the scene. The accused was spotted in Lari through his phone and he was arrested and booked at Lari police station O.B No. 39/22/12/2020. He was taken to Njoro police station the next morning. The court granted them 14 days to finalize on investigations.



16. Meanwhile the body was taken to Egerton University mortuary. He witnessed the post mortem being conducted and several samples were taken for DNA analysis. Thereafter he recovered a bloodstained grey shirt (EXB 2) which the accused was wearing. He also had a bag in which he carried a white shirt (EXB 3), and he wore blue jeans trousers (EXB 4) which were sent to the government chemist together with the samples from the morgue for analysis vide the Exhibit Memo (EXB 5a). He said soil samples from the scene were also sent to the government chemist. Samples were also taken from the deceased's two daughters (Zipporah and Ruth) for DNA analysis.
17. On 4<sup>th</sup> January, 2021 vide O.B No. 5/4/1/2021 he was informed by the OCS Njoro police station that the accused had escaped from lawful custody. He was traced and re-arrested in Bahati Kagoto on 6<sup>th</sup> January, 2021 vide O.B No. 2/6/1/2021. He was charged and convicted of unlawful escape from custody. He was also charged with murder.
18. In cross examination he said he only interrogated PW1. He did not record her statement. He learnt that accused and deceased used to drink.
19. PW7 – Ruth Wangare Kahiu a government analyst based at the government chemist Nairobi stated that on 22<sup>nd</sup> January, 2021 the office received exhibits from PW6. The exhibits were EXB 2 – 4 plus blood samples for Zipporah and Ruth.

Findings were:

The shirt (EXB 2) and trousers EXB 4 had moderate human blood stains. The shirt (EXB 3) was slightly stained with human blood. These were examined with the human blood samples. There are 99.9% chances that the blood stains on EXB 2, 3 & 4 are from the biological mother of Zipporah and Ruth. She produced the report as EXB 5 b.

20. In his sworn defence the accused denied the charge and said the deceased was his wife. That on 21<sup>st</sup> December, 2020 11am him and the deceased woke up to do Christmas shopping in Nakuru town. After shopping they took a motor vehicle to go back to Njoro at around noon. The deceased had a quarrel with the conductor and they were ordered out of the vehicle. However, the vehicle left with part of their luggage which upset them.
21. They decided to go to a bar where they took glass after glass of alcohol. They later took a motorbike which dropped them down in an accident. They decided to walk home arriving at around 7.00pm. At the gate they found PW1 and PW2 and they greeted them. PW2 asked them why they had not gone for milk. PW2 insisted he goes with the deceased to get the milk but the deceased was not for the idea. They went to their house and on reaching there he took a jerrican and went to PW2's for the milk. He found PW2 at the gate and he wanted to know why he had not sent the deceased to get the milk. He started beating him together with his son. Being so drunk he left without the milk.
22. Reaching home, he inquired from his wife if she had any relationship with the deceased and she said NO. He packed his bag and left for Kiambu to his uncle Peter Waweru's home. He denied fighting with his wife. That he even left with her permission. This was around 9.30pm. He did not find his uncle at home. He was advised to go to Peter Ng'ang'a's as his uncle was there. He was arrested by the police when he reached. Ng'ang'a rebuked him saying he had killed his wife and was coming to hide at their place.
23. He denied sending PW1 any message. He denied being home when his house got burnt. He said his house was made of timber and iron sheets on the roof. It was his evidence that him and the mother (PW1) did not relate well because of a parcel of land left by his father. He denied the charge leveled against him.



### **Prosecution's submissions**

24. The prosecution filed two sets of submissions. The first are dated 29<sup>th</sup> October, 2024 at the case to answer stage and they were filed by M/s Okok principal prosecution counsel. In this set she set out the prosecution witnesses' evidence and submitted that the accused had been placed at the scene by the evidence of PW1. Further that from her evidence the accused was the last person to be seen with the deceased while alive, and they were the only people in the matrimonial home.
25. On whether the accused had malice aforethought she answered in the affirmative arguing that the accused assaulted the deceased and set the house on fire ensuring that the deceased was burnt beyond recognition.
26. In her further submissions dated 23<sup>rd</sup> April, 2025 counsel referred to the accused's defence which she said was shaky and an afterthought not sufficient enough to rebut the prosecution case. Further that there was no proper reason advanced as to why he left their matrimonial home from Kiambu at 9.30pm, yet there was no emergency. To her the accused was simply running away. She urged the court to find the charge of murder proved against the accused.

### **Accused person's submissions**

27. The same were filed by Felix Ochieng Orege advocate, and are dated 25<sup>th</sup> April, 2025. Counsel submitted that there was no direct evidence connecting the accused to the murder of his wife. That the evidence is speculative and open to multiple interpretations. On the fire that burnt the house he submitted that there was a possibility of the fire and death of the deceased having been caused by a third party or the gas cylinder that the accused stated they had in the house or by electricity which was in the house.
28. Referring to PW4's report of the cause of death being 100% degree burns, he argued that there was no way of telling whether the body had sharp or blunt injuries. He further submitted that it was not possible to tell whether the body was burnt prior to or after the death. That the investigating officer did not know whether the door was locked from inside or outside.
29. Counsel also raised issue with the message PW1 allegedly received on phone from the accused as the same was never produced as evidence. He referred to the allegation of there being bad blood between PW1 and accused which could have triggered this. This he said was displaced by accused's defence that he was not at the scene on the morning of the fire and he never sent PW1 any message.
30. Counsel submitted that the accused explained his whereabouts at the time of the deceased's death and burning of the house. That the blood stains on his clothes were as a result of the motorbike accident that occurred when him and wife were from drinking after the day's frustrations. He stated this in reference to the government chemist's report. He thus explained that the prosecution failed to establish any motive to kill on the part of the accused. Counsel called for the accused's acquittal.

### **Analysis and determination**

31. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the penal code. Murder is defined in section 203 as:

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

While section 204 provides:



“Any person convicted of murder shall be sentenced to death”.

32. It therefore follows that for a charge of murder to be proved the following ingredients must be established namely:
  - i. The death of the deceased and its cause.
  - ii. That the accused committed the unlawful act which caused the death (actus reus)
  - iii. That the accused had malice aforethought, ill intention (mens rea) in committing the offence.
33. From the evidence adduced by PW1, PW3 & PW5 the deceased’s burnt body was found in the house where the accused and deceased lived as husband and wife. They saw the body that was completely burnt. A post-mortem was conducted by PW4 Dr. George Biketi, who found the cause of death to be 100% burns to the body. The respiratory examination showed both lungs to have collapsed. PW6 vide the investigations confirmed that the deceased had been burnt to death. The fact and cause of death have been proved. The critical issue here is who killed the deceased?
34. It is clear from the evidence adduced that there was no eye witness to what happened to the deceased. The prosecution relied on circumstantial evidence to establish its case. It is trite law that before an act of law can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt see *Sawe v Republic* [2023] KLR 364; *Teper v Republic* [1952] ALL ER 480; *Musoke v Republic* [1958] EA 715.
35. Bearing the above guidance in mind I now wish to examine the evidence on record to see if it is such circumstantial evidence that would form the basis of a conviction.
36. Though the accused in his defence talks only about the happenings of 21<sup>st</sup> December, 2020, PW1 talks of those starting from 20<sup>th</sup> December, 2020 to the night of 21<sup>st</sup> – 22<sup>nd</sup> December, 2020. PW1 who is the accused’s mother stated that on the evening of 20<sup>th</sup> December, 2020 the accused and deceased came to her house and left her with their two children. They did not return that day but came back the next day (21/12/2020) at 7.00pm and they were both drunk. She lived with the couple on the same compound.
37. The element of both accused and deceased being drunk on 21<sup>st</sup> December, 2020 evening was also confirmed by the accused himself in his defence. He said they took quite some alcohol to cover their frustration caused by a matatu conductor. PW1 testified that on the night of 21<sup>st</sup> December, 2020 when the couple returned she heard the deceased being beaten and she alerted a neighbor (PW2) who came. After PW2’s intervention, and his departure the accused followed him to his house while armed with a panga. He accused PW2 of having a love affair with the deceased. In the process PW2’s son was attacked by the accused whom they chased away up to his home gate and they (PW1 and accused) closed the said gate.
38. In his defence the accused alluded to his going for milk from PW2’s home where he was allegedly confronted by PW2 and his son who beat him for the sole reason that the deceased did not go for the milk. He also confessed to having been so drunk and so left.
39. PW1 further said she did not leave the area of residence until the accused and deceased were silent which was around 11pm. She then went to sleep, after that.



40. The accused in his defence said he was not a favourite of the mother (PW1) because of some land left behind by his father. In cross examination of PW1 this is what she stated at page 10 of the typed proceedings:

“When he gets drunk he becomes bad, otherwise he is okay. We have not differed over the land left behind by his father. He owns the land.

I have other children. They have no issue with the land. Their father had said that the land shall be shared into two”.

41. The defence’s intention was to have PW1 treated as untruthful and malicious due to a land issue between her and the accused. From his passing statement and cross examination of PW1. I do not find anything to show that PW1 hated the accused so much that she could fabricate such a heinous accusation against him.

42. Counsel for the defence submitted that the deceased may have committed suicide or there could have been some problem with the electricity in the house. What would have led the deceased to committing suicide? No reason has been given by the accused. In fact, accused in his defence said the deceased released him so well. As for the electricity short fall the defence would have asked for a report from Kenya Power & Lighting if there was anything of the sort. No such report was sought, for nor filed.

43. The main issue here was the suspicion by the accused that the deceased was having an affair with PW2. In his drunken state and in anger he went to PW2’s house while armed with a panga. Even before going to PW2’s house he had confronted him at their gate and told him how his wife was a prostitute who would go to PW2’s house and stay there for over two (2) hours pretending to be collecting milk.

44. In that anger after leaving PW2’s house he confronted the deceased and he alone knows what he did. He was an angry and bitter man. PW1 left the vicinity at 11pm so the accused can not lie that he left the house at 9.30pm for Kiambu. Where was he going and what was the emergency to make him leave his house at 9.30pm while very drunk? What would have propelled him to go searching for his children’s birth certificates and sorting out a land issue in the night as claimed by him in his defence.

45. Additionally, the accused’s shirt (EXB 2) and trousers (EXB 4) which he wore had moderate human blood stains while another shirt (EXB 3) found in a bag carried by the accused was slightly stained with human blood. Upon examination by the government analyst (PW7) it was found that the blood on EXB 2, 3 & 4 were 99.9% from the deceased.

46. Putting all this evidence together I find that the accused’s conduct based on suspicion of his wife’s infidelity led him to do what led to the deceased’s death.

47. The next ingredient is whether the prosecution proved the element of malice aforethought against the accused. What then is Malice aforethought? Section 206 of the Penal code defines it 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;

48. Malice aforethought can be determined by several means for example evidence, type of weapon used, gravity of the multiple injuries inflicted on the deceased, the part of the body injured, conduct of the assailant before during and after incident. Considering the nature of the burns suffered by the deceased at 99.9%, both her lungs had collapsed, brain was burned, and body being burnt beyond recognition the only conclusion I come to is that the murder was intentional.

49. The upshot is that the charge of murder against the accused has been proved beyond reasonable doubt. For my part I find the accused guilty and convict him under section 322(1) [Criminal Procedure Code](#).

50. Orders accordingly

**DELIVERED, DATED AND SIGNED THIS 28<sup>TH</sup> DAY OF MAY, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

