



**Republic v Kanai (Criminal Case 16 of 2017)  
[2024] KEHC 9624 (KLR) (Crim) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9624 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 16 OF 2017  
LN MUTENDE, J  
JULY 31, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAMARIS KANYIWA KANAI ..... ACCUSED**

**JUDGMENT**

1. Damaris Kanyiwa Kanai, the accused, is charged with murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the night of 30<sup>th</sup> March 2017 at around 7pm at Huruma Ngei II in Starehe Sub-county within Nairobi County she murdered John Kikati.
2. The facts of the case are that the accused lived in a rented house at a plot in Huruma. On the fateful day the deceased was found fatally injured at her door step causing the tenants to raise an alarm. The Caretaker called the accused who was known as the woman friend but she disconnected the cellphone. Subsequently she was traced and taken to the Police Station. Investigations were carried out which culminated into the accused being charged.
3. To prove the case the State called 10 witnesses. PW1 Patrick Mbuvi Kaseki was the deceased father. Upon learning of his son’s demise he went to the police station where he encountered the accused. He also identified the deceased body and witnessed the postmortem.
4. PW2 No. 89109 Police Constable Paul Kamende from Huruma police station accompanied the deceased father and his son during the postmortem on 4/4/2017.
5. PW3 Peter Kimani Gichuhi the landlord was a Kibichoi bar which was about 400meters from the plot when he was called by a tenant at about 6:45pm. He proceeded to the plot and found the deceased at the door of room No. 21, he was bleeding from the abdomen and tenants were standing at the balcony.



- Since he did not know the deceased he called the owner of the said room No. 21, the accused herein, who was also at the balcony. PW3 took the accused to the police station where she was remanded in custody.
6. PW4, Urbanus Muthini Kingi the caretaker at PW3's plot went to the plot after learning of the incident and found the deceased bleeding next to the door of room No.21 and that at that time the deceased was already dead. He called the accused to inquire what was happening who told him to wait, but later disconnected her phone. He testified that the accused had been living with deceased for 9 months and that there were days when he would hear noise from the room.
  7. PW5 Joseph Kasamba Mbuvi identified the body of the deceased to the Doctor who conducted, the post mortem.
  8. PW6 No. 234286 Chief Inspector, David Wambua, the Investigating Officer testified to have received the accused and the landlord and the accused alleged that she disagreed with the deceased and ran out of the room where after the deceased stabbed himself.
  9. On visiting the scene, they found the deceased body lying behind the door with two visible stab wounds on the abdomen, his intestines were protruding and there were blood stains scattered all over the room. The house was disarranged, there was a broken stool and the TV set had its broken parts on the floor. The bed was also unmade. The murder weapon, a knife, was found on top of the cupboard.
  10. The investigating officer testified that the knife implied that a fight had ensued and that the accused's allegation of the deceased stabbed himself and took a cloth to stop his bleeding was not convincing. That the deceased could not stab himself, take a cloth to prevent bleeding and then place the knife back.
  11. PW7 Dr Dorothy Njeru carried out the postmortem, found the deceased having sustained injuries, four stab wounds on the left side of the abdomen. There was severe blood loss, the blood from the vessels to the intestines had been cut through and there was multiple wounds on the small intestines. He concluded that the cause of death was abdominal injuries due to penetrative trauma or stabs.
  12. PW8 Margret Wangu Maina from the government chemist received exhibits which comprised of a knife with a handle marked A, and blood samples from the deceased which were in a bottle marked B. Her findings were that the blood was from human origin and the DNA on the knife matched the deceased blood.
  13. PW9 No. 93324 Corporal Florence Ngendo of DCI Headquarters went to scene with other investigators on 30/3/2017. They found the deceased lying down near the door of the house, he lay on his back and had two stab wounds on the abdomen and protruding intestines were evident. She reiterated PW6's testimony in material particulars.
  14. PW10 No.85991 PC Daniel Kiema of digital forensic laboratory took photographs of the scene which he adduced in evidence.
  15. Upon being placed on her defence the accused denied having committed the offence. She stated that the deceased, her boyfriend visited her on 30/3/2017. He had told her that he would pass by and that he wanted Ksh 2000/=. He arrived at 5:00pm and found her at the balcony with her friend mama Bianco. She did not have the money the deceased had asked for. The deceased went to the balcony and asked her to go to the house which she did. He sat on the chair while she sat on the bed. She noted that the deceased was sweating and trembling and he asked her if she knew he smoked cannabis sativa an allegation that was not within her knowledge. He closed the door and the window, went back to where he was sitting and asked for the money.



16. Since she did not have money, she told him that she could try borrow from another lady. Then the deceased asked her to explain why men come to her house, allegations that she denied. The accused did not want to reveal the source of this information. She told him to relocate to her house to establish the truth which was that no other man had been to her house. The deceased continued to argue and started assaulting her, he pushed her on the bed and started strangling her but she pushed him off.
17. He took a stool intending to hit her but the stool hit the wall and broke. The deceased asked for a knife so that he could kill her and kill himself instead of leaving her to other men. He beat her up; she tried to reach the door to seek help but the deceased hit her hand at the wrist and continued beating her. He told her that he had given her one minute to give him a knife, but, she managed to push him and the deceased fell down. That she opened the door and fell outside, he pulled her legs from behind to prevent her from going outside, she screamed twice then ran to the balcony where she had been with the lady, but the lady had locked the door.
18. She called the lady, who came out and asked what was happening and upon explaining what transpired the lady declined to go unaccompanied.
19. In the meantime, the accused saw her brother from the balcony, at the stall buying vegetables and called him. That she was bleeding from the nose and her clothes were soaked in blood. She asked him to go assist in removing the deceased from the house They knocked the door and called him to open the door but the deceased cried out saying that: - “he had stabbed himself with a knife and that he needed to be taken to hospital”. Her brother kicked the door, the deceased was found lying next to the door. They took the deceased outside so that he could get fresh air.
20. That the accused entered the house while her brother went to get a motorbike to take the deceased to hospital. The accused asked the deceased where he had stabbed himself, he could not talk, she noticed that his intestines were protruding and she took a bed sheet and tied him on the lower abdomen.
21. The lady screamed and people gathered to assist her. Her brother came back and volunteered to help her take the deceased to hospital but a certain man said he was already dead. People advised her to run away so that she could not be arrested but she declined.
22. The landlord came and inquired what happened but she could not talk. She asked the landlord to take her to the police to report. She was placed in custody pending investigations.
23. She denied having committed the offence and added that she had known the deceased for 8 months and that she stayed with her 3 children and her brother.
24. On cross examination, it was established that the statement was silent on the allegation about the deceased having asked for a knife, and that prior to the deceased going to the house she was with her brother hence that should not have provoked the deceased.
25. DW2 Dorcas Damaris the accused daughter testified that she used to stay at Huruma with her mother and on the fateful date she had arrived from school at 5:30 pm. and went to study with her friend in company of her sisters Magret and Josephine and that they went back home at 7:30pm.
26. Upon reaching 3<sup>rd</sup> floor of the building they saw a person lying outside their house but they did not bother. They entered the house and found items scattered all over. She began to arrange them and they later borrowed a phone from a certain lady at 4<sup>th</sup> floor and talked to their mother who said she had gone to the Police Station. She advised them sleep at their friends place and that she would pick them the next day.



27. DW3 Edward Musee said to be the accused brother stated that he was 17 years old at the time of the incident and that he lived with his sister in Huruma. That on 30/3/2012 he had gone outside when the accused called him. This was about 6:00-7:00pm. The accused told him that John had caused chaos.
28. That the door was closed and he kicked it and found John (the deceased) lying on the floor and he told him that he had stabbed himself. The accused told him to get a motorcycle but the deceased had already succumbed to the injuries when he arrived.
29. At the close of the defence case it was submitted that the prosecution did not discharge the burden of proof and that the witnesses were not sure of what had transpired on the day of the offence .
30. That an eye witness was not called to testify, the blood samples were taken from the murder weapon but the prosecution failed to ascertain who the perpetrator was. Further, that the prosecution failed to establish the motive of the accused in stabbing the deceased.
31. It was also submitted that they tried to give the deceased first aid but he passed away. That they moved the body outside and reported the matter to the police. That the accused case was corroborated by DW3 Edward Musee Kanai who testified that the deceased told them while they were at the door that: “nimejidunga visu mbili na sifungui “.This prompted them to push the door.
32. I have considered evidence adduced, and,submissions on record. Section 203 of the Penal Code provides that:
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”
33. In Anthony Ndegwa Ngari v Republic (2014) eKLR the Court of Appeal held that :
- “For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction.
- They are:
- The death of the deceased and the cause of that death;
- that the accused committed the unlawful act which caused the death of the deceased and that the Accused had the malice aforethought”
- The issues for determination are twofold: -
- Whether death occurred.
- Whether the death was committed by an unlawful act and of malice aforethought.
- Whether the accused was the perpetrator.
34. Evidence adduced by the witnesses is that by the time the landlord was being called, the victim had succumbed. Subsequently the body was moved to the mortuary and a postmortem was conducted by PW7 Dr. Njeru. The cause of death was abdominal injuries due to penetrated sharp trauma or stabs. This was proof of death having occurred.



35. Article 26 (1) of *the Constitution* provides for the right to life which is a solemn and sacred and can only be deprived in circumstances authorized by law:

“Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law.”

36. This means that where an act is committed that violates the law then the ingredient of an unlawful act exists. Section 206 of the Penal Code defines malice aforethought as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;

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;

An intent to commit a felony;

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 prosecution must demonstrate the above ingredients in its evidence. Malice aforethought can also be determined from circumstantial evidence and the actions of the perpetrator can reveal the real intention and mindset before and at the time of the commission.

38. In *Lucy Mueni Mutava -Vs- Republic* (2019) eKLR the Court of Appeal held that:

“All in all, we, like the trial Court are satisfied that the Appellant’s actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined under section 206 of the Penal Code.”

39. In *Rex -Vs- Tubere S/O Ochen* 1945 12EACA 63 cited in *State -Vs- Paul Onyango Arira* [2020] eKLR the court held:

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident.”

40. In this case, the murder weapon was established to be a knife which was recovered at the scene and was placed on the cupboard. The deceased who was stabbed on the stomach suffered a painful death, the perpetrator intended to maim deform and/or kill him as per photographs of the bloody knife, his intestines protruding and the bloody scene described by witnesses.

41. As to whether the accused caused the death, it is denied that the act in question was committed by her. The argument raised by the defence is that it was committed by the deceased himself. The burden of proof in a criminal trial is described as beyond reasonable doubt as set in the case of *Miller -Vs- Minister of Pensions* [1947] 2 ALL ER 372 – 373 .



42. It is not in dispute that the deceased was at house No. 21. He lived in that particular house with the accused as confirmed by PW4, and even the accused herself. The investigating officers visited the house and established that firstly, there had been a fight which was not disputed by the accused. Secondly, the fight was between the two who lived in that house.
43. The photographs form sufficient evidence of how the knife was carefully placed on top of the cupboard, the deceased was also found lying behind the door so that when the door was opened he fell outside as depicted by the photographs.
44. Suicide or self-inflicted harm is discounted. The deceased could not have viciously stabbed himself so that his intestines were protruding and also have the strength to smear blood all over the place, have strength to return the knife and then take himself to the door where he was found and lock the door.
45. The evidence proves beyond reasonable doubt that in the course of their stay the accused and deceased had various disputes. The accused also told court that on that day the deceased had accused her of having an affair with other men, he was angry looked disturbed and also told her how he takes cannabis sativa. It is clear that a fight ensued and it turned fatal and that the deceased could not have stabbed himself.
46. Looking at the defence case, evidence adduced was contradictory and also incoherent. The police visited the scene with the accused who went to the Police following advice of her landlord. The door was locked and the body was lying inside. The house was not re-arranged as claimed by DW2 who claimed that she reorganized the utensils and the house generally.
47. The evidence adduced in this case being considered as a whole and in totality leads to the irresistible inference of guilt on the part of the accused. In *Joan Chebichii Sawe -Vs- Republic* [2003] eKLR the Court of Appeal listed out the key elements of circumstantial evidence. It held that:

“Before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence.”

48. It is apparent that evidence adduced by the prosecution was accurate such that it excluded the deceased as having committed the act that caused his death. Circumstances and the chain of events were incompatible with the innocence of the accused.
49. In the upshot, I find that the prosecution having proved beyond reasonable doubt that the accused is guilty of murder contrary to Section 203 of the Penal Code and I so find, therefore she is convicted for murder as charged.
50. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

**L. N. MUTENDE**

**JUDGE**

