



**Republic v DKN (Criminal Case 48 of 2017)
[2024] KEHC 11412 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL CASE 48 OF 2017
RB NGETICH, J
SEPTEMBER 27, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

DKN ACCUSED

JUDGMENT

1. The accused DKN has been charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that the accused on the 11th day of November,2017 at Turi Trading Centre in Molo Sub-County within Nakuru County murdered IK.
2. The accused denied the charge and the matter was set down for full trial where the prosecution summoned a total of 8 witnesses in support of the charge preferred against the accused.

Prosecution Evidence

3. PW1 SMM who is the deceased’s mother testified that on 11th November,2017, she left the market at 6 p.m and on reaching home, she met his son N and inquired from him the whereabouts of his brother IK and he informed her that he had seen him with other boys in Chandra Centre. Later, she was called by a neighbor who asked her to go to Molo Hospital as her son Mbugua was in serious condition. Shortly thereafter, she received report to go to Molo as there was a bad report. She said she called her husband JM(pw2) and gave her fare to go to molo as she was feeling weak; and at 3a.m, her husband arrived back crying and informed her that he found their son dead. She saw her son’s body when it was being removed from the mortuary for burial on 19th November,2017.
4. PW2 JMK who is the father to the deceased testified that in the evening of 11th November,2017, he was at home when he received a call informing him that his son had been stabbed with a knife. He went to Molo district Hospital where he found his son already dead. He said he saw a stab wound on the



- buttock and the gumboot he was wearing was full of blood. He reported at molo police station. He said 3 boys among the boys who had gone Njuguna's home where the incident occurred were with him.
5. PW 3 EK testified that on 10th November, 2017, he circumcised his two sons BKN who was aged 14 years and DMN aged 12 years at his home. He said that he requested his nephew DK the accused herein who was aged 16 years old at the time to take care of the two initiates. He further stated that on 11th November, 2017, at around 5 P.M, 11 young men who were school with his son went to his home. He said the boys were in two groups and one group went and returned to the structure which was measuring 10 by 10m. He said they asked for food and after about 10 minutes, his G who had invited went to inform him that he was chased from the house by the others because he was circumcised through church.
 6. He testified that shortly thereafter, he heard noises and upon asking the young men to come out, they went out and left; and at 11.30 P.M, police arrived and informed him that a boy in the group had died as a result of a fight in his house which he denied. He said that he was informed that his nephew DK the accused herein fought with the boys and stabbed the deceased with a knife.
 7. PW4 GKN testified he was 19 years old at the time of the incident testified that he was at home with his brothers BK and DM who had been circumcised. He said he had invited 4 of his friends who were his classmates to his home but 11 arrived to celebrate the right of passage of his younger brothers and his cousin DK who is the accused herein was also present.
 8. He said the boys who arrived at his home asked for food but it was not enough and one of them started telling him that he was circumcised in church. He said he went to inform his father that he had been chased but his father asked him to go back. He said his father went to the room and hit the iron sheet wall and the boys left. He said later police arrived and informed them that IK who was his classmate had died and the suspect was his cousin DK the accused herein as the young men were saying it was him who killed the deceased.
 9. PW5 Dr. Chebet from Molo Sub- County Hospital produced postmortem report on behalf of Dr. Ntenye Mbithi who conducted postmortem on the body of the deceased on 17th November, 2017 at Molo sub-county Hospital and found that the deceased died from severe hemorrhagic shock cuts and bleeding; that he bled from the cut vessels until he died. She produced the report as exhibit 1 in court.
 10. PW6 PNN now aged 23 years old testified that on the 11th November, 2017, he was studying in [Particulars Withheld] Secondary school and at 5p.m, they were invited by their friend GK (pw4) to attend circumcision party at his home and 11 of them who were classmates went to his home and upon reaching G's home, they took tea and when it started raining, they entered the structure where the circumcised young men were.
 11. He said they all entered the structure and when the rain stopped, they went for a stroll and then went back and asked for food. Shortly thereafter pw4 went and switched off the lights on and off then he saw accused standing on the bed holding a knife and while on the door, he asked those on the door to leave. He then heard a voice of K's father (PW3) hit the iron sheet wall of the structure with a whip telling them to get out and leave and the deceased IK was the last to leave. He said the was still inside and he saw accused stab the deceased. He said he heard him saying in Kikuyu that he had been stabbed and when he went out, he saw accused cleaning the knife with water flowing from iron sheets. He further stated that he saw the deceased being whipped by GK's father and the deceased left after being whipped.
 12. PW7 ZKK now aged 23 years old testified that on the 11th November, 2017, they had been invited by GK (Pw4) to initiation ceremony in his home and they were 11. He said on arrival, they were welcomed and given tea then they entered the structure where the initiates were staying. He said shortly after,



- G left with some of the boys at around 5p.m then they went back around 7p.m and asked for food but the accused told them those who wanted food should have gone earlier. Shortly after, he saw the accused stand on the bed with a knife with dark brown handle telling the boys to leave.
13. He further confirmed that pw4 switched the lights off and on then he heard Pw4's father hitting the iron sheet and when he went outside, he saw Pw4's mother holding the deceased while Pw4's father was whipping him(deceased). He said the deceased was released and he went. He later heard that accused had stabbed the deceased with a knife and Pw4's mother said "let them go and die there".
 14. He stated that the person who was holding/raising the knife was the accused but he did not see the accused stab a person but the knife was stained with blood. He said he saw accused raise the knife and release it to stab but he did not see the person he stabbed. He said that it was his first time to see the accused who appeared like he was the same age with them.
 15. PW8 number 85477 CPL Juma Omar testified that on 11th November, 2017, at around 9.30 p.m. while at Molo police station, he received a report of murder of one IKM a Form Four student from [Particulars Withheld] Secondary school and the report was made by 3 students who were deceased's friends accompanied by the deceased's father. He said that the boys reported that the deceased was stabbed on the buttocks by a person well known to them at Turi trading centre in a house of one of their friends where they had gone for a circumcision party.
 16. He further testified that together with 3 other fellow Police Officers, they proceeded to the scene in Turi trading centre and the boys directed them to a semi-permanent structure where they found three boys and 2 of them who were initiates positively identified the suspect to them. He said that they arrested him and carried out a thorough search within the house to see if they could recover the killer weapon but they did not find any. He said they were later joined by DCI officers and together they went to hospital where the deceased's body was lying. They found the body in one of the consultation rooms and upon inspection, they found a wound on the right side of the buttock of the deceased's body. They went back to molo police station where they booked the accused with the offence herein.
 17. Upon the closure of the prosecution case, by ruling delivered on the 6th day of February,2024, this court found that a prima facie case had been established against the accused person and he was placed on his defence in accordance with Section 306(2) of the criminal procedure code.

Defence's Case

18. The accused gave sworn statement in his defence and availed 3 witnesses in support of his case. He said he is now 23 years old approaching 24 and in 2017, he was a form 2 student at school [Particulars Withheld] Secondary school. He testified that on the 11th November,2017, he was in his Aunt AW's home in Molo Turi having gone there on 8th November,2017 from his home in Nyandarua Kipipiri on invitation by his uncle and aunt to take care of their sons who had been circumcised.
19. He stated that on 11th November,2017 at 5 p.m., he was with the two initiates and about 11 boys who had gone to the home with his cousin GK (PW4). He said they gave the boys tea and chapati and the boys left at around 6p.m leaving 4 of them being the two initiates, him and pw4 G; and at 6.30 p.m, other 11 boys went there. He said 7 of them were in the temporary structure while others were stood at the door and others outside.
20. He stated that at around 6.40 p.m., the boys who had left earlier returned and asked for food from his cousin pw4 but they were not given food and they started quarrelling with the boys they found. He said after about 5 minutes, he heard the iron sheets hit twice. He said that he heard his uncle N (Pw3) say 'TOKENI' meaning "leave" and all the boys left.; after which his uncle peeped and asked if the



- initiates were okay and he replied they were okay and he left. The accused then went to collect food for the initiates and at around 11 p.m, he heard a knock and upon opening, he saw his uncle and the police.
21. The accused stated that police entered the structure and searched saying they wanted a knife but they did not find anything in the room. Accused was arrested together with his uncle. Accused denied stabbing anyone and said he did not know any of the boys who went to his uncle's home and he did not quarrel with any of them. He said he had not seen the deceased IK and that he heard his name while in the cell. He denied having had a blood-stained knife and stated that the boys who arrived in the home did not know him as he was new in the area and was taking care of the initiates.
 22. DW2 AW testified DKN was her sister DW's son. She confirmed that in the year 2017, she called him to her home and by the time, he was a student at [Particulars Withheld] Secondary School in Form 2 and was aged 16 years old. She said she called the accused to take care of his sons who had gone through initiation and that accused arrived in her home on 8th November,2017 and that they had construction a structure for the initiates. She said on 11th November,2017, before 7p.m, the accused was with her son G(pw4) who was then a form 4 candidate. she said she learnt that boys arrived at her home from around 5/6p.m though she did not see them but she heard noises at around 7p.m while she was with her husband in the house.
 23. She said her husband went to check and when he returned, he informed her the boys had left. At around 11p.m she heard noises in the main gate. Her husband went to checked and confirmed they were police officers who had entered the plot where the boys were and thereafter, the police went with accused and her husband.
 24. She denied allegation that she held the deceased as her husband whipped him. She also said she did not go near the structure where the initiates were since she could not be allowed to go to where the initiates were. She denied saying, "wacha waende wakufie huko" meaning "let them go and die there". She stated that she did not enter the initiates room and could not know whether there were weapons and that she checked accused's bag when he arrived and there was no knife and she did not gave him any knife to use in the structure.
 25. DW3 BN testified that he knew the accused as his cousin. He said in the year 2017, he was 15 years old and at the time he was schooling at [Particulars Withheld] Preparatory Academy in class 8 and in the said year his cousin the accused had been called to take care of him and his brother after circumcision and the accused arrived at their home on 8th November, 2017. He said that a structure of iron sheets was constructed for them and it was one room with one door with no windows.
 26. He stated that at 5p.m a group of 11 boys invited by his brother G(pw4) went to where they were and asked for tea and chapati which was brought by his elder brother G and accused and the boys left after 10 minutes. He said at around 5.30p.m, a second group arrived and after a short while, the first group returned and they argued over tea. He said accused was not involved and while inside, they heard the house hit from outside and his father ordered them to leave. He said accused was not involved in chasing away the 2 groups and after they had left, accused and his elder brother G went for food which they ate and slept.
 27. He further stated that at around 11p.m, they heard a knock on the door then police entered and searched the house but nothing was recovered. He said police went with accused. He said he did not see accused with a knife neither did he see anyone injured in the house. He said there were two beds in the house and besides the bed, there was a table where they had placed a radio. He said that they were not cooking in the room and food was being brought from the main house. He denied seeing accused with a penknife but he only heard his father telling the boys to leave. He said that he did not



hear the deceased saying that he had been stabbed and his mother did not go to where they were as she was not allowed to go there.

28. DW4 DN aged 20 years old. He said accused is his cousin as their mothers are sisters. He confirmed that in the year 2017 November, the accused went to their home in Molo Turi from Nyandarua Kipipiri to take care of him and his brother BN as they had been circumcised. He said that on the 11th November, 2017, they were with accused in the structure they were staying after circumcision a one roomed structure made of iron sheets and which had one door but no windows.
29. He narrated that at 5p.m, a group of boys went to the house and his elder brother GKN introduced them as his friends from [Particulars Withheld] Secondary School where he was schooling. He stated that they were given tea and chapatis and some were outside while some were inside and after taking tea, they left and a second group arrived at around 6P.m and shortly thereafter the first group returned; after a short while, they started quarrelling. He said that they were inside and they were not allowed to get out. He heard noises from the two groups then he heard the iron sheet wall of the structure hit and the boys left. He said when he heard the wall hit, he hid under his blanket and after the boys left, the noise stopped. He stated that food was brought which they ate and the four of them slept being himself, his 2 brothers and a cousin and after a while his father went and knocked the door and entered with police officers. He confirmed that the police officers searched the room and then left with accused and his father followed. He said police informed them that there was a boy who had been stabbed.
30. He denied seeing accused with a knife and stated that the accused did not leave the house neither was he on top of the bed standing but he sat on the bed and the commotion was outside. He stated that his father did not beat up the deceased with a whip and added that the incident happened fast and accused did not have a knife neither did he wash a knife with rain water. He said that he did not hear his mother's voice.

Prosecution's Submissions

31. The prosecution counsel summarized evidence adduced in court and submitted that they were required to prove the three ingredients for the offence of murder being proof of death, that the death was caused by accused's unlawful act or omission and that accused had malice aforethought. The prosecution counsel submitted that the accused was a person with rage; that he drew a knife and gave several orders to the young visitors to exit from the structure and they all scampered for safety albeit the deceased was last and he received the wrath of the accused who by single stab and subsequent flogging by the parents of the initiates regardless of the injuries he had received; that the evidence places the accused at the scene and he was the only one with a knife though the same was not traced; that the young visitors saw the accused stab the deceased; that circumstantial evidence links the accused to the deadly stabbing. He submitted that the evidence of the witnesses in the small room corroborated each other on seeing the knife the accused held at the time and also what he did after washing the said knife.
32. On malice aforethought, the prosecution counsel submitted that in the case of Nzuki versus Republic[1993]KLR 171, the learned judge set out the principles of determining whether the intention to commit murder is proved by stating that malice aforethought is a term of art and is either an express intention to kill or implied whereby a person is intending to cause grievous bodily harm to his victim and the victim died as a result; the prosecution submitted that they proved the charge against accused beyond reasonable doubt.



Accused's Submission

33. The defence counsel submitted that the accused was 17 years old when he was arraigned in court on 20th November 2017. He summarized evidence adduced in court and on proof of death, he submitted that there is sufficient evidence that the deceased died as a result of excessive bleeding.
34. On whether the accused caused the death of the deceased, he submitted that two prosecution witnesses pw6 PNN and Pw7 ZK testified that the deceased caused deceased's death. That the two testified that they were invited to the home of pw3 by their son Pw4. That Pw7 said he saw accused stab the deceased and he saw him with blood-stained knife and heard accused say he had stabbed the deceased.
35. He further said Pw7 did not say he saw the accused stab the deceased but he saw accused with blood-stained knife and that accused said he had stabbed the deceased. Counsel submitted that the evidence of the two witnesses is fraught with glaring inconsistencies and contradictions to safely support conviction for the offence of murder and their evidence is therefore unreliable
36. He submitted that Pw6 further testified that he saw Pw3 the father of initiate whipping the deceased and he had a panga and Pw7 on the other hand said the mother to G Pw4 was holding the deceased as Pw3 was whipping him
37. Counsel further submitted that on the other hand Pw4 G submitted that the accused had no knife when he went to their home and he was not supplied any knife and when the boys were chased from the home, the deceased did not complain that he had been stabbed at the time he left the home. He further submitted that Pw2 testified that she did not leave the main house as it was contrary to kikuyu culture to go to structure where initiates were staying.
38. Counsel further submitted that the accused testified that he did not know any of the boys who had gone to her aunt's home and Dw3 and Dw4 who were initiates denied seeing the accused with a knife. He further submitted that the deceased, Pw6 and Pw7 did not inform Pw3's neighbors that the deceased had been stabbed and there was no evidence of blood stains at the room where the accused is alleged to have been stabbed and the knife was not also recovered from the room; and the fact that the accused and the other 3 boys were sleeping is not consistent with the conduct of a guilty person and concluded that it cannot be proved beyond reasonable doubt that the accused fatally stabbed the deceased.
39. On the third ingredient of malice aforethought, counsel submitted that under section 106 of the penal code, circumstances to be proved are:-
 - i. intention to cause death of or to do grievous harm to any person whether that person is killed or not,
 - ii. knowledge that the act or omission causing death will probably cause 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 harm is caused or not or by a wish that it may not be caused,
 - iii. an intention to commit and
 - iv. felony an intention by act or omission to facilitate escape from custody of a person who committed or attempted to commit such a felony.
40. Counsel submitted that assuming evidence of pw6 and 7 were to be believed that he stabbed the deceased, the prosecution has failed to prove malice aforethought against the accused. He further



submitted that there are many inconsistencies on the evidence of the 2 witnesses alleged to be eye witnesses and there are many gaps in the prosecution as to how and where the deceased sustained injuries and urged this court to resolve the gaps in favor of the accused.

Analysis and Determination

41. I have considered evidence adduced and submissions filed. Section 203 of the Penal Code provide as follows:-

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

42. From the following, the ingredients for the offence of death are as follows: -

- a. The death of the deceased.
- b. The accused committed the unlawful act which caused the death of the deceased.
- c. That the Accused had malice aforethought.

43. Further in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, the elements of the offence of murder were listed as follows:

- i. The death of the deceased occurred;
- ii. That the Accused committed the unlawful act which caused the death of the deceased; and
- iii. That the Accused had malice aforethought.

44. Similarly, in the in the case of Republic Versus Andrew Omwenga (2009) eKLR the court stated as follows:-

“It is clear from this definition that for an Accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission - there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) The death of the deceased and the cause of the death, (b) That the Accused committed the unlawful act which caused the death of the deceased and (c) That the Accused had the malice aforethought”.

45. Accordingly, this being a murder charge the prosecution must prove mens rea and actus reus. The burden to proof beyond reasonable doubt lie with the prosecution. In the case of Joseph Kimani Njau V Republic [2014] eKLR the Court of Appeal stated:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution.”



a. Proof of death of the deceased

46. From the evidence adduced, there is no doubt that the deceased died. All the prosecution witnesses testified that the deceased died on the morning of 11th November, 2017. This was confirmed by PW 5 Dr. Chebet who produced postmortem report signed by Dr. Ntenye Mbithi who conducted postmortem on the body of the deceased at molo subcounty hospital on the 17th November, 2017. She confirmed that the deceased died as a result of acute head injury due to blunt force trauma following assault. She produced Postmortem report signed on the 5th January, 2022 as exhibit 1.

(b) Whether the Accused committed the unlawful act which caused the death of the deceased

47. From the evidence adduced, the accused had been invited to her Aunt's home to take care of his two cousins Dw3 and Dw4 who had been circumcised. On the material day, his cousin G PW4 who was in form 4 then at [Particulars Withheld] Secondary School had invited 4 classmates for a ceremony in the home but 11 of the classmates arrived. From evidence adduced, the young men went in two groups and while at the structure where the initiates were, they disagreed over food. In the process, the deceased was stabbed and he eventually succumbed to the injuries.

48. From evidence adduced, Pw6 testified that after the quarrel, he saw accused stand on the bed holding a knife. At the same time Pw3 hit the wall of the structure from outside and the boys left. Pw6 said he saw the deceased was among the last to leave and he saw the accused stab the deceased with a knife near the door as the deceased left the structure. He stated when he went out, he saw the accused cleaning the knife with rain water. He further stated that Pw3 whipped the deceased while outside while telling them to leave. His evidence was corroborated by evidence of Pw7 who said he saw the accused with a knife standing on the bed after the quarrel in the structure. He however did not see the person stabbed.

49. From evidence of Pw4, there was light in the room though Pw6 and Pw7 said Pw4 was switching the lights on and off when the quarrel started. The cause of death as confirmed by the doctor Pw5 was as a result of bleeding due to stab wound. It is worth noting that the initiates and Pw4 who are all cousins to the accused are the ones who said there was no knife and they did not see accused with the knife. There is no mention of any other persons present seen with another weapon on the said room apart from the accused. Pw6 and Pw7 as confirmed by accused were not known to the accused, they are not related to accused and, in my view, they had no reason to make false allegations against the accused. Having considered the evidence adduced by all prosecution witnesses together with evidence by the defence, I am convinced that the deceased died a result of being stabbed by the Accused herein.

(c) That the Accused had malice aforethought

50. Section 206 of the Penal Code on Malice aforethought states that:

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

51. From the evidence adduced, there is no doubt that the incident was not planned. The deceased was not known to the accused. The accused was new in the area. The incident arose after disagreement between the two groups. From the foregoing no malice aforethought has been proved against the accused beyond reasonable doubt. I therefore proceed to find accused guilty of the offence of manslaughter contrary to section 202 as read with 205 of the penal code.

52. Final Orders: -

- i. The Accused person is convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the penal code.
- ii. Right of appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27TH DAY OF SEPTEMBER 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Schola.

Mr. Kihara for state.

Mr. Ndubi counsel for Accused.

Accused present.

