



**Republic v Nganga (Criminal Case 2 of 2019)  
[2024] KEHC 4415 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4415 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL CASE 2 OF 2019  
RM MWONGO, J  
APRIL 30, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**KELVIN NYAMAU NGANGA ..... ACCUSED**

**JUDGMENT**

1. The accused person was charged with murder contrary to Section 203 as read with 204 of the [Penal Code](#). The particulars of the offence are that on the 16<sup>th</sup> of January, 2019 at Kirogo village, Tabere location within Kirinyaga County, unlawfully murdered Purity Wawira.
2. The evidence adduced through prosecution's seven witnesses was as follows.
3. PW-1 Paul Mbugua Waweru testified that he was at the Bar popularly called Village Joint on 16<sup>th</sup> January 2019 when PW-3 (Joseph Maina Mwaniki) PW-6 (Karanja Ndirangu) and the accused (Kelvin Nyamau Nganga) joined him. He recalled that the accused was taking a drink worth Kshs 90/- with a cigarette of Kshs 10/-.
4. When the deceased demanded the bill, the accused resisted stating that he had no cash but that his phone had money that he could transfer to the deceased when ordered to do so, he started walking out instead. The deceased decided to follow him outside and that is when he heard PW- 3 (Joseph Maina Mwaniki) screaming for help. He testified that he witnessed the deceased lying on the ground facing up and unconscious. That indeed it is PW-3 who called one Emma Wawira Kungu the owner of the said Pub to the scene.
5. PW 2- Dennis Mbugua Nderi testified that on the 16<sup>th</sup> January, 2019 at 10 pm he had seen the accused at Village Point Pub before he went outside. The accused, Maina and Nyawira left the Pub together and Wawira told Maina to help her ask for money from Nyamau. He was told by Maina that it was Nyamau who had beaten Wawira. Later, he run away.



6. PW-3 Joseph Maina Mwaniki testified that he was at the Village Joint Pub on the 16<sup>th</sup> January, 2019 at about 22:45 hrs where he was joined by PW-5 Paul Mbugua, PW-6 Karanja Ndirangu and the accused Kelvin Nyamau.
7. He said that while at the bar, the accused was taking a popular drink known as Keg that cost about Kshs 30/- a cup, and this time he also had ordered cigarettes stick that costs Kshs 10/- in total he had a bill of 40/-. He stated that the barmaid, deceased Purity Wawira requested the accused to settle the bill but he walked outside instead.
8. As the accused left the bar, the barmaid followed him. PW3 was near the door. He stated that the accused stopped the deceased with his leg. She fell down and became unconscious. He called the bar owner who came to the scene. In a short while the deceased was put in a vehicle by the owner of the bar and taken to the hospital.
9. PW-4 Dr. Francis Ndirangu Karomo testified that he was a pathologist. He performed the Post Mortem on the body of Purity Nyawira. He formed the opinion that the cause of death was massive internal bleeding following an assault with a blunt object. No external injuries were seen, but the digestive system had massive bleeding in the stomach. There was bleeding under the scalp and mild brain swelling on the right. He produced the Post Mortem Report as PExb 1.
10. PW-5 Emma Wairimu Kungu testified that on 16<sup>th</sup> January, 2019, she was in her bed resting at about 22:30 hrs when she heard the deceased Purity Wawira shouting to a customer. She was demanding for payment of his bill because time for selling beer was almost up. She heard the deceased call the customer by name saying; "Nyamau please pay me my bill, time for selling beer is over". Suddenly she heard some movement of footsteps of someone running.
11. She said that shortly after that PW-3 Joseph Maina Mwaniki knocked on her door and informed her that the accused had assaulted the deceased and escaped. It was her evidence that she tried administering first aid to the deceased before taking her to Kimbimbi Sub-County Hospital where she was pronounced dead on arrival. Thereafter, she made arrangements for the body of the deceased Purity Wawira to be taken to Kibugi Funeral Home.
12. PW-6 Karanja Ndiragu corroborated the evidence of PW-1 Paul Mbugua Waweru and PW-3 Joseph Maina Mwaniki. He stated that on the 16<sup>th</sup> January, 2019 they were both at the Village Joint Pub from 2100 hrs to 2200 hrs when the deceased requested the accused to settle his bills. Instead, he started walking out of the Pub.
13. He witnessed the deceased following the accused for the payment but suddenly he heard screams from outside to the effect that the accused was killing the deceased. This prompted him to go outside where he saw the deceased lying down unconscious. He stated that he could not tell exactly what transpired since he was inside the Club. He said that it took the intervention of PW-5 Emma Wairimu Kungu, the owner of the Pub to take the deceased to Hospital assisted by other members of the public.
14. PW7 CPL Paul Mwambere Jumwa the investigating officer testified that he visited the scene of crime. On arrival he received information that the deceased had been kicked by the accused on the abdomen and she became unconscious. The deceased had been to Kimbimbi Sub- County Hospital.  
At the hospital, he found that the deceased had succumbed. He arrested the accused the next day and attended the post-mortem on 22/1/2019.



## **Defence Case**

15. The Accused person gave sworn evidence and did not call any witness. He said that on the morning of 16.1.2019 he went to his work as usual and at around 8pm in the evening he went to Village Joint Club bar and ordered a drink. He paid for the drink and at around 10pm when he was leaving the club, the bar maid Wawira demanded that he should pay for the drink a second time. It was then that the accused person realized that Wawira was furious given that she was drunk, and he decided to leave the club to avoid a fight as she was bigger than he was.
16. He stated that immediately he left, Wawira who was drunk followed him; that she fell as there was a plastic chair that blocked her way, and that he went home and slept as he never suspected there was anything wrong. He said that his home was about 2 kilometres away from the Club.
17. The following morning, 3 people went to his home at 9 am and they introduced themselves as police officers from Wang'uru Police Station. They told him to take them where he had been with Wawira and he took them to the Club. They took photographs and later he was taken to Wang'uru Police Station and charged with the offence of murder. He denied being involved in Wawira's murder.
18. He said the reason as to why he left the Club was because Wawira was strong than him and he was afraid that a fight would ensue as Wawira looked angry and furious and she threatened to fight him. The accused said the victim was running to go and close the door to block him from leaving the Club and that is when she fell down head facing downwards.
19. The parties filed written closing submissions.
20. The prosecution submitted that the accused was the perpetrator who had occasioned the timely demise of the deceased Ms. Purity Wawira on the 16th January 2019. According to the prosecution the accused had the intention to cause the death of the deceased Ms. Purity Wawira or do grievous harm when he kicked her on the abdomen after she demanded that he settles his bills.
21. Further, the prosecution submitted that the accused knew that the kick would probably cause the death of the deceased or do grievous harm to her as PW-3 Joseph Maina Mwaniki indeed testified that he quickly escaped from the scene immediately after he assaulted the deceased.

## **Proof that the accused had Malice aforethought**

22. The kick used in assaulting the deceased, the force used to inflict the injury and the timing that the accused occasioned the injury points the fury, anger and knowledge that the accused wanted to maximize the opportunity to eliminate the deceased at whatever cost.
23. From the evidence on record, the deceased died of (Massive internal bleeding) an indication that impact on her abdomen was severe and forceful. The accused had already prepared not to pay his bills as the deceased approached him for payments, he was already up and started exiting the bar. The prosecution submits that the accused was properly identified and placed at the scene of the crime.

## **Accused Submissions**

24. The accused submitted that from the evidence adduced, 6 of the prosecution witnesses adduced hearsay evidence. They reported what they heard; all of them say it is PW3 Joseph Maina who told them that it is the accused who kicked the deceased. PW3 was clearly the only eye witness, and he said he was near the door while the other witnesses say that Maina (PW3) followed Wawira (deceased) and Nyamau (the accused) outside the club. This evidence according to the accused, this is contradicting



evidence, as it is not clear whether Maina (PW3) was standing at the door of the club or he was outside the compound where the incident occurred.

25. The accused also highlighted contradictory evidence of PW1 who at one time said he was outside the club, and of another time during examination-in-chief said he was drunk and remained in the bar. PW1 said he heard screams about 2 minutes after Wawira and Nyamau chased each other. PW2 said he heard the scream after 20 minutes. While the other prosecution witnesses said the deceased Wawira was chasing Nyamau to pay his bills for the beer/keg he took, Pw2 said he did not hear Wawira asking for money from Nyamau. PW2 further said that Maina (PW3) and Wawira went to sit outside since there was a place where people sit outside; PW2 never mentioned that the two were chasing Nyamau.
26. The accused submit that the evidence by the prosecution witnesses is full of inconsistencies and contradictions. Therefore, clear under what circumstances the deceased person died and who was the perpetrator.

### **Analysis**

27. Having considered the testimonies of the seven (7) prosecution witnesses and the defence testimony the question is whether the evidence tendered is sufficient to convict the accused for the offence of murder, with which he is charged.
28. Section 203 of the *Penal Code* defines the offence of murder. The following elements of murder require to be proved beyond any reasonable doubt; to establish the offence of murder: proof of death, the cause of death, proof that the death was due to unlawful actor or omission, that the unlawful act or omission was occasioned by the suspect and that the unlawful killing was done with malice aforethought

### **The death of the deceased occurred**

29. It is not in dispute that the death of the deceased occurred. The post-mortem report PExb. 1 produced by PW4 confirms the death. The cause of death was massive internal bleeding following as assault with a blunt object.

That the accused committed the unlawful act which caused the death of the deceased

30. The key eye witness in the case was PW-3 Joseph Maina Mwaniki. PW3 testified that the deceased requested the accused to pay a bill of Kshs 40 for alcohol. The accused refused. The accused left the bar, and the barmaid followed him. PW3 was near the door and saw the event play out. According to PW3, the accused stopped the deceased with his leg. She accidentally fell down and became unconscious. It was not very clear what PW3 meant when PW3 said the accused stopped the deceased with his leg. It is not clear he kicked the deceased or whether he tripped her. In any event she fell and became unconscious.
31. PW7 - CPL Paul Mwambere Jumwa. He testified that he had gathered information that the deceased had been kicked by the accused on the abdomen and she became unconscious. She was taken to the hospital where she died.
32. The accused person on the other hand stated that the deceased fell down since there were chairs and a table which entangled her and she fell. According to the accused the impact of the fall might have caused the internal massive bleeding. The defence submitted that the prosecution had failed to prove beyond any reasonable doubt that the deceased died out of unlawful act or omission of the accused. The accused concluded that the prosecution case is based on circumstantial evidence.
33. In the case of *Abamad Abolfathi Mohamed and Another v Republic* [2018] eKLR, the court of appeal said the following 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.

34. PW3 testified that the accused stopped the victim with his leg leading her to trip and fall down. PW4 testified that the cause of death was massive internal bleeding following as assault with a blunt object. There is no witness who saw the accused assaulting the deceased with any object. The clearest evidence of contact between the accused and deceased was that the accused either tripped the deceased who then fell to her death, or that the accused kicked the accused who then fell to her death.
35. I find that the deceased died as a result of being tripped pr being kicked and falling to the ground leading to injuries that resulted in her death.

### **Did the accused have malice aforethought?**

36. Section 206 of the [Penal Code](#) defines malice aforethought as follows:

Malice afterthought 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 or grievous harm to some person, whether that person is the person 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.
37. The testimony of PW3 indicates that the accused in tripping or kicking the deceased leading to her falling and dying had malice aforethought. The evidence was clear that PW3 had refused to pay for the alcohol and proceeded to run away from the Pub when he interacted with the deceased near or at the door of the Pub, as the deceased confronted him for payment.
  38. In [Roba Galma Wario v Republic](#) [2015] eKLR the court held that;  

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
  39. The prosecution submitted that the kick used in assaulting the deceased, the force used to inflict the injury and the timing that the accused occasioned the injury points the fury, anger and knowledge that the accused wanted to maximize the opportunity to eliminate the deceased at whatever cost.
  40. The accused submit that the evidence by the prosecution witnesses is full of inconsistencies and contradictions. Therefore, unclear under what circumstances the deceased person died and who was the perpetrator.



41. The accused submits that it is not clear how the deceased met her death. None of the prosecution witnesses has adduced evidence as to whether the accused person herein might have intended to cause the deceased grievous harm or death.
42. The accused person submits that under this limb, the prosecution failed to prove malice aforethought on the part of the accused person beyond reasonable doubt.

### **Conclusions and Disposition**

1. Ultimately, I find and hold that the prosecution has not proved beyond reasonable doubt that the accused murdered the deceased. However, the evidence shows that there was contact between the accused leg and the deceased leading to the injuries either from a kick or from falling by tripping resulted in the death of the deceased.
2. There is no evidence to show that the accused had any malice aforethought or intent to kill the deceased when he used his leg against the deceased. There is no doubt that he was intent on escaping from the Pub in a bid to pay the bills, and or being confronted by the deceased he either kicked or tripped her resulting in her fatal injuries.
3. The accused is therefore guilty of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*; I accordingly convict him with the offence of manslaughter.
4. A mitigation date shall be fixed by consent.
5. Orders accordingly.

**DATED AT KERUGOYA THIS 30<sup>TH</sup> DAY OF APRIL, 2024**

---

R. MWONGO

JUDGE

Delivered in the presence of:

Waweru the Accused in Person

Kelvin Nyamau Nganga Accused in person

Mamba for State

Murage, Court Assistant

