



**Republic v Kamau (Criminal Case 12 of 2023)  
[2024] KEHC 16087 (KLR) (Crim) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16087 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL CASE 12 OF 2023  
CM KARIUKI, J  
DECEMBER 20, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOHN NG'ANG'A KAMAU ..... ACCUSED**

**JUDGMENT**

1. The Accused person is charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code Laws of Kenya. The particulars are that on 5 June 2015, at Ol-moran Trading Centre, Laikipia County, jointly with others not before the court, murdered Jire Lenangetai.
2. The accused pleaded not guilty, and the matter went to full trial. The prosecution called six (6) witnesses and closed its case. The accused was found to have a case to answer and was put on his defense.
3. The prosecution case is as follows:
4. **PW 1 Peter Wanjagua Male Sworn and States in Kiswahili:**
5. Pw1 lives at 01 Moran on the farm, 7 km from town. He stated that on 05/06/2015, he was at home and slept, and at about 3:00 am, he heard cattle on his farm. The dogs started barking. He went out and found cows had eaten and slept on the farm.
6. There were 26 cattle. He had beans and maize in the shamba. He did not know whose they were then but came to know later. He Called Assistant Chief Peter Wachiuri, who told him that he could not go but that PW1 should take the cattle to O1 Moran police station. He took them to the police station and found the OCS Njihia, who told him to leave them there so that they could find out whose cattle they were.



7. While at the Police Station, the owner arrived and told OCS the animals were his, and OCS informed him that the cattle would remain at the police station till he paid for what the cattle ate at the PW1 farm or if the two ( Owner and PW1) agreed. Pw1 told him to pay Kshs. 20,000/- but he said he would pay Kshs. 15,000/-. OCS noted that since some are for milking, he would release all the females, but the bull would be held at the police station. The owner told pw1 that he would sell his one cow and pay him the next day at 1.00 pm. Thus, He left with 25 heads of cattle.
8. The next day, OCS called PW1 and asked him to go to see the person who had been killed to confirm if he was the person they had a case with. Pw1 went and confirmed that he was the person. Pw1 did not see injuries. He was only shown the face. There were no injuries on the face or blood. He did not know the name of the person. He further stated that when they finished the case the previous day, they parted ways at the police station. Pw1 did not know where he went till OCS called him to go and identify the body.

#### **9. PW2 Alice Akwom Female Sworn and States in Kiswahili:**

10. She testified that she was a farmer from Ol Moran. On 05/06/2015, at about 5.20 pm, she was at Ol Moran Centre. She met her Samburu friend, whom she could not recall his name. He was middle-aged. She did not have money to hire a room, so they went to the bush and stayed there until 6.00 pm, making love. She heard the police whistle lowering the flag and left for a bar at Ol Moran Centre at about 7.30 pm.
11. The Samburu came, stood outside, and then entered the bar. He had a walking stick, which he waved. He was drunk. He was not staggering. He had not carried any alcohol. She saw him waving his stick while at the bar's door. Ng'ang'a, the accused, came inside the bar. He started to argue with the Samburu man. Ng'ang'a was a customer in the bar. They began to struggle over the stick.
12. There were lights inside the bar. She did not know what type of light was inside. She did not hear them say anything as they struggled over the stick. Both the Samburu and Ng'ang'a went outside the bar. By then, Ng'ang'a had taken the stick from the Samburu. The Samburu came out of the bar first, and Ng'ang'a followed. They went back inside. Even outside, they were struggling over the stick. She remained outside. They were still struggling over the stick.
13. Her Samburu friend told her that they would meet on Tuesday, market day. She left him there and went home. When he said they would meet on Tuesday, he entered the bar for the first time. She went to her house, Munyanyaka, at Ol Moran.
14. She slept, and the next day, she went to work in the shamba. A person passed by and told her that somebody had been killed in town. The land they were working on was near the road. They went to find out who had been killed, and she was told the Samburu man had died. She was told the body was taken to the mortuary. She went to the trading center and went to a bar. The owner of the bar bought her <sup>1</sup>/<sub>2</sub> alcohol.
15. OCS Ol Moran entered the bar, questioned her, and took her to the station. She did not know where the body was found. She did not know how the Samburu man was killed. She did not tell the police who did it. Ng'ang'a used to skin goats at the butchery in Ol Mora. Butchery is apart from the bar. The bar is about 30 meters from the butchery. It is closed at 8.00 pm. She did not know if the butchery was closed or not. I can identify Ng'ang'a if She saw him.



**16. PW3 Samuel Karoru Kariuki Male Sworn and States in Kiswahili:**

17. Pw3 testified that he was from Ol Moran and did casual jobs. He stated that, on 05/06/2015, at about 7:00 pm, he was in a bar called 89. It is at 01 Moran. His friend Mwangi was with him, taking alcohol. They continued to drink until 9:00 pm, when a person came in screaming. He did not know him. The bar was dim because a battery lit it.
18. Mama Chohi was selling at the counter and told him to go outside. The person left. After a while, the person came back and threw a stone in the bar. He was a man. He threw a stone and left. Mama Chohi closed the bar and told them to pay up. She told them all to leave, and they left. Pm. The person who entered the bar was a stranger. He did not see what he was carrying, and he was not able to say what he had or see it.
19. He did not see the accused in the bar. They sat at the same table. They were seated about 4 -5 meters from the counter. It was about 3 to 4 meters. He had gone there at 7.00 pm - had been there for 2 hours. There were many people.
20. He knew the accused as he used to do a casual job in a butchery. In the slaughterhouse, he used to slaughter goats and cattle. He would slaughter utilizing a saw or knife. He works in Ol—Moran Slaughter House. It is in the center. It is about 100 meters from the slaughterhouse to the bar. He is employed in the slaughterhouse. I did not see him that day.
21. He used to frequent the bar, but he had never met him there. The bar closed at 9:20 pm. The one who made the noise left at about 9:00 pm. He did not stay, as he was evicted. When he left the bar, he went home at 01 Moran. The next day, he woke up at his uncle's, and he heard that 01 Moran Police were looking for him. He found them at home and went with them to the police station.
22. It was about noon. OCS asked if he knew what had happened the night before. He asked him where he was at night, and he said he was at 89. He asked him to tell him what had happened at the bar. He told him that he had called him out as a person who had been linked. He did not know who died.
23. He cannot tell if he is the person who entered the bar or not. He did not know the deceased. He heard on the next day that Ng'ang'a had been arrested. It was said his shoe was where the person who died was. He heard Ng'ang'a was arrested for the murder of the person. CID called him at Rumuruti on the 6th. He cannot recall well. After interrogating him, the OCS told him to remove his shoes, and he was arrested.
24. The next day, he was placed in a vehicle from Sipili and entered the police station. CID asked if he saw Ng'ang'a in the bar, but he denied it. They asked if he could identify a particular shoe, but he said he could not. He slept at CID.

**25. PW4 Dr. Boniface Miring'u Male Sworn and States:**

26. A Senior Medical Officer attached to Nyahururu County Referral Hospital since 2013. He graduated from the University of Nairobi in 2009 with a Bachelor of Medicine and Surgery. He has worked at Kiambu General Hospital and Nyeri PGH.
27. He have a post mortem report for Jire Lenangitai. He performed the postmortem on 12/06/2015 at 10.20 am at Nyahururu County Referral Hospital. The deceased was an African male, 39 years, height 171 cm. The body was well preserved under refrigeration. On general examination, the findings were; the neck was placed unstable, with stab wounds on the front fir<sup>st</sup> wound between the four<sup>th</sup> and fif<sup>th</sup> ribs at midline. 2<sup>nd</sup> wound was on the right mid-clavicular (collarbone). 3<sup>rd</sup> wound on right side



on 5 - 6<sup>th</sup> intercostal space (5<sup>th</sup> and 6<sup>th</sup> ribs).Respiratory system - there was a perforated and collapsed lung with hemothorax, and the trachea was severed. The larynx was also cut.Cardiovascular system - torn pericardium covering of the heart.The aorta ascending one had been perforated.The heart collapsed.Digestive system - all organs were pale.The side of the chest, exterior chest;general system, nervous system, and spinal column were all normal.

28. He formed the opinion that the cause of death was shock following the right lung plus aortic perforations (massive hemorrhage) and, secondly, two stab wounds.
29. He signed the Death certificate No. 266282. He signed a postmortem on the same day, and it was stamped. He produced it in evidence as an exhibit.
30. PW 5 Samwel Mwangi Wanjiku testified that he is from Ol moran and operates a boda boda rider (motor Cycle).That on 5.6.2015 he was at work at 8pm when he went with a friend to 89 bar with his friend called Karuru.While taking alcohol, somebody he did not know came A waiter called mama Chohi who told that person to go out. The person went out and came back after five (5) minutes and threw a stone.(court notes that the testimony is not complete in typed and handwritten record).The record shows cross-examination was nil.

### **31. PW6 Sworn and States as follows:**

32. He stated his name is Retired CIP Peter Githuka, no. 217964. He used to be at OCS 01 Moran Police Station. On 06/06/2015, he was at 01 Moran Police Station when he received a report from area Assistant Chief Mr. Busienei that there was a dead body within 01 Moran Market.
33. He took the report and proceeded to the scene. On arrival at the scene, He found a dead body with deep knife wounds on the chest. He did not recognize it. It was between 2 plots, and they enquired from neighbors whether they recognized the dead person. He got a Samburu name for the dead body. He also traced his name from an ID found in his clothes. He started to do an inquiry from the locality. He got a report that the suspect was seen fighting with the accused at a nearby bar. The bar was Club 89.
34. After getting the report, he got accused and arrested. He knew him before as he was familiar with the market. He is John Ng'ang'a Kamau. He was arrested in the market. He informed the OCPD and DCI Laikipia West of the incident.
35. Immediately, the DCIO and his team came to the scene. He gave the DCIO the report he had and the reason he arrested the suspect. The body was still at the scene. After that, the DCIO took over the case and continued to trace witnesses. Initially, he investigated the case, but the DCIO took over the matter. He was the arresting officer. The accused is in court.
36. The prosecution closed its case, and the accused was put on his defense after a court found that a prima facie case was established.

### **37. Accused defence sworn**

38. The court found the accused to have a case to answer after the prosecution closed its case. The accused testified via sworn testimony that his name was John Ng'ang'a Kamau. He is from Wanjohi and used to live in Olmoran. He was working as a butchery employee. He used a knife to scratch animal heads, put them on fire, etc.
39. On 5/6/2015 at 8:05 pm, he closed his job and entered 89 Bar. He used to drink there. He took alcohol. A noisy person came into the bar. The bar owner removed him. He came throwing stones in the bar. Customers went away.



40. He knew he was a Samburu. He had known him before. He was drunk. He used to drink. He was not noisy while sober. When the Accused left the bar, he went away. When he walked out, he did not see him again. He slept at home and resumed his job in the morning the next day.
41. While on the job, he saw people crowding at Ol Moran and learned that it was the same Samburu person who was lying dead, and people were viewing his body. While doing his job, the police came. He explained to the police what happened the previous night. He was taken to his house for search and then taken to Rumuruti police station. He stated that he did not kill him (the victim) and that he had no grudge against the deceased.

**42. On Cross-examination by Omooria state counsel,**

43. He stated that he knew Alice Akwom, a witness herein, and that he never fought the deceased that evening. He was arrested and charged. He confirmed he was with the deceased at the bar material time.

**44. On Re-examination, he stated-**

45. While in the bar, there were about six people. Alice was not in the bar. A number of people were arrested over the incident. His tools of trade were in butchery.
46. They never had any problem with the deceased. He did not know the knife, which was produced as a murder weapon.
47. Parties were directed to file submissions, which they did and exchanged.

**48. Prosecution submissions**

49. The accused person has been charged with the offense of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
50. Particulars of this offense are that on 5 June 2015, at Olmorán Trading Centre, Laikipia County, jointly with others not before the court, murdered JIRE LENANGETAI. The prosecution submitted that the ingredients of the offense of murder must be proved beyond a reasonable doubt in order to establish the offense. Proof of the fact and cause of death of the deceased. Proof that the deceased met their death due to an unlawful act or omission on the part of the accused. Proof that the said unlawful act or omission was committed with malice aforethought.
51. When the case came up for hearing, the prosecution called five witnesses. When the prosecution attempted to seek an adjournment to enable them to call the investigating officer and the officer from the Government Chemist, the same was declined, and thus, their case was closed.
52. Nevertheless, the evidence tendered before the court enabled the court to find that a prima facie case had been established. As such, the court placed the accused on his defense, which he tendered on 27.2.2023, and did not call any witnesses.
53. the ingredients of the offense of murder to be proved were as follows: -

**54. On the fact of the death of the deceased, there cannot be any doubt**

55. The information states that the deceased was murdered on 5 June 2015. A postmortem was also done on the body of the deceased as proof that he indeed died. The same was conducted by Dr. Miring'u at Nyahururu District Hospital. The deceased was identified by witnesses who knew him and who confirmed the fact that he was indeed dead. This proves that the deceased actually died.



## 56. On the cause of death of the deceased

57. The doctor who conducted the postmortem confirmed that the cause of death was due to shock following Right lung + Aortic perforations (massive hemorrhage) secondary to stab wounds. The postmortem report was also produced in court as an exhibit and marked as P Exhibit 1. This was expert medical evidence regarding the cause of death and was neither challenged nor controverted in any way by the defense.
58. On whether an unlawful act or omission on the part of the accused person caused the said death.
59. Under Article 26(1) of *the Constitution* of Kenya, every person has the right to life. Sub-Section 3 provides that a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* and the law.
60. William J, in his book on criminal law on Page 299, referring to J.M Nyasani Scholarly works on analysis and causation, observed as follows:-

“Homicide is the taking of human life by a human being. All killings are homicide, but not all killings are criminal, or not all homicides are unlawful. Lawful homicides are committed in execution or advancement of justice, in reasonable defense of a person or property and as a result of accident or misadventure”.

61. One Alice Akwom Juma testified that on 5 June 2015, she met the deceased with whom they had sex in the bush and later went to a pub (89), and the deceased had a walking stick, which he was waving in the air in happiness. Then the accused, who is a butcher man, approached him and snatched his walking stick.
62. The older man struggled until the accused overpowered him and ran out of the pub with that stick. The deceased ran after him and got hold of his walking stick, and a fight ensued later; both of them returned to the pub, which was fully packed with people. The other eye witness, pw3, testified that a person came in screaming. He did not know him. It was dim because a battery lit it. Mama Chohi was selling at the count and told him to go outside.
63. The person left. After a while, the person came back and threw a stone in the bar. He was a man. He threw a stone and left. Mama Chohi closed the bar and told them to pay up. She told them all to go, and they left. He did not see the accused person in the bar, and he was a person whom he knew.
64. The question is whether the Circumstantial evidence links the accused to this crime as the person responsible for murdering the deceased person despite no one seeing him commit the offense. The circumstances showed that he was the last person seen struggling with a stick with the deceased, thus questioning whether he was culpable for the offense.
65. The case of Abanga Alias -vs. Republic CRA No. 32 of 1990 [UR] sets out the test for determining whether the prosecution has established its case against the accused. See also the case of R -Vs-Taylor Weaver and Donovan (1928) CR. APP R.21.
66. Abanga Alias vs R supra stated;
67. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established On proof that the said unlawful act or omission was committed with malice aforethought



68. It is trite that malice aforethought can be inferred from circumstances in which the offense was committed. The celebrated case of Tubere S/O Ochen —V Republic [1945] EACA 63 outlined the following circumstances:(a) The nature of the weapon used against the deceased to inflict injuries.The part of the body targeted by the attacker, whether vulnerable or not.The manner in which the lethal weapon was used and whether to cause grievous harm, the assailant used the weapon repeatedly.The conduct of the accused before, during, and after the attack of the deceased.
69. The postmortem indicates shock following Right lung + Aortic Perforations (massive hemorrhage) secondary to stab wounds, which shows that a dangerous weapon may have caused the same. It is our submission that the stabs targeting the lungs mean the perpetrator had malice aforethought to either cause grievous harm or murder the deceased.
70. In applying the above principles to the facts of this case, It is submitted that malice aforethought is present against the accused in the absence of any evidence to the contrary. Thus it is submitted that the accused was culpable for the offense of murder.
71. When placed on this defense, the accused confirmed that he indeed is a butcher man and uses a knife in his daily routine, among other implements. He also placed himself at the bar where the deceased was also drinking but only stated that the deceased was making noise and, at one time, was throwing stones and was drunk.
72. However, he did not challenge the prosecution witnesses' evidence, who stated that he had fought with the deceased after grabbing his walking stick and running outside with it.
73. The court found that the accused's defense was full of denials, which could did not exonerate him from blame.

#### **74. Defence Submissions**

75. The defence submits that, ingredients of murder can be narrowed down:That the deceased died and the cause of death That the accused indirectly or directly unlawfully caused the death of the deceased.That the accused had malice aforethought.

#### **76. The death of the deceased and the cause of death**

77. The death of the is not disputed since it has been confirmed by the 6 prosecution witnesses who have testified and more so by PW4, one Dr Boniface Miringu who performed postmortem on the body of the deceased and prepared the post mortem report which was produced in court as PEXH1 which cannot be conducted when death has not occurred. PW4 opined that the cause of death was shock following right lung + Aortic perforations(massive hemorrhage) as a result of 2 stab wounds. The accused as well saw his body before being apprehended.
78. That notwithstanding, the prosecution never produced the scene of crime photographs nor the photographer who would have corroborated the evidence of PW4 as to what he described as repeated stabbings. There is thus the body, and death and the cause of death and the question that now arises and begs for answers is “who then stabbed the deceased leading to his death?”
79. PW2 and PW3 alleged that the incidence took place at a Bar called 89 at Olmoran Trading center. PW3 told the court that at about 9:00pm a person whom he did not recognized came in and started causing distractions by screaming when the waiter, one Mama Chohi chased him away. That he started becoming violent by throwing stones inside the bar when the accused intervened and attempted to take the stick he was waving from him. PW2 contended that the two were not fighting neither were they



- engaged in heated exchange of words since he never heard them saying anything but they just struggled over the stick.
80. When PW2 was pressed with questions during cross-examination, she told the court that she did not know who killed the deceased. She further told the court that she never saw the accused hitting the deceased at any one time but she still maintained the position that the two were struggling over the stick. The fact that the accused did not fight with the deceased has further been corroborated by PW3 who on cross-examination told the court that he did not see anyone fighting another.
  81. PW3 and PW5 told the court at around 9:20pm, the waiter closed the door and ordered everybody to clear their bills and go home. That everybody including the accused headed to their own directions only to realize the following morning that the deceased had been killed. One thing is clear, that the accused was not the only person who left the bar and went home and so why was he the only person charged with the offence of murder?
  82. From the above disposition it is contended that there is no eyewitness as to the circumstances under which the deceased met his death. The only direct evidence by the prosecution is that there was a struggle between the accused and the deceased over a stick as demonstrated hereinabove. The prosecution has therefore relied on circumstantial evidence in linking the accused to the murder of the deceased. See the cases of *Ahamad Abolfadhi Mohammed And Another V Republic* [2018] Eklr, *Teper V. R* [1952] AC at P.489, *TEPER V. R* [1952] AC at P.489 where the tests to be applied in considering whether circumstantial evidence placed before a court can support a conviction were set.
  83. The first circumstance the prosecution has relied on to link the accused to the murder is the fact the accused and deceased were seen by PW2 and PW3 struggling over a stick outside club 89. The prosecution believes that the accused was the last person to be seen with the accused yet PW2 told the court that the accused and the deceased entered the bar before she left and later the waiter closed the door and ordered everybody inside the bar to clear their bills and go home.
  84. It is clear that the accused left the bar at 9:20pm in the company of others and one wonders how he would be the only person suspected of committing the said crime. The prosecution did not adduce evidence to the effect that the accused and the deceased left the club together and headed towards the same direction so that he could execute the crime.
  85. The second circumstance is that the accused was a butcher man working with a slaughter house that is 100m from the said club according to PW3 and according to PW2, he worked with a butchery that was 30m away from the said club. That evidence is contradictory. That notwithstanding, the prosecution believes that since butcher men use knives in their work and that the deceased had been stabbed using a knife, it is the accused who stabbed him. Knives can be accessed by anyone since every household uses a knife on a daily basis and it is not a reserve of butcher men only. On the other hand, PW6 told the court that he only caused the arrest of the accused and the D.C.I.O took over the conduct of the matter. The I.O
  86. in this matter though a crucial witness in this matter was not called upon to testify but the accused told the court that a search was conducted in his house but no such a knife was recovered from his house and he only had old knives that had not be used recently and so the source of the knife that was produced as exhibit ought to have been explained but was not.
  87. The prosecution alleged that the deceased body was found lying in a pool of blood which had spilled over a radius of about 2 meters. The clothes that the accused had put on on the fateful night were the same clothes he had on the following day and his white trouser was not stained with blood meaning that he did not stab the deceased.



88. In the the above circumstances from which the prosecution has called upon this court to infer the accused's guilt have not been cogently established and so the first test has failed.
89. When it comes to second test, the prosecution having failed in the first test, it cannot be said that it has unerringly pointed towards the guilt of the accused as the court similarly found in Republic v Peter Mwangi Karimi (supra).
90. Taking the above circumstances cumulatively, a complete chain leading to the conclusion that any crime was committed by the accused cannot be formed. The chain has been broken since the weapon used in stabbing the deceased was not recovered from the accused and its source was not explained neither were his clothes stained with blood, reliance is made onon the court's holding in Peter Mwangi Karimi (supra).
91. The prosecution did also not call crucial witnesses in support of its case. The I.O in this matter, who would have helped the court reach a conclusion as to the source of the knife( produced In court as exhibit) and how it was associated with the accused and the commission of the crime , was not called. Similarly, the "mama Chohi" who has constantly been referred to by the prosecution was equally not called and she could have shed some light as to what transpired on the fateful night at club 89.
92. Therefore, can be concluded that their evidence would have been adverse to the prosecution's case and so the evidence called was barely adequate to prove its case. Reliance made on the case of Halkano Mata Bagaja V Republic [2015] eKLR where the honourable court relied on the case of Bukenya & Others 1972 EA 549 .
93. Thus it is submitted that, that circumstantial evidence could not be used to infer guilt on the accused person since the same was not tenable and it failed the tests established In the case of Republic V Peter Mwangi Kirimi ( Supra)
94. The prosecution therefore did not make out the actus reus of the crime of the offence of murder against the accused person beyond any "reasonable doubt. A possibility consistent with the innocence of the accused has been created .
95. Black's Law Dictionary defines "aforethought" as premeditating or instead thinking carefully beforehand for any length of time, however, shorter, before doing the act. Malice on the other hand, means the intent to cause harm. Malice aforethought, therefore, is the mental element of the offense of murder.
96. Section 206 of the Penal code provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

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

The knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether the person is 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. See also Republic V Anthony Wambua Willy, Supra.



97. The issue of malice aforethought by the accused in the instant case is quite remote. The accused affirmed the position that he did not fight with the accused, which PW2 and PW3 have corroborated. The struggle over the stick could not have pushed the accused to want to cause the death of the deceased or cause grave injuries.
98. Furthermore, the deceased and the accused had never quarreled before, and he was not the owner of the piece of land that the deceased's cows had allegedly invaded but PW1. This shows that no personal vendetta existed between the accused and the deceased.
99. Before applying the principles applied herein above in the circumstances in which the deceased's death occurred, we reiterate what we have demonstrated in the second ingredient that the prosecution did not place the accused at the scene of the crime, which has cast doubt as to the accused's involvement in the alleged crime.
100. The prosecution inferred that the weapon used in the stabbing was a knife, which was also produced as an exhibit, which is a lethal weapon, and that the part of the body targeted was the lungs and he was stabbed twice, meaning that the perpetrator (who was not the accused) intended to kill the deceased.
101. If all the deceased were involved in killing the deceased, his clothes would have been stained with blood, and he would have changed his clothes. The accused never changed his clothes, and when he learned that the deceased was dead, he appeared at the place where the body was lying and later on returned to his place of work. The import of all these is that if it were the accused who murdered the deceased, he would have taken off, but he remained still until he was apprehended at his place of work, meaning that he is innocent. Reliance made on the case of Republic V Ali Kajoto Ali [2021] eKLR (supra
102. The prosecution in the case at bar did not provide a prima facie case that the accused was motivated by malice aforethought in causing the death of the accused since the accused cannot be said to have formed an intention to do something he did not execute.
103. In the upshot, it is contended that the prosecution did not adduce evidence that illuminates beyond reasonable doubt the connection between the death of the deceased herein and malice aforethought as held in Republic V Ali Kajoto (supra). The accused, therefore, did not form an intention to kill the deceased, meaning that this ingredient has not been made out against beyond all reasonable doubt as held in Uganda v Yokonia Mazinga (supra), where the court held thus;

“The burden of proof is on the prosecution to prove all the ingredients of the offenses beyond all reasonable doubt.” (emphasis ours)

#### **104. Issues Analysis And Determination**

105. After going through the evidence on record, I find the issues are whether the ingredients of murder below were proved beyond reasonable doubt/name ;
  - a. -Proof of the fact and cause of death of the deceased.
  - b. -Proof that the deceased met their death due to an unlawful act or omission on the part of the accused.
  - c. -Proof that the said unlawful act or omission was committed with malice aforethought.
106. The prosecution submits that the ingredients of the offense of murder were proved beyond reasonable doubt and that the accused ought to be convicted.



## 107. Analysis

108. In Kenya, the standard of proof for murder is beyond a reasonable doubt. To convict an accused of murder, the prosecution must prove the following three elements: Section 107 (2) of the *Evidence Act* Cap 80 laws of Kenya encapsulates that:

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Section 108 goes ahead to provide that;

“the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all was given on either side.”(emphasis ours)

109. Section 109 of the same Act envisages that:

“The burden of proof as to any particular fact lies on the person who wishes the court believe to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”(emphasis ours)

The victim died  
The death was caused by an unlawful act or omission  
The death was caused with malice aforethought

110. The prosecution must also prove that the defendant’s actions caused the victim’s death. This can be done through circumstantial evidence or eyewitnesses, and medical evidence is not required.

111. If the accused used a weapon or other instrument to inflict serious harm on the victim, and the victim died from the injuries without seeking medical treatment, the accused is presumed to have caused the death.

## 112. On the fact of the death of the deceased;

113. The information states that the deceased was murdered on 5 June 2015. A postmortem was also done on the body of the deceased as proof that he indeed died. The same was conducted by Dr. Miring’u at Nyahururu District Hospital. The deceased was identified by witnesses who knew him and who confirmed the fact that he was indeed dead. This proves that the deceased actually died.

## 114. On the cause of death of the deceased

115. The doctor who conducted the postmortem confirmed that the cause of death was due to shock following Right lung + Aortic perforations (massive hemorrhage) secondary to stab wounds. The postmortem report was also produced in court as an exhibit and marked as P Exhibit 1. This was expert medical evidence regarding the cause of death and was neither challenged nor controverted in any way by the defense.

116. On whether an unlawful act or omission on the part of the accused person caused the said death.

117. Under Article 26(1) of *the Constitution* of Kenya, every person has the right to life. Sub-Section 3 provides that a person shall not be deprived of life intentionally except to the extent authorized by *the Constitution* and the law. William J, in his book on criminal law on Page 299, refers to J.M Nyasani’s Scholarly works on analysis and causation, observed as follows:-

118. “Homicide is the taking of human life by a human being. All killings are homicide, but not all killings are criminal, or not all homicides are unlawful. Lawful homicides are committed in execution or



advancement of justice, in reasonable defense of a person or property and as a result of accident or misadventure”.

119. PW2 and PW3 alleged that the incident took place at a Bar called 89 at Olmoran Trading Center. PW3 told the court that at about 9:00 pm, a person whom he did not recognize came in and started causing distractions by screaming when the waiter, Mama Chohi, chased him away. He started becoming violent by throwing stones inside the bar when the accused intervened and attempted to take the stick he was waving from him. PW2 contended that the two were not fighting, nor were they engaged in a heated exchange of words since She never heard them saying anything, but they just struggled over the stick.
120. One Alice Akwom Juma PW2 told the court that she did not know who killed the deceased. She further told the court that she never saw the accused hitting the deceased at any one time, but she still maintained the position that the two were struggling over the stick. The fact that the accused did not fight with the deceased has further been corroborated by PW3, who, on cross-examination, told the court that he did not see anyone fighting another.
121. PW3 and PW5 told the court that at around 9:20 pm, the waiter closed the door and ordered everybody to clear their bills and go home. Everybody, including the accused, headed in their direction only to realize the following morning that the deceased had been killed. One thing is clear: the accused was not the only person who left the bar and went home.
122. There is no eyewitness as to the circumstances under which the deceased met his death. The only direct evidence by the prosecution is that there was a struggle between the accused and the deceased over a stick, as demonstrated hereinabove.
123. The prosecution theory is premised on the circumstantial evidence linking the accused to the murder of the deceased. Thus, caution is always advised when basing a conviction solely upon circumstantial evidence. The court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.” The court “should also consider circumstantial evidence in its totality and not in peace-meal as the privy council stated in *TEPER V. R* [1952] AC at P.489 “circumstantial evidence must be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”

“it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;

The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the subject
- (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that, within all human probability, the crime was committed by the accused and none else. (emphasis supplied)

124. The accused and deceased were seen by PW2 and PW3 struggling over a stick outside Club 89. PW2 told the court that the accused and the deceased had entered the bar before she left, and later, the waiter closed the door and ordered everybody inside the bar to clear their bills and go home.
125. It is clear that the accused left the bar at 9:20 pm in the company of others, and one wonders how he would be the only person suspected of committing the said crime. The prosecution did not adduce



evidence to the effect that the accused and the deceased left the club together and headed in the same direction so that he could execute the crime.

126. The prosecution theory is that since the accused was a butcher, working with a slaughterhouse that is 100m from the said club according to PW3 and according to PW2, he worked with a butchery that was 30m away from the said club, and since the butcher men use knives in their work and that the deceased had been stabbed using a knife, it is the accused who stabbed him.
127. However, no evidence to support the theory or justify it was provided. Anyone can access knives since every household uses a knife on a daily basis, and it is not reserved for butcher men only.
128. In this matter, though a crucial witness in this matter was not called upon to testify, the accused told the court that a search was conducted in his house, but no such knife was recovered from his house, and he only had old knives that had not been used recently and so the source of the knife that was produced as exhibit ought to have been explained but was not. Nor was the knife subjected to forensic examination.
129. The above circumstances from which the prosecution has called upon this court to infer the accused's guilt have not been cogently established, so the first test failed. When it comes to the second test, the prosecution has failed in the first test; it cannot be said that it has unerringly pointed towards the guilt of the accused as the court similarly found in *Republic v Peter Mwangi Karimi (supra)* where the court categorically stated as follows;  

“The circumstances of the prosecution were not definite and did not unerringly point towards the guilt of the accused (sic). The prosecution left gaps in its case, which created doubt that the accused committed any murder at all. (emphasis ours)
130. Taking the above circumstances cumulatively, a complete chain leading to the conclusion that any crime was committed by the accused cannot be formed. The chain has been broken since the weapon used in stabbing the deceased was not recovered from the accused, its source was not explained, and neither were his clothes stained with blood.
131. Thus, the circumstantial evidence could not be used to infer guilt on the accused person since the same was not tenable, and it failed the tests established In the case of *Republic V Peter Mwangi Kirimi ( Supra)*
132. The prosecution, therefore, did not make out the actus reus of the crime of the offense of murder against the accused person beyond any ‘reasonable doubt.
133. The court finds that the accused's defense was unrebutted, and thus, the entire prosecution evidence exonerated him from blame. Therefore, the escapable conclusion is that the prosecution has failed to prove its case against the accused beyond a reasonable doubt, thus making the orders;
  - i. The court makes a finding of not guilty of the offense of murder, and, therefore, the accused is acquitted, and he will be set at liberty forthwith unless otherwise lawfully held.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 20<sup>TH</sup> DAY OF DECEMBER 2024**

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**CHARLES KARIUKI**  
**JUDGE**

