Case Number:	Criminal Case 7 of 2012
Date Delivered:	25 Feb 2022
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Jairus Ngaah
Citation:	Republic v Daniel Maina Kanyenje & 2 others [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	3rd accused convicted
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL CASE NO.7 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS-

DANIEL MAINA KANYENJE.....1ST ACCUSED

MARTIN GAITA KARIUKI.....2ND ACCUSED

LAWRENCE GITONGA WAWIRA.....3RD ACCUSED

JUDGMENT

The accused in this case were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63. According to the information, on the nights of 23 and 24 January 2012 at Githiru area in Nyeri County within the Central Province, jointly with others not before court, they murdered Teophila Nyokabi Nduthu.

Upon their examination by the psychiatrist, Dr. James Mwenda, (PW10) the accused were found to be mentally fit to take plea and stand trial. They pleaded not guilty to the charge.

To establish its case against the accused, the prosecution called 10 witnesses. The first to testify was **Anne Njeri Muturi (PW1)** whose evidence was that **she** hailed from Gatitu in Nyeri County and that on 22 January 2012 the deceased had sought her assistance to harvest the deceased's crop of beans. She went to the deceased's home the following day at 8.A.M. The deceased's gate was, however, closed and she was unable to access the home. She waited at the gate for quite a while hoping that the deceased will open it but the deceased did not show up. When she sought to track the deceased on her phone a male voice answered and told her to leave a message.

Muturi then enquired from **David Mwangi (PW4),** the deceased's neighbor, whether he had seen the deceased; he told her that he had not.

Anxious of the deceased's whereabouts, she called the deceased's daughter, Mary Nyaguthi (PW2), at about 11. A.M. to inform her that she was trying to reach the deceased but in vain. Four days later, she learnt that the deceased had been murdered.

The second prosecution witness to testify was **Anne Wanjiru Nduthu (PW2)** who testified that she was the deceased's daughter. **S**he lived and worked in Nairobi at the material time. It was her evidence that on 24 January 2012, her elder sister (PW3) called her and told her that their mother was missing. The two called their relatives enquiring whether their mother could be in their homes and when they failed to get any positive response they travelled to Nyeri on 26 January 2012 together with their brother, John Waweru who also lived and worked in Nairobi. They reached their home to find a crowd of people in the compound. Their house was in a state of disorder and some of their property was missing.

On the same date of 26 January 2012, the police brought the accused to their home in Nyeri and asked Nduthu whether she knew or could identify any of the accused. She answered in the negative.

Later they were also asked to identify certain items at the police station which the police had recovered. Amongst those items Nduthu was able to identify a wheel barrow, car batteries, two phones, a camera and a watch.

She also identified a DVD, a Panasonic disc player and an electric iron box. Other items were a thermos flask, a sufuria, a blow dryer, extension cables, a fork, radio cassettes, a safaricom bag with assorted items and a *ciondo* bag.

She identified these items as belonging to the deceased. Some of them had special and unique features. For instance, the wheelbarrow had initials P.E.N marked on its sides. This initials denoted the name of the deceased's husband, Peter Ephantus Nduthu, but who was also deceased.

She testified further that the original colour of the wheelbarrow was light blue. The other item with the initials P.E.N marked on it was a car battery.

A *sufuria* and cassettes had initials "M.B & R" denoting "Mwago Bar and Restaurant" which is a business enterprise that her parents used to run. She identified the fork because the handle had a crack, the extension cable had an ink mark and the spade was broken at the tip.

The witness together with her sister and brother were summoned at the Nyeri Central Police station again on 27 January 2012. Together with the police they went back to their home. While at their home, the 3rd accused pointed to the spot where the deceased's body was eventually exhumed from. She was able to identify the body as that of her mother; she again identified it later at the mortuary for post-mortem purposes.

Mary Nyaguthi (PW3) another of the deceased's daughters confirmed that on 24 January 2012 she received a call from Muturi (PW1) on 24 January 2012. She was then living in Nairobi where she also worked. Muturi informed her that the gate to their home was locked although she had agreed with the deceased that they were to meet on the material day. Nyaguthi asked Muturi to keep checking and although she did, the deceased had not shown up by 3 P.M. on 24 January 2012. It is then that she called her sister (PW2) and their brother (PW5) and, together they travelled to Nyeri.

David Mwangi Muriuki (PW4) testified that he was the deceased's neighbor and that he had been with the deceased at her home on 23 January 2012 to recharge his torch. He left the deceased's house at 9:45 P.M. He went back to the deceased's home on 24 January 2012 to deliver a calendar which the deceased had asked for. However, he found the gate was closed.

John Waweru Nduthi (PW5) testified that the deceased was his mother and like his sister (PW4), he testified that the police asked them to identify some items at the police station. He also testified that the 3rd accused led the police where the deceased's body was recovered.

Bonface Kioko Kithika (PW6) testified that he knew the 3rd accused and that he first met him in Nyeri in September, 2011 when the 3rd accused was looking for a rental house. The 3rd accused told him that he hailed from Embu and that he was a stranger in Nyeri. He assisted the accused secure rental premises but he did not stay there for long. Later in 2012, he met the 3rd accused when he was pushing a wheelbarrow emblazoned with the initials P.E.N. The 3rd accused asked him to repaint the wheelbarrow for him. He also asked him to write the 3rd accused's name on the wheelbarrow. He repainted the wheelbarrow but the initials P.E.N could still be seen despite applying two coats of paint. Kithika was able to identify the wheelbarrow in court as the same wheelbarrow that the 3rd accused had given him to repaint.

Dr. Obiero Okoth (PW7) performed the autopsy on the deceased's body on 2 February 2012. He observed the deceased to be a female African of 74 years old. He described her physique as 'large' and nutrition 'obese'. At the time of autopsy, there were putrefaction changes. Externally, there was laceration of 5 by 6 centimeters on the frontal scalp. There was also a stab wound measuring 2 by 1 centimeters associated with skull fracture accompanied by 2 by 1 centimeters skull defect on the left parietal region. He opined that the deceased died as a result of head injury secondary to a sharp trauma. He signed a certificate of death on 2 February 2012.

Sergeant Stephen Chesire (PW8), the investigation officer, testified that on 24 January 2012 he received a report of a missing person. At that time, he was attached to Nyeri central police station. He visited the area where the missing person was said to have hailed together with police constable Makoko. They were directed to the deceased's home by one Mundia, whom he described as the deceased's relative. He established in the course of his investigations that the missing person was one Teophilla Nyokabi Nduthu, the deceased. They broke into the deceased's house but they could not find her there.

An informer told the police that ‘a small boy’ had been seen pushing a wheelbarrow loaded with some items. He was heading towards Gatitu area. The informer told the police that he could identify the boy if he saw him. While at Blue Valley in Nyeri in Majengo area, the police met a boy pushing an empty wheelbarrow. The informer recognized the ‘boy’ as the one whom he had seen earlier pushing the same wheelbarrow loaded with items. The ‘boy’ who was arrested as a suspect turned out to be the 3rd accused. He was arrested on 24 January 2012. After his arrest, the 3rd accused led the police to his residence in Majengo area on 28 January 2012. The police recovered from his house several assorted items which the police believed to have been stolen from the deceased’s house. These items were presented in court as exhibits.

The 3rd accused led the police to two other suspects who turned out to be the 1st and 2nd accused both of whom lived at Gaita area in Nyeri County.

The 3rd accused told the police that he, together with the 1st and 2nd accused, murdered the deceased. He then led the police to the place he had buried the body of the deceased. The deceased’s body was recovered from a rubbish pit. It was taken to Nyeri Provincial General Hospital for post-mortem.

With the help of an informer, the police were able to recover one Nokia 1200 phone which belonged to the deceased. The informer led the police to the premises belonging to one George (PW9). George told the police that the phone had been sold to one Beatrice but that he had bought the phone from the 2nd accused. The police managed to trace Beatrice and found her in possession of the phone. She was arrested together with George. However, the police opted to treat the two as witnesses.

The investigation officer testified that other than what the 3rd accused told them, they did not find anything else linking the 1st accused to the death of the deceased. Similarly, nothing was recovered from the 2nd accused that linked him to the deceased’s murder. **George Kibunja Nyawira (PW9)** testified that he ran an electronics shop in Gatitu area in 2012. He had an assistant called James Ndegwa. Sometimes in 2012, James Ndegwa received a phone in his shop. The phone was brought by the 2nd accused. It was a Nokia 1200. James bought the phone at Kshs. 650. He later sold the phone to Beatrice.

When they were put on their defence, the three accused opted to give sworn statements.

The 1st accused denied murdering the deceased. He denied knowing any of the other accused persons. When he was arrested on 29 January 2012, the police confiscated his phone but did not take away anything else from his house. The 3rd accused was brought to the same cell in which he had been confined. He knew the 3rd accused because the latter used to drink from his bar.

It was his evidence that they were taken to the deceased’s home but only the 3rd accused went to the deceased’s compound with the police. He testified further that when he was arrested, he was under the impression that he was being arrested for selling alcohol without a licence. He knew the deceased since the deceased was his former school teacher and they shared the same neighbourhood.

On his part, the 2nd accused denied having murdered the deceased. He could not, however, recall what he was doing on 22 January 2012 and 24 January 2012. He testified that he was arrested on 29 January 2012 because of a phone he picked at Skuta on 21 January 2012. He sold it to a person who worked with Kibunja (PW9) at Kshs. 650/=. He, however, denied knowing that the phone was stolen.

The 3rd accused testified that he hailed from Embu and that he arrived in Nyeri on 27 February 2011. The deceased had previously been to his home in Embu where she had come to buy bananas. She was also looking for a domestic worker. The 3rd accused offered to work for her. The deceased employed him. On the day the deceased died he was away because the deceased had given him a day off. He had left on 21 January 2012 to travel to his home in Embu and only came back on 25 January 2012. It was his evidence that he dropped his phone at Skuta on 21 January 2012. When he went back to Skuta to look for it a woman told him that she knew the person who had picked the phone. He was arrested near Nyeri General Hospital as he prepared to go back to his employer.

Although he initially said that he had dropped his phone at Skuta he changed his testimony to say that he had been robbed of the phone and a woman at Skuta had witnessed the robbery.

He testified further that he lived in the same compound as the deceased. As a matter of fact, his house was an extension of the deceased’s house.

On the issue of the wheelbarrow, he testified that he took a wheelbarrow to a friend for repair. It was his evidence that he did not like its colour and therefore he wanted it repainted. He changed its colour to blue. He admitted that he paid somebody to buy the paint and repaint it. He also testified that he allowed the police access his house. They carted away everything from the house. He also confirmed all the items exhibited in court were removed from his house. It was his testimony that he related well with the deceased. He was familiar with the two other accused.

The 3rd accused's testimony concluded the evidence that was presented before court.

The accused, as noted, have been charged under Sections **203 of the Penal Code** as read with 204 of the same Code. These two provision of the law read as follows:

Section 203. Murder

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

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

Section 204 has since been declared to be unconstitutional because, first, its application renders mitigation upon conviction futile; secondly, it purports to deprive the trial court of its discretion to mete out what would be an appropriate sentence depending on the circumstances of each particular case; and, finally it is discriminatory in nature. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR).**

Following the decision in **Francis Karioko Muruatetu** case Section 203 remains the pertinent provision in murder charges.

According to this section, this offence of murder is established when, first, death of a person is proved; secondly, it must also be proved that the death was as a result of an act or omission of another person; thirdly, there has to be proof that the act or omission was unlawful; and, finally, it must be proved that the person who did the unlawful act or omitted to act had malice aforethought.

The deceased's body was positively identified as that of Teophila Nyokabi Nduthu The pathologist's evidence on the injuries the deceased sustained which injuries, in his respectful opinion, led to the deceased's death would suggest that the death was occasioned by an act of some other person. It was never suggested and no evidence was led to support any conclusion that the death may have been justified; in other words, the death was caused by what was an unlawful act by another person. So, the certification of death of Teophila Nyokabi Nduthu coupled with the evidence on the cause of her death is enough evidence from which can be discerned that the first three elements of the offence of murder. That is to say, the following facts have been proved to the satisfaction of the court and most crucially, to the required standard of proof: the death of a person; the fact that it was caused by an act of another person and that the act of causing the death was unlawful.

The outstanding question is whether the accused are the people behind the deceased's death and if they did whether they had malice afore thought.

There is no direct evidence linking the accused or any of them to the deceased's death in the sense that none of the witnesses testified having seen the accused murder the deceased. All that the state presented in the prosecution of its case was indirect or circumstantial evidence.

Even then, the investigation officer testified that apart from what the 3rd accused told him, he did not find anything that linked the 1st and 2nd accused persons to the deceased's death. This part of the prosecution evidence should be sufficient to remove the two accused persons from culpability. This leaves the 3rd accused as the only person in focus when assessing both the prosecution and defence evidence.

The connection between the 3rd accused and the deceased's death is on two fronts; first, he was the deceased's employee and taking

him at his own word, he lived with her in the same compound in a house that was an extension of the deceased's house. But being the deceased's employee and living in the same compound with the deceased would not, *ipso facto*, lead to the conclusion that the 3rd accused must have murdered the deceased. Nonetheless, it is evidence worth considering in the context of the whole gamut of circumstantial evidence.

The second front upon which the 3rd accused is linked to the deceased's death is that he was found in possession of certain property that had been stolen from the deceased's house.

The deceased's daughter was able to identify positively stolen items belonging to the deceased. She was able to identify these items because they bore unique marks or initials of name of the deceased's late husband and the business name of a bar and restaurant that they both used to operate. The accused did not deny having been in possession of these items. In his own words this is what he said:

"I gave the police officers my keys and they removed everything from where I used to sleep…The exhibits that were removed from the room where I used to sleep are the ones which have been produced here as exhibits."

Earlier in his evidence on the 3rd accused's possession of the items, the investigation officer testified as follows:

"On interrogation, the suspect led us to his residence in Majengo area on 28.1.12. we searched his house and recovered several assorted items in his residence which we believed to be from the deceased's house and are before this honorable court".

As far as the wheelbarrow is concerned the 3rd accused stated as follows:

"I was not arrested with the wheelbarrow. I bought a wheelbarrow and took it to the fundi for repair. I did not like its colour so I changed its colour. The original colour was black. I changed it to blue. I gave somebody money to buy the pain and paint it.

Kithika (PW6) who testified that he knew the accused as early as the year 2011 when he assited him secure a residence in Nyeri told the court that in 2012 the accused brought him a wheelbarrow to repaint. He noticed that the wheelbarrow had the initials P.E.N on it but that the accused wanted them replaced with his own name.

The wheelbarrow in question was before court and it was clear to the court that although there was an attempt to repaint it, the initials P.E.N were still visible. It is reasonable to conclude from the facts established before court that the attempt to repaint the wheelbarrow was not necessarily because the accused did not like its colour, as he suggested in his evidence, but the objective in repainting it was to erase any marks linking the wheelbarrow to the deceased or her husband.

In these circumstances the 3rd accused would be culpable of the murder of the deceased under the doctrine of recent possession considering that he was found in possession of the deceased's property soon after her murder.

This doctrine of recent possession has been explained in the case of **Chaama Hassan Hasa versus Republic (1976) KLR** at page 10 where the High Court (Trevelyan and Hancox JJ) explained it as follows:

"Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining)."

And on the question of conviction based on the doctrine of recent possession, the court noted as follows:

"Whether the accused should or should not be convicted, depends not simply on his possession, but on all the facts since such possession is but one aspect of the circumstantial evidence the sum total of which must be unexplainable upon any reasonable hypothesis other than that of guilt of the person charged, before a conviction can be recorded."

Thus, possession in the context of this doctrine of recent possession is but only an aspect of circumstantial evidence the totality of

which the court must examine before coming to the conclusion whether or not it is sufficient to sustain a conviction.

Speaking of circumstantial evidence, it is trite that a court can convict on circumstantial evidence and it has been hailed as the best evidence. In **Tumuheire versus Uganda (1967) E.A** at pages 328 and 331 circumstantial evidence was held to be the best evidence; the court held that:

"It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case."

As much as it may be a basis for a conviction the court cautioned that:

"As was said by Lord Normand in Teper versus R (1952) A.C. at page 489:

'Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another…It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Thus a trial court must be cautious that the evidence is inconsistent with the accused's innocence or, put differently, it is consistent with the accused's guilt.

But the rule always is, in order to justify an inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected to the fact sought to be inferred. By way of analysis, the evidence has to satisfy the following criteria:

(a) the circumstances from which the conclusion is drawn should be fully established;

(b) all the facts should be consistent with the hypothesis;

(c) the circumstances should be of a conclusive nature and tendency;

(d) the circumstances should exclude every hypothesis but one proposed to be proved. (See **Sarkar on Evidence, 12th Edition, Page 34).**

The basis upon which this sort evidence is accepted as proof of the fact sought to be proved has been explained in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135 and Simon Musoke versus Republic (1958) EA 715**. In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence (6th Edition, page 311)**, held as follows:

"In order to justify 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. 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 on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

In **Simon Musoke versus Republic**, the same court cited with approval the passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** quoted in **Tumuheire versus Uganda** (supra).

In my assessment of the prosecution evidence, I am satisfied that the inculpatory facts are not only incompatible with the innocence of the 3rd accused but also that those facts are incapable of explanation upon any other reasonable hypothesis than that of the 3rd

accused's guilt.

The circumstances from which the state has urged this court to draw the inference of guilt have, in my humble view, been fully established; are consistent with the hypothesis which the prosecution has proffered and are also conclusive excluding every other hypothesis except the one which was sought to be proved.

The final question is whether the accused had malice aforethought. Malice is the mental element of the offence of murder and it may be express or implied. **(See Woolmington v DPP [1935] AC 462).** It is express when it is proved that there was an intention to kill unlawfully **(see Beckford v R [1988] AC 130)**, but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm **(see DPP v Smith [1961] AC 290).**

It is apparent that intent is a common element in both forms of malice aforethought.

Section 206 of the **Penal Code** prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

206. Malice aforethought

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.

When I consider the pathologist's evidence on the nature and extent of the injuries that the deceased sustained and, when I take into account the fact that it is out of these injuries that the death of the deceased resulted, I can safely conclude that in perpetrating the injuries, the 3rd accused had an intention to cause the death of or to do grievous harm to the deceased, who eventually died.

It is also easy to conclude that the 3rd accused had knowledge that his act or acts that resulted in the death of the deceased were likely to cause death or some grievous harm to the deceased. As it turned out, the worst of the two scenarios happened.

I am persuaded that malice aforethought has been established.

In the ultimate, I am satisfied that the state has proved its case against the 3rd accused beyond all reasonable doubt and he is convicted accordingly.

For the reasons I have given, the 1st and 2nd accused are acquitted of the charge of murder. They are set at liberty unless they are lawfully held.

SIGNED, DATED AND DELIVERED VIA VIDEOLINK ON 25TH FEBRUARY 2022

Ngaah Jairus

JUDGE