



**Republic v Mwangangi (Criminal Case 52 of 2015)  
[2022] KEHC 11788 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 11788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 52 OF 2015  
MW MUIGAI, J  
AUGUST 3, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ROBERT MWANGANGI ..... ACCUSED**

**JUDGMENT**

**Background**

1. The accused person, Robert Mwangangi Kioko was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. In the Information, the particulars of the offence are that on 30<sup>th</sup> day of May, 2015 at Kyawango Location in Mwala Sub-County within Machakos County, the accused person murdered Kata Muasa.

**Court Proceedings**

2. On 6<sup>th</sup> July, 2015, the charge, ingredients and particulars of the offence of murder were read to the accused person in Kikamba language, the accused person responded that 'It is not true' and plea of not guilty was entered.

**Evidence**

The trial was conducted and proceedings commenced and evidence was heard and recorded by the Trial Court hon D K Kemei J as follows;

3. PW1, Mutanya Muasa testified that on 30.5.2015 at 1400 Hours while at home, the deceased arrived home and was being pursued by the accused, they got hold of each other and the accused floored the deceased on the ground and he saw blood oozing. He told the court that deceased seem to have been stabbed with a knife since blood was oozing from the upper part of the deceased's chest and that he



- saw the assault weapon. PW1 screamed for help and the deceased was screaming for help too. PW1 pointed the knife that stabbed the deceased which was marked as MFI-1(One pen knife (flick-able and blood stained)).
4. In cross-examination by Advocate for the Accused person, Muthama, PW1 stated that the incident took place at around 2.00 pm. It was his testimony that he could not tell whether the deceased and accused had come from a drinking spree but the accused arrived while claiming that he would kill the deceased. According to PW1, the accused got hold of the deceased and suddenly the deceased was floored on the ground and the accused was on top of the deceased. It was his testimony that the knife was abandoned at the scene beside the deceased's body.
  5. In re-examination, PW1 stated that on returning from calling neighbours, the accused had fled the scene.
  6. PW2, Mutune Kivundu testified that on 30.5.2015 he heard screams from his neighbor Mutania Muasa who lived 100 meters away. He stated that he found the deceased lying down on the ground bleeding profusely from the upper part of the chest, while the accused was on top of the deceased. According to PW2, he knew both the deceased and accused who are his neighbours. He stated that he raised alarm and the accused ran away. He pointed the knife recovered from the scene. He stated that the knife was and is still blood stained. PW2 stated that the accused was wearing a black vest and T-Shirt which he identified in court.
  7. In cross-examination by Muthama, PW2 stated that he found Mutania, Robert and deceased. It was his testimony that the knife was beside the body of the deceased. He stated that he saw the blood stained knife.
  8. PW3, Francis Sikuku Maundu an Area Assistant Chief testified that on 30.5.2015 at around 3.00 hours he received a report that the accused and the deceased were fighting. He rushed to the scene where he found the deceased lying on his back on the ground facing the sky and there was blood oozing from his chest. According to PW3, there was a knife beside his body. That he alerted the police but the accused had already escaped from the scene and linked up with Village elders and later traced him near a river while relaxing. The Police Officers visited the scene and collected the body of the deceased. PW3 testified that the accused was dressed in a black T-shirt stained with blood and jeans which he identified in Court.
  9. In cross-examination by Muthama, PW3 stated he did not witness the incident and how it took place.
  10. PW4, Kyalo Mwaya testified that on 30.5.2015 at around 6pm, he received a call from the Area Assistant Chief Francis Sikuku that the deceased had been killed and that he was to assist to search for the Accused person Robert Mwangangi. PW4 stated that they traced the accused at Chanambo River who wore a Black T-Shirt which he identified in Court.
  11. In cross-examination by Muthama, PW4 stated that he did not witness the incident.
  12. PW5, PC Dan Onyango Ndura testified that on 30.5.2015 at around 11.50 hours, he accompanied the OCS Masii to a scene where they found the deceased lying in their compound and covered with a blanket and when they uncovered the body , they noticed a wound on the chest oozing blood. That there was a pen knife near the body which was blood stained. He testified that blood of the deceased and the accused was collected and handed over to the Government Chemist. On 4.6.2015 he attended a post mortem examination of the deceased. It was PW5's testimony that he had known the accused prior to his arrest.



13. In cross-examination by Muthama, PW5 stated that he did not lift finger prints on the murder weapon so as to link it with the suspect but there were eye witnesses. He stated that he re-arrested the accused who appeared then to be drunk.
14. PW6, dr Waithera Githendu a Consultant Pathologist in Machakos County testified that on 4.6.2015 she carried out a post mortem examination on the deceased where she found the body had a stab wound on the left chest and there was excessive bleeding of about 2.5 litres of blood. That the stab wound extended to the left lung and the spleen had shrunk due to excessive bleeding. PW6 opined that the cause of death was chest injury due to stab wound.
15. They took blood samples for analysis. According to PW6, the weapon was a sharp and penetrating one. She produced the Post Mortem Report as Exhibit- 3.
16. In cross-examination by Kyalo, PW6 stated that they took blood samples for comparison purposes.
17. PW7, Elizabeth Waithera Syengo a Government Analyst testified that she had been requested by PC. Dan Njura of Masii Police Station to analyze blood samples of the accused and the deceased, a knife and a black t-shirt to determine the origin and presence of blood stains on the items presented.
18. PW7 found that the DNA profile generated from bloodstains on the T-shirt Item marked -D3 indicated as that of the Accused person Robert Mwangangi. The bloodstains on the knife Item marked D4 matched the DNA profile from Blood sample Item marked D2 indicated as that of the deceased Kata Muasa. PW7 produced the Government Analyst Report as Exhibit -4.
19. In cross-examination by Muthama, PW7 stated that the report was made two years after receipt of the samples. PW7 stated that she was not present during the extraction of the samples.
20. In re-examination, PW7 stated that the analysis delayed due to backlog of cases and also lack of resources.
21. The Trial Court granted parties time to file and serve Written Submissions on 31/10/2019. On 29/1/2020, the Trial Court delivered Ruling on a Case to answer and the Accused person was called upon to give his Defense under Section 306 of the [CPC](#).

### **Taking Over Trial Court**

22. This Court took over the matter at this juncture. The parties through their respective Counsel were served with typed proceedings and the same was confirmed on 2& 4/11/2021. The Court had the Accused person informed of his rights under Section 211 [CPC](#) and opted to give Sworn Testimony and called 1 witness. This Court heard and recorded the evidence on record as follows;

### **Defense Hearing**

23. In his evidence the accused testified as DW1stated that he did not kill the deceased. He stated that on 30.5.2015 at 9.00 am, he went to the bar and found the deceased. They drank together and went home by 12 noon. When they got near home the Accused person asked the deceased for his money but the deceased abused him and his mother. They started fighting, held each other and they struggled. He stated that deceased had a knife in his pocket. He removed it to stab the accused but accused defended himself and they fell down. He stated that he held the knife, pushed the deceased down and stabbed the deceased by mistake.
24. He stated that they were both drunk at the time as they came from a bar. It was his testimony that PW1 and PW2 came and separated them. Thereafter, he went to the River and slept there. He did not know



the deceased died until the next day. It was DW1's testimony that he had no grudge with the deceased and his family. That he was drunk and became angry. He stated that he was remorseful for the death of the deceased.

25. In cross-examination by Mwongera, DW1 stated that they were drunk. He stated that he did not have the pen knife but it was the deceased who had it. He stated that it is not true that the deceased's mother saw him stab the deceased. According to DW1, after the incident he did not run away.
26. In re-examination by Court, DW1 stated that he did not have the knife and did not run away. He stated that PW1 and PW2 found them there and they separated them. They did not run away.

### **Prosecution Submissions**

27. On behalf of the Prosecution, it was submitted that PW1 and PW2 placed the accused in the scene of crime. PW1 was present in the house and witnessed when the Accused person stabbed her son. PW2 came into the compound and found the deceased bleeding from the chest while the accused was on top of him and the accused ran away.
28. According to Prosecution, the accused had malice aforethought as prescribed under Section 206 of the [Penal Code](#) because he inflicted injury to the deceased by stabbing him with a knife.
29. It was submitted that the accused was properly identified by PW1 and PW2 who were present in the crime scene. PW1 witnessed the accused stab the deceased in her compound.
30. PW6 opined that the cause of death was a chest injury secondary to stab wound. PW7 stated that she scrutinized the Knife and T-shirt which she concluded the blood stains on them matched the DNA profile generated from the blood samples of the deceased.
31. It was submitted that the accused evidence is an afterthought hence cannot shake the prosecution cogent evidence before the Court. According to the Prosecution, it proved the case beyond reasonable doubt hence accused should be convicted under Section 203 as read with Section 204 of the [Penal Code](#).

### **Accused Person's Submissions**

32. On behalf of the accused person, it was submitted that the prosecution witnesses never saw the accused kill or attack the deceased hence it is a case premised on circumstantial evidence. Reliance was placed on the case of *Sawe v Republic* [2003] eKLR, *Republic v Kipkering Arap Koske & another* [1949] 16 EACA 135, *Simoni Musoke v Republic*[1958]EA 715 where court set out the parameters required for the Prosecution to sustain a conviction on circumstantial evidence.
33. Reliance was placed on the case of [Erick Odhiambo Okumu v Republic](#)[2015]eKLR where court set out three tests as follows:-
  1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established
  2. Those circumstances should be of a definite tendency un erringly pointing towards the guilt of the accused
  3. 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.



34. It was submitted that the circumstantial evidence by the state does not form a chain that is so complete to infer the guilt of the accused when all the evidence is taken as a whole. That the accused did not have the motive to kill the deceased. According to the accused, motive is relevant where the case is entirely premise on circumstantial evidence as held by court in *Libambua v Republic* [2003] eKLR. It was submitted that the accused stated that he did not have any dispute or bad blood with the deceased and no ill motive was established by the state to warrant the charges against the accused.
35. According to the accused, under Section 111(1) and 119 of the *Evidence Act* a statutory rebuttable presumption exists and in this it exists against the accused person. It was submitted that the state never proved the alleged murder weapon belonged to the accused. According to the accused, that burden has not been discharged against the accused. It was submitted that the Prosecution has failed to establish a case against the accused and should be acquitted of charges under Section 215 of the *Criminal Procedure Code*.

### **Determination**

36. I have carefully considered evidence on record and submissions by parties through Counsel. The issue for determination is whether the Accused person committed the offence of murder as charged.

### **Evidence By Previous Court**

1. With regard to the fact that the proceedings were partly conducted by the Trial Judge hon D K Kemei and partly before this Court particularly only with regard to the Defense Hearing; the provisions of Section 200 (3) *CPC* were not applicable in that the provision provides;
  - (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
50. In the instant case this Court took over the matter after the Prosecution case was closed before the Trial Judge, parties' through their respective Counsel were granted opportunity to file written submissions and thereafter, the Trial Judge after considering the evidence adduced, the law and submissions filed rendered the Ruling of 29/1/2020 and confirmed a prima facie case was established and set down the matter for Defense Hearing.
51. The Ruling of 29/1/2020 is and remains a valid, regular and legal order of the Trial Court with similar, concurrent, competent and equal jurisdiction to/with this Court and therefore this Court cannot reopen the Prosecution case in light of Section 200(3) *CPC* by recall of witnesses and /or hearing of the matter de novo because it would amount to rehearing a matter already heard and Ruling delivered by the Trial Court.
52. Therefore, this Court applied Section 200 (1) *CPC* that provides;
  - (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
    - (a) .....



- (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

Section 201 CPC also provides;

- (1) .....
- (2) The provisions of Section 200 of this Act shall apply *mutatis mutandis* to trials held in the High Court.

53. It is on the basis of the above provisions that the Court informed Accused person of rights under Section 211 CPC and through his advocate elected to give a sworn statement in Defense hearing and now the Judgment is underway.

In criminal case the burden of proof solely rests with the Prosecution. In the celebrated case of *H.L(E)Woolmington v DPP* [1935] A.C 462 pp. 481, Viscount Sankey L.C held that:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

37. The standard of proof is proof beyond reasonable doubt. According to Lord Denning on what is proof beyond reasonable doubt in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated that:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

38. The accused person is faced with the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

39. In *Republic v Mohammed Dadi Kokane & 7 Others* [2014] eKLR the elements of the offence of murder were listed by M. Odero, J. as follows:-

- 1) The fact of the death of the deceased.
- 2) The cause of such death.



- 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
  - 4) Proof that said unlawful act or omission was committed with malice aforethought.
40. Similarly in *Roba Galma Wario v Republic* [2015] eKLR court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional...”

### **Direct Evidence On Record**

41. In this case, the Court finds direct evidence has been adduced by PW1 and PW2. According to the accused person, no witnesses saw him hence any evidence in this matter is circumstantial. The court notes that the evidence on record confirms that PW1 was present when the fight ensued between the deceased and accused while PW2 arrived at the scene and found the fight between the Accused person and deceased going on. PW1 sought help from neighbours. PW2 whose home was 100 meters away from PW1 heard screams from PW1 home and ran to PW1’s home. He stated that he found PW1, accused and deceased at the scene of crime. They both saw the accused taking off. PW1 & PW2 also saw the knife that was bloodstained at the scene. The Knife was collected and presented to the Government Analyst who confirmed the bloodstains were the deceased’s blood.

42. The Court of Appeal in *PON v Republic* [2019] eKLR had this to say on direct evidence;

“In its ordinary meaning, direct evidence would be that which directly links a person to a crime; that which is based on an eyewitness account, on personal knowledge or observation. The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased meet her death. There is no such evidence hence the recourse to circumstantial evidence...”

43. Odunga J. in *Republic v Martin Kiiro Ngei* [2019] eKLR 52 stated that:

“Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eye witness, asserts actual knowledge of a fact, that witness’ testimony is direct evidence.”

44. Direct evidence is evidence premised on an eyewitness account, on personal knowledge or observation. PW1 and PW2 saw the accused at the scene of crime on top of the deceased.

### **The fact of the death of the deceased.**

45. The fact of death of the deceased herein is not in dispute. All the prosecution witness confirmed the death of the deceased. PW3 found the deceased covered with a blanket. The postmortem report produced as exhibit 3 bears the name of the deceased. According to PW6, the body of the deceased was identified by Muasa Mutune (Father) and Kilo Mutune (Uncle); the two relatives identified the deceased body at the mortuary.



## **The cause of death**

46. The cause of death was explained by PW6. PW6 confirmed the cause of death was due to chest injuries secondary to a stab wound by an assailant as per the postmortem report dated 4.06.2015. She stated that the body had stab wounds on the left chest. She stated that there was excessive bleeding of about 2 litres of blood. That the stab wound extended to the left lung and the spleen had shrunk due to excessive bleeding. She stated that the weapon was sharp and penetrating one. PW1 and PW2 stated that they saw blood oozing from the upper part of the chest. PW1 to PW5 stated that there was knife beside the body of the deceased. PW6 opined that the cause of death was chest injury due to stab wound.

## **Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons**

47. The accused in his defense did not dispute that he stabbed the deceased but asserts that it was by mistake. He stated that they were both drunk. He stated that he got hold of the knife and stabbed the deceased by mistake when the deceased removed the knife to stab him. As per the Court record, PW1 stated that it was after the deceased was floored on the ground that PW1 saw blood oozing from the upper part of the deceased's chest. In cross-examination PW1 stated that the accused arrived at their home while claiming that he would kill the deceased. PW1 and PW2 stated that the deceased was on top of the deceased. PW6 examined the deceased body. She stated that the deceased had been stabbed on the left chest by an assailant which led to an excessive bleeding of about 2.4 litres of blood. The stab extended to the lung. She noted that the weapon was sharp and penetrating one.
48. This Court has considered the evidence on record by the Trial Judge as outlined above and also, in particular the Ruling of 29/1/2020 by the Trial Court which reads in part;

The prosecution evidence does establish the 3 ingredients of the offence of murder. It is not in dispute that there was death and the cause was established. On the question of the Accused's participation, this Court finds that, in the absence of any evidence to the contrary, the evidence of PW1 does establish participation by the Accused person..... The said PW1 is the key eye witness to the incident.

49. The Court finds from totality of the evidence on record that put the Accused at the scene of the offence and direct evidence by PW1 who witnessed the Accused and Deceased fighting until the deceased's death and the Defense by the Accused person where the accused admitted that they fought, struggled and resulted in stabbing the deceased by mistake, the Accused person's actions led to the death of the deceased. The Accused's did the unlawful act which caused the death of the deceased.

## **Proof that said unlawful act or omission was committed with malice aforethought.**

50. Section 206 of the *Penal Code* sets out the circumstances which constitute malice aforethought as follows:

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

- (a) An intention to caused death or to do grievous harm to any person whether such 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 such person is the



person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.

- (c) An intention to commit a felony.
- (d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

51. The Court of Appeal in *Nzuki v Republic* [1993] KLR 171 held that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed.

The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v Director of Public Prosecutions* [1975]AC 55”. (emphasis added).

52. In the case of *Daniel Muthee v Republic* Criminal Appeal no 218 of 2005 (UR) cited in the case of *Republic v Lawrence Mukaria & another* [2014] eKLR, Bosire, O’kubasu and Onyango Otieno JJA., while considering what constitutes malice aforethought observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the *Penal Code*.”

53. Malice aforethought is the mental element (or *mens rea*) required to prove the offence of murder which has to be established by the Prosecution. The prosecution has proved that the accused caused the death of the deceased but also the mental element of the accused has to be proved as well for the court to determine whether the offence of murder has been proved beyond reasonable doubt or not.

54. In *Joseph Kimani Njau v Republic* [2014] eKLR the Court of Appeal stated that:-

“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.....”

55. The evidence on record is that, PW1 stated that the deceased was pursued by the accused person. He stated that the accused and deceased fought whereby the accused floored the deceased down on the ground. PW1 saw blood oozing from the deceased’s upper chest when the deceased was on the ground and the Accused on top of the deceased. PW1 saw the knife which was bloodstained and identified it in Court as the one the Accused person used to stab the deceased.
56. PW1 stated that the deceased was screaming for help. In cross-examination, PW1 stated that the accused arrived at their home claiming that he would kill the deceased. It was PW1’s testimony that after the incident, the knife was abandoned at the scene beside the body and PW1 rushed to call the neighbors who came and found the knife.
57. The evidence on record is that PW2 stated that he heard screams and ran to check. He stated that it was at PW1 home that he found the Accused person on top of the deceased and blood was oozing from the upper chest of the deceased. According to PW2, the accused ran away from the scene when he saw them. PW3 found the accused near a river while PW5 stated that the accused appeared drunk. It was the accused’s testimony that they were on drinking spree with the deceased before they came home.
58. According to PW6, the deceased had excessive bleeding of about 2.5 litres of blood. She stated that the stab wound extended to the left lung and the spleen had shrunk due to excessive bleeding. According to PW6, the weapon was sharp and penetrating one. According to PW1 to PW5 the knife was on the side of the deceased body. All the witnesses stated that the knife was blood stained and identified it in court as the one that was found at the scene of the crime.
59. It will be noted that PW1 only saw blood oozing from the deceased after he was stabbed by the Accused person, and did not know who had the knife or whether the knife came from the deceased pocket but the accused has admitted that he took the knife from the deceased who had the knife in the pocket. PW1 and PW2 only saw blood oozing from upper chest of the deceased and did not know how the deceased was stabbed or who was holding the knife. However, it will be noted that the accused ran away when PW1 and PW2 came to the scene of the crime only to be found near a river. The accused came to PW1 home claiming that he would kill the deceased. PW6 stated that the stab came from a weapon that was sharp and penetrating.
60. PW7 confirmed that the bloodstains on the knife were of the deceased. The bloodstains on the black T-shirt the Accused person had were said to be of the blood of the Accused person. This Court finds this outcome strange in light of the evidence on record, the Accused person was not stabbed nor was/ is there any evidence on record of any injuries the Accused person sustained or any medical attention he received. It is also noted that examination of the exhibits was after 2 years.
61. The prosecution witnesses, PW1 and PW2 stated that the knife in Court was the one found at the scene of crime. They stated that accused was the one at the scene of crime. The Accused did not controvert the prosecution witness evidence about the knife. In fact stated that he used the knife to stab the deceased but it was a mistake.
62. According to the accused person, the Prosecution did not prove that he had motive to kill the deceased. It was submitted that the accused stated that he did not have any dispute or bad blood with the deceased and no ill motive was established by the state to warrant the charges against the accused. Indeed no evidence has been adduced to show that there was bad blood or grudge between the accused and deceased. The accused stated that they had come from a drinking spree. The only evidence adduced that led to the death of the deceased was the fight between the accused and deceased. PW1 cannot tell who



was in possession of the knife despite the death of the deceased. In light of the unconfirmed position from the evidence on record in terms of who had the knife, the Accused person or the deceased person and the outcome of the Government Analyst Report, the issue of motive is in doubt and unconfirmed.

63. Section 9(3) of the *Penal Code* stipulates that unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.
64. In the offence of murder, the motive has to be the motive with malice aforethought nothing more or less. In *Nzuki v Republic* [1993] (*supra*), the Court in substituting Nzuki's charge of murder with manslaughter observed:

“ there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

65. The Court is not satisfied that malice aforethought has been established in terms of Section 206 of the *Penal Code* despite that admission by the accused that he stabbed the deceased. A life has been lost and the accused has admitted having stabbed the deceased, but based on the evidence in totality, I am unable to find that the ingredients of murder have been proved.
66. Section 179 of the *Criminal Procedure Code* provides-
- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
  - (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

### **Disposition**

67. In the premises, the Court hereby reduces the charge of murder to manslaughter. The accused is acquitted of the charge of murder but convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

**DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS ON 3RD AUGUST 2022.  
(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

