



**Republic v Nagib alias Majid (Criminal Case E002 of 2022)  
[2023] KEHC 24632 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E002 OF 2022  
A. ONG'INJO, J  
OCTOBER 31, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ABDUL MAJID NAGIB ALIAS MAJID ..... ACCUSED**

**JUDGMENT**

1. The accused Abdul Majid Nagib alias Majid faces a charge of murder contrary to Section 203 as read together with Section 204 of the Penal Code.
2. Particulars of the offence are that Abdul Majid Nagib alias Majid on an unknown date between the 16th day of December 2021 and 18th day of December 2021 at Bondeni area in Mvita sub-county within Mombasa County murdered Nagib Abdalla Fate.
3. The prosecution called 9 witnesses to support its case that the accused person committed the offence herein and he was placed on his defence.

**Prosecution Case**

4. PW1, Ali Mohamed Salim informed court that on 18.12.2021 at around 0600 hrs, he woke up and went to the mosque when he received a phone call from his aunt Fatma Ahmed who informed him that she got information from her sister Maimuna that their brother Najib Abdalla was missing. That she instructed him to go to his uncle's home and look for him. That his uncle was staying in Bondeni and he used to visit him. That he proceeded to his uncle's home and on arrival, he found that there were prayers/Quran on a computer, they were loud and could be heard from outside. That as he continued to knock, a neighbour went and told him that he heard the owner of the house closing the door just a few minutes before his arrival. That when he learnt that the accused had just left, he went to another uncle, Hamisi, in Florindi Kilifi Village to ask if he was aware his brother was missing. That he did



not find him and that he was told he had gone to swim in the ocean. That he followed his uncle who confirmed that his brother was missing.

5. PW1 said that they went back to the deceased's house where he opened the house with the spare key he had and they gained access to the house. That PW1, his uncle Hamisi and his aunt Fatma entered the house where they found a laptop placed on a praying mat on the floor with a speaker. That he switched off the laptop and they started searching the rooms. That when they entered the kitchen there was foul smell. That there were 2 toilets and one of them had a new padlock on the door while the other was open. That the foul smell was coming from the toilet and that they broke the padlock and found manila bags with the body of the deceased. That blood was still dripping from the bags and the shower had been switched off.
6. PW1 informed court that he opened the manila bag using a knife and found the body of his uncle. That after the arrival of his grandfather Ukasha to the scene, they went and reported the incident at Central Police Station vide OB No. 15/18/2021. That police officers accompanied them back to the house and that they started their investigations and photographs of the scene were taken before the body was removed from the manila bag and also photographed. PW1 said that when they laid the body on bedsheets, they found that the deceased had been stabbed on the chest and head. He had also been cut on the pelvic joint. That the body was taken to Coast General Hospital for postmortem which was done on the same day, 18.12.2021. PW1 said that he identified the body of the deceased for postmortem.
7. PW1 testified that thereafter, the body was taken for burial in accordance with Islamic traditions. That after burial, he went back to the deceased person's house in the company of CID officers from Urban. That he opened the door for them and they recovered a red bag that had been hanged on the window near the toilet containing two t-shirts, a short and underpants. The t-shirts were red and blue in colour.
8. PW2, Hamisi Fate Hamisi, the brother of the deceased said that on 17.12.2021 at 8.30 pm, his brother PW3 called to find out whether he had information about the deceased herein and when he said he did not have any information, they agreed to go to the deceased's house in Bondeni. That their sister Maimuna also joined the and when they knocked on the house and the accused refused to open but when Maimuna persistently knocked, the accused finally opened and on inquiring where the father was, he said that the deceased had gone to the farm in Kilifi. That PW3 told the accused that neighbours heard his father scream that "Abdul Magid unaniua!" That the accused told that he was the one shouting the previous evening. That since the accused was not giving straight forward answers, PW2, PW3 and their sister decided to leave. That when they were leaving, young men had gathered outside the house as they wanted to invade the house to find out where the deceased was as he had not been seen in the mosques at dawn, at 1.00 pm and 4.00 pm on 17.12.2021. They were however restrained by the village elder Mzee Selemani.
9. That as PW2, PW3 and their sister left the deceased person's house, PW2 decided to call his daughter who was leaving in Chumani to establish if the deceased was at his farm in Kilifi. That the daughter called at 1.00 am and reported that the deceased was not at the farm. That the following day, PW1 went to the deceased person's house and learnt that the accused herein had left very early in the morning. That they proceeded to the deceased person's place and they got a spare key and accessed the house, he felt some foul smell which came from a locked bathroom. That when they broke the lock to the bathroom, they found a manila bag placed in the bathroom and on opening it found the body of the deceased stuffed in it. He accompanied PW1 to Central Police Station where they reported and the police accompanied them back to the scene, took photographs and moved the body to the mortuary.



10. PW3, Ukasha Athman Ukasha said that on 16.12.2021, he had gone to swim with Nagib between 6.00 am and 8.00 am then returned to their respective homes. That on 17.12.2021 while he was coming from the mosque, he heard people say that there was a commotion at Nagib's house at night and he was crying "Mbona unaniua! Mbona unaniua!" That PW3 went home and tried to call the deceased twice on phone number 0787775881. That PW3 used the number 0722773080 but there was no response. That he made a call to Hamisi Pate, the brother of Nagib to know if he had any information. That they agreed to meet at Najib's house in Bondeni which they did but Abdul Majid resisted to open for some time. That he later opened and they entered and inquired where the father was as they were not getting him on phone. That he told them the father had gone to the farm in Mtwapa and they asked why he was not picking calls and Abdul told them his phone was faulty.
11. PW3 said that they were surprised that Najib had not attended Friday prayers. That whenever he was on the farm, they could contact him and talk. That it was usual for him to send spiritual messages to them on Fridays. That when they pressured the accused, he became violent and was talking loudly so they decided to leave. That the next day in the morning as usual, PW3 went to swim in the ocean and that he met Hamisi and they decided to report and call the police. That while on the way from the ocean, they met Ali who accompanied Hamisi to go to Nagib's house as PW3 went home. That Ali had found Abdul had left and that is why he went for Hamisi. That Ali had a spare key to Najib's house and when they opened and searched, they found the body of the deceased in the toilet. That PW3 was informed and he went to the scene and confirmed Najib had been murdered. He identified Abdul Majid as the accused in court.
12. PW4, Mwidadi Omar, the Government Analyst Mombasa testified that he had two documents namely: DNA report dated 15.3.2022 and the police exhibit memo form that he received on 29.12.2021 from PC Stephen Sachita No. 71711 from DCI Mombasa. PW4 said that on 29.12.2021 at the Government Chemist Mombasa, he received 7 exhibits: pocket knife that was marked A; red t-shirt with blood stains marked B; blue t-shirt with stains marked C; black short with orange lining – blood stained marked D1; black short with stains marked D2; 2 manila sacks with blood marked E1 and E2; and blue underwear with stains marked F.
13. PW4 said that they did the analysis for each exhibit and results confirmed that the knife A, manila sack E1 and short D2 tested positive for human blood by a method known as HEM Direct. The conclusion was that the knife Exhibit A generated a male DNA profile that matched the DNA profile generated from the black short Exhibit D2 and the manila sack Exhibit E1. That the other 4 exhibits did not generate any DNA profile. PW4 produced the report ExhP 3 (a) and the Exhibit Memo Form as ExhP 3 (b).
14. PW5, No. 76452 PC Faris Thoya previously based at DCI Urban conducting investigations testified that on 18.12.2021, him and PC Sachita were assigned to investigate a case whereby a person known as Najib Abdalla was found murdered in his house in Bondeni. That PC Sachita had visited the scene and on 18.12.2021, he accompanied him to Nairobi to effect arrest of the suspect, son of the deceased known as Abdul Majid Nagib. That they embarked on the journey to Nairobi based on information from Safaricom which tracked Tel. 0707949992. That the number had been subjected to analysis by Safaricom and it was established the suspect was tracked in Nairobi. That they arrived in Nairobi on 19.12.2021 and on 20.12.2021 using the same device from Safaricom and soft target, they located the accused in Juja between Citi Bank and KCB. That the suspect was wearing a cap and that PW5 asked him to remove. That PW5 learnt the healing wounds had been sustained when he was subjected to mob justice when he molested a woman a month earlier.



15. PW5 said that he asked him for his ID card and confirmed he was the one they were looking for. That they escorted him to Juja Police Station and prepared to bring him to Mombasa. That the suspect had a bag and an inventory was made of what was in the bag and his pockets including ID and blood stained pocket knife. That the inventory was dated 21.12.2021 and signed by PC Sachita and the suspect Abdul Majid Nagib. That having arrested the suspect and brought him to Mombasa on 22.12.2021, he was presented in court and detention orders sought where they were given 12 days. That they escorted the suspect to hospital for mental assessment and subsequently he was arraigned in court. PW5 identified the suspect arrested as the one in court.
16. PW6, PC Stephen Sachita testified that on 18.12.2021, a report of murder was made at Mombasa Central Police Station by Ali Mohamed Salim who said that they had found a dead body of his uncle in his house within Bondeni area. That IP Leonard Namutali visited the scene with other officers and photographs were taken before the body was removed to the mortuary for preservation and autopsy. He said that the matter was assigned to him for investigations and they revisited the scene with PC Chitenya where they recovered a blue and red t-shirts which had blood stains. They also recovered two black shorts and a light blue underwear. The exhibits recovered from the scene were taken for further investigations. PW6 travelled to Nairobi to follow the suspect who was living with the deceased prior to his death as they located his Safaricom line on the road towards Nairobi. That they located him on 20.12.2021 in Juja area around 3.00 pm. On arrest, the suspect was found in possession of the deceased's passport, his own passport, the deceased person's driving license, a mobile phone suspected to belong to the deceased, equity bank visa card in the name of Abdul Majid Abdulla, wallet carrying particulars of Abdul Majid Fate, national ID card, KCB ATM card and Absa ATM card for the deceased, old generational ID card for Salma Ali Sudi, letter addressed to the deceased dated 14<sup>th</sup> May 2018 by the Governor, bus ticket from Mtwapa to Nairobi issued on 18.12.2021.
17. PW6 stated that they requested for call data or SIM card No. 0720164400 which they established belonged to Nagib Fate; 0707949992 which they established belonged to Abdul Majid Abdalla, the suspect herein and 0700371745 which they found had no registration details. They did establish that the suspect had not made any withdrawals from the deceased person's Mpesa account. That although the accused denied having been around for 6 days prior to the day the body of the deceased was found, it was established he was within the locality of the house by the time the case was being reported. PW6 also said that on 17.12.2021, some relatives to the accused visited the house but the accused refused to let them in alleging the accused had travelled to Kilifi where they had bought land. PW6 investigations established that the accused person left the scene on the material morning and travelled to Nairobi. The exhibits recovered by PW6 were forwarded to the Government Chemist for analysis and a report – ExhP 3 prepared. PW6 produced the exhibits recovered from the house and those recovered from the accused person on arrest as ExhP 1-13.
18. In cross examination by Mr. Obonyo for the accused, PW6 said that Ali Mohamed went to get the spare key when they were unable to access the house as the door was locked. He said that Ali left the house some years back but he could not tell how many times he had accessed the house prior to December 2021. He said that he did not search Ali's house and did not take blood samples from Ali for analysis. PW6 also said the deceased went missing on 16.12.2021 and the body was recovered on 18.12.2021 at 0700 hrs. He said that the bus in which the accused travelled in left Mtwapa at 800am and that Safaricom data indicated that the accused left Mombasa towards Malindi Road and thereafter proceeded to Nairobi.
19. PW7, Dr. Gabriel Mngola, Senior Medical Officer at Coast General Teaching and Referral Hospital testified that Dr. Sharifa conducted postmortem on the body of Najib Fate and that Dr. Cathy Samba the pathologist in charge signed the postmortem report. That the postmortem was requested by



Central Police Station and the body was escorted by Sgt Ringera, IP Namutali and Ali Mohamed witnessed the postmortem on 18.12.2021 at Coast General Teaching and Referral Hospital. That on general observations, the body was covered with blood stained bedsheet, the body was of a male of Arab race, the deceased was 68 years old, of good nutrition, well built, strong, and height of 180 cm. That postmortem changes and assessment at time of death was that the body was partially decomposed with several skin marbelling.

20. PW7 said that on external appearance, the head had a cut on the chin, a cut on the right ear, a deep cut on the anterior chest and 4 stab cut wounds. That on the lower limbs, there were bilateral deep cuts on the thighs. He said that on internal appearance, the chest had massive bilateral hemothorax, sternum was fractured, there was fracture of the 5<sup>th</sup> ribs on the right side, the lungs on the left were punctured and there was massive haemopericardium with a punctured heart. That all other systems were found to be normal. That as a result of the examination, the doctor formed an opinion that the cause of death was haemorrhagic shock secondary to multiple deep cut wounds on the chest and thighs. That Dr. Sharifa signed the postmortem report and the pathologist in charge also signed on her behalf. PW7 produced the postmortem report as ExhP14.
21. PW8, No. 236533 IP Leonard Namutali, formerly the OCS Anti-Crime, Central Police Station Mombasa testified that on 18.12.2021 at around 0700 hrs while at Central Police Station Mombasa, 2 people, Ali Mohamed Salim and Hamisi Fate, went to the station and reported that their brother who had gone missing for 3 days had been found murdered and his body stashed in a manila sack and locked inside a toilet in the house. That PW8 booked a report and organized a team of officers to visit the scene. That on arrival at the scene, they found the body of Najib Abdalla, the deceased, having been murdered and the body put in a sack and placed inside the toilet. That they retrieved the body and found it had multiple cuts. The scene was processed and removed to coast General Hospital Mortuary.
22. PW9, No. 80072 Sergeant Benson Ingotsi attached at Malindi DCI performing crime scene investigation duties gazette under Gazette Notice No. 217 of 2012 testified that on 18.12.2021 at around 0900 hrs, he was requested by CIP Namutali of Central Police Station Mombasa to join him in Bondeni area within Mombasa Township for purposes of processing suspected murder scene where it was reported a decomposing body was discovered in a bathroom in the house stuffed in manila sacks. That on arrival, he found DCI Mombasa and police officers from Central Police Station.
23. PW9 said that photographs of the scene that he took included close upshot of the general view of the house from the outside, tight close upshot showing unscrewed lock of the bathroom door, close upshots showing the body in a manila sack inside the bathroom, close upshots showing general view of the body after being retrieved from the sack, close upshots showing facial view of the deceased with stab wounds on the right side of the head, tight close upshots showing blood stains on the floor and wall of the bathroom, photograph showing ransacked master bedroom in the house. PW9 said that he took the photographs and prints were processed under his supervision. That they have not been touched or interfered with in any way and he produced the bundle of 13 photographs as ExhP 2 (a) and the crime scene report dated 12.4.2022 as ExhP 2 (b).

### **Defence Case**

24. The accused testified that the deceased was his father and prior to his demise he was living with him from the year 2014 when he came to Kenya. He said that there has never been a grudge between him and his father and that they lived peacefully. The accused said that he made money from producing music which was initially a hobby that he turned into a job. That his siblings from Dubai also sent them money for bills and maintenance and that the money sent was Kshs. 30,000 and it was his father's. The accused said he worked from home and whenever he made enough money, he allocated time within the



- year for vacation in Nairobi or Nakuru every 2 to 3 months. The accused said that in 2020, his father was very sick and was living at the farm in Kilifi. That a friend of his reached out to the accused and informed him of his father's condition and that he needed someone to go and bring him back home. That the accused went for his father and brought him back home and that he took care of him while he was ailing which included helping him take a shower and go to the toilet.
25. The accused said that on 23.10.2021, he was returning from the mosque with his father when he was stopped by a young man who proceeded to shout "Why did you touch my mother!" That before the accused could respond, he attacked him with a metal rod in his hand. That he was injured on the forehead and at the back of his head. That his father was behind and when he caught up with him where the two guys were attacking the accused, he stood between them and pleaded with them to leave the accused alone. That the accused's father was also beaten in the course of restraining the two. The accused said he was bleeding and that his father administered first aid on him before taking him to hospital where he got stitches on his head. That the matter was reported at Central Police Station vide OB No. 61/23/10/2021 and the OB extract – ExD1. That no one was arrested following the attacks and that the accused made follow ups with the officer who recorded his statement and that he told them that his life was in danger.
26. The accused said that he left home on 14.12.2021 and headed to a female friend's house in Shanzu where he stayed until 18.12.2021 when he boarded a bus from Mtwapa to Nairobi and that his dad was aware he was going on vacation and he was very happy as when he was in the area, he was worried about him. That he was arrested in Juja Town in Kiambu County where he was meeting a female friend and that when he was just about to hug the said friend, a man pulled his jeans and said he was the one who murdered the deceased. That they were taken to the police station and the girl was interrogated and left to go.
27. The accused said that on 14.12.2021, he called his father and told him that he had arrived safely at his friend's place in Shanzu. That however, when he arrived in Nairobi, the accused called his father but he did not pick and that he left him a message on his number 0720164400 that he had arrived safely in Nairobi. That his father had two phones and the other one was in his possession as he took it to Nairobi because it needed to be repaired and that the accused was the one who handled the technology. The accused said his father was very dear to him, took care of him, paid his school fees until he graduated. That he had no reason that would want to make him hurt his father and that there is nothing he stands to benefit from his father's death.
28. DW2, Fatma Mohamed Yusuf testified that the accused is her son and the victim of the murder was her ex-husband. That she lived with the accused until he got to grade 12. That when he wanted to start university, it was very expensive and she allowed him to come to Kenya for the father to pay his fees. That since the accused started living with his father, she never heard of any problem. That there was a time the deceased was very sick and her sister-in-law went to take care of him together with the accused. That their relationship was very good and they lived together for 6 to 7 years and she never heard of any altercation. That the accused worked from home in Bondeni in Mombasa and sometimes he could go to Nairobi.
29. DW2 further said that the deceased had a farm in Mavueni and he could go to the farm whenever he had a project. That DW2 learnt on Saturday, 18.12.2021 that the deceased was missing. That it was her sister who sent a message that the deceased was missing. That they used to video call on Saturdays and DW2 gave the kids to talk to their father. That DW2 knew the accused as a selfless and simple person who wanted to study to have his own career. That the accused was attacked twice in the neighbourhood but she does not know who did it or what the motive of the attack was. That the first attack was very bad and almost left him blind while the second attack was on his head. That a report was made and



nothing was done and that it was the deceased who intervened. DW2 said there was no reason why the accused could have killed the deceased.

### Accused Person's Submissions

30. The accused person submitted that when an accused person pleads an alibi, the burden of proving the falsity lies with the prosecution. The accused cited the case of *Victor Mwendwa Mulinge v Republic* (2014) eKLR while addressing alibi defence and they urged the court to find that the prosecution evidence on record failed to displace the defence of alibi of the accused.
31. The accused argued on whether the prosecution discharged its onus that at the time of the offence, he was in Nairobi on holiday and later travelled to Juja and Kiambu County. That he called his mother (DW2) who supported his claim and confirmed that indeed the accused person had been on holiday in Nairobi. That although the fact of the deceased's death was ascertained, the cause of his death was not proved, and although the postmortem report indicated that the cause of death was hemorrhagic shock due to multiple deep cut wounds on the chest and thigh, it was also not clear what weapon had been used to kill the deceased.
32. That the accused raised an alibi defence and also relied on the cases of *Wangombe v Republic* (1980) KLR 149 and *Adedeji v the State* (1971) 1 All N.L.R. 75. The accused submitted that the prosecution's case is based purely on circumstantial evidence and that there is no witness who told the court that they saw the accused committing this offence. That there is evidence by PW2 that he was told by one of the neighbours that he heard the deceased's voice saying "unaniu, unaniu" but the same was not substantiated.
33. The accused contended that the offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code. That the definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted. The accused person relied on the definition of malice aforethought under Section 206 of the *Penal Code*.
34. The accused submitted that according to PW1, PW2 and PW3, the deceased and the accused enjoyed a good relationship as father and son. That the prosecution therefore failed to establish motive on the part of the accused to warrant the commission of the offence. That the accused person took care of his deceased father during the Covid pandemic and if there was intention on his part, he would have killed his father then. The accused further submitted that the prosecution failed to adduce evidence to identify the accused positively as the one who murdered the deceased. That according to the witnesses, the accused was the only son of the deceased and they lived in the same house but neither of them saw the accused killing his father, and the neighbours who purportedly heard the deceased scream and saw the accused leave the house shortly after, were not brought to court to give their testimonies.
35. The accused argued that the evidence surrounding circumstances to a crime is the best evidence and that courts in this country have taken cognizance of this fact in various decisions. The accused cited the cases of *Neema Mwandoro Ndurya v R* (2008) eKLR, *R v Taylor Weaver and Donovan* (1928) 21 Cr. App R 20. That however, caution is called for when relying on circumstantial evidence as was held in *Teper v R* (1952) AC at p. 489.
36. The accused stated that during the hearing, the issue of murder weapon was raised and the police tried to include a murder weapon insinuating that the murder weapon was a knife. That a postmortem was not done to ascertain the length and/or width of the stab wounds to match with the alleged murder weapon. That the said murder weapon which was brought to court was a clean knife but during cross



examination, the police officers tried to insinuate that it was blood stained. That the blood samples taken from the scene of crime was not matched with that of the accused yet he was available to be tested. That the fact that the accused person was in Nairobi at the time of the deceased's death exonerates him from being the culprit in the murder of his deceased father.

37. On whether the accused was present at the scene of the offence when the said offence was committed, the accused submitted that at the time of the incident, he had gone to Nairobi on holiday, and his mother DW2 corroborated his evidence. That PW1, PW2 and PW3 identified the accused as the person who killed the deceased based on what they heard from neighbours that the deceased was shouting, and afterwards they allegedly saw the accused person leaving the house very early in the morning. That the said evidence was merely hearsay which is not admissible in law in according to Article 50 (4) of *the Constitution* and in the cases of *Kinyatti v Republic* Cr. Appeal No. 60 of 1983 (CA) and *Burunyi & Anor v Uganda* Cr. Appeal No. 1968 EA 123. The accused also relied on the case of *Abamad Abolfathi Mohamed & Another v Republic* (2018) eKLR.

### **Analysis and Determination**

38. In consideration of the evidence of 9 prosecution witnesses and in consideration of the defence witnesses' sworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.
39. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -
- 'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'
40. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -
- i. That the deceased died;
  - ii. That the death was caused by an unlawful act or omission;
  - iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
  - iv. That there was malice aforethought.

### **Death of the deceased**

41. There is no dispute as to the death of the deceased. The body of deceased was found stuffed in manila bags and locked in a bathroom with multiple cuts all over the body as well as the fractured of the sternum and 5<sup>th</sup> rib on right side. There was also a punctured left lung and a punctured heart.

### **Whether death was caused by an unlawful act or omission**

42. The injuries observed by the pathologist in ExhP14 – Postmortem Report are such that they could not have been self-inflicted and they were not accidental. There were multiple cuts all over the body with fractures and puncture to the lungs and heart that led to massive hemothorax and hemopericardium. Dr. Sharifa is of the opinion that cause of death was hemorrhagic shock secondary to multiple deep



cut wounds to the chest and thigh. It is no doubt therefore that the cause of death was through an unlawful act.

### **Participation of the accused in the commission of the alleged offence\*\***

43. According to the submissions by the accused person's advocate, the prosecution failed to displace his defence of alibi to the effect that he was in Nairobi at the time that the offence was committed. Reference has been made to the authority of *Victor Mwenda Mulinge v Republic* (2014) eKLR where the Court of Appeal while addressing the defence of alibi stated as follows: -

“It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs. R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”

44. The Court of Appeal Case of *Wangombe v Republic* (1980) KLR 149 *Adedeji v State* (1971) 1All N.L.R. 75 were also relied upon by accused person to support the position that he was not at the scene and that the prosecution's case relies entirely on circumstantial evidence that has not been substantiated.

45. It is true that the accused person said that he left home on 14.12.2021 and that his father was aware that he was going on a vacation. That he first went to a female friend's place in Shanzu and it is from there that he boarded a bus from Mtwapa headed to Nairobi on 18.12.2021 from where he was arrested on 20.12.2021 in Juja on allegations that he had killed the father and brought back to Mombasa. The accused person said the deceased was dear to him and that he had no reason to hurt him and that he was not a murderer. He said that the people who attacked him are the ones who murdered his father.

46. The evidence of prosecution witnesses PW2 and PW3 was however that they used to go for prayers with the deceased at the mosque at dawn, at 1.00 pm, at 4.00 pm, and in the evening and that the last time they saw the deceased was on 16.12.2021. That on 17.12.2021 when they did not see the deceased attend prayers and they had information that the neighbours heard commotion in his house at night, PW2 and PW3 together with their sister Maimuna and her daughter went to the deceased house at night. That they knocked the door and could hear prayers and recitation of the Quran on a laptop but the accused who was in the house refused to open the door. That Maimuna persistently knocked the door until the accused person opened and when they asked where the deceased was as they were not finding him on phone, the accused person explained that the deceased had gone to his farm in Kilifi and that his phone was faulty and that is why he was not being reached.

47. PW2 and PW3 said that the accused person was not giving them straight answers and they decided to leave. They also said that at that time, there were young men in the neighbourhood who had gathered at the deceased person's house and wanted to invade and establish the whereabouts of the deceased as he had not been seen but the village elder restrained them. PW2 and PW3 went to the deceased house on 17.12.2021 at 9.00 pm in the night and they said they found the accused person.

48. PW1 also testified that when his aunt Fatma Ahmed instructed him to go to the deceased person's house and look for him as he was reported missing, he found there were prayers going on in a computer that were very loud and could be heard from the house but nobody opened for him the house. That a neighbor told him that someone had just left the house a few minutes before he arrived.



49. The accused person alleged that he was a female friend's place in Shanzu from 14.12.2021 to 18.12.2021 when he travelled to Nairobi for holidays but he did not give the name of the said female friend and according to PC Stephen Sachita, PW6, the accused person's call data located him within the locality of the deceased person's residence on 18.12.2021 at 8.00 am before heading to Mtwapa where he boarded a bus destined for Nairobi. The accused person was tracked using his mobile phone in Juja, Kiambu County.
50. The accused person does not explain how and why he was in possession of his father's personal effects such as a passport, driving license, national ID, wallet, and ATM Cards if he was going for a holiday and that he had left his father in the house six days prior to the deceased person's death. This explains that the defence of alibi is an afterthought which cannot therefore be regarded and the evidence of the prosecution witnesses places the accused person at the scene of the crime.
51. From the evidence of the three prosecution witnesses, PW1, PW2, PW3, PW5 and PW6 this court finds that the appellant's allegations that he had been away from 14.12.2021 and that he was not present when his father was murdered is outweighed and dislodged by the evidence of prosecution witnesses. Being that it has been established that the accused person was present at the scene of the offence and that he was the only one occupying that house with the deceased, the only inference that one can make is that he is the one who committed the unlawful act of inflicting fatal injuries on the deceased.

### **Malice aforethought**

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

“Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances: -

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person is the person 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

53. On the element of malice aforethought in respect to Section 206 of the Penal Code, the court held as follows in the case of [Isaac Kimathi Kanuachobi -vs- R](#) (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”



54. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No. 32 of 1990) where the Court held:

“ the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

55. Evidence was adduced and submissions made as to the good relationship between the accused and his father the deceased herein and the investigating officer confirmed this fact. However, the nature of injuries inflicted on the deceased person which included multiple cuts all over the body, the fractures noted by the pathologist, the stuffing of the body in manila bags, and an attempt to conceal the murder by locking the body in a bathroom/toilet as well as playing loud music to destruct suspicion by the neighbours and finally lying to PW2 and PW3 that the deceased had gone to his farm in Kilifi only for the accused to escape the following day on 18.12.2021 is evidence of express malice on the part of the accused person.

56. In conclusion, this court therefore finds that the prosecution has proved its case beyond reasonable doubt. The accused person is found guilty of the offence of murder and convicted in accordance with Section 322 of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 31<sup>ST</sup> DAY OF OCTOBER 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Mr. Obonyo Advocate for the Accused

Accused person present in person

Mr. Ngiri:

We don't have previous records.

Mr. Obonyo Advocate:

We can mitigate immediately. The accused is a young man and he was the sole caregiver of his father. This court takes into account the good relationship he had with the father and give lenient sentence. The accused is a first offender. I pray that court considers sentiments of the family.

**Order:**

Mention on 14.11.2023 for Victim Impact Statement, pre-sentence report, psycho-social report and sentence. Certified copies of judgment to be supplied to parties.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

