



REPUBLIC OF KENYA



**Republic v Muruiki (Criminal Case E019 of 2020)
[2022] KEHC 13089 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E019 OF 2020
LM NJUGUNA, J
SEPTEMBER 21, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

DAN MUNENE MURUIKI ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* and the particulars of the offence being that on November 15, 2020 at Runyenjes Township, Runyenjes Location Embu East Sub-County, murdered Victor Murimi Mwiti.
2. Upon arraignment, he pleaded not guilty and a plea of not guilty was entered. The case proceeded for trial and wherein the prosecution called a total of Six (06) witnesses who testified in support of its case.
3. PW1, James Mugwongo stated that on the material day, he left for town and on the way, before he got to Club Spider, he saw the deceased being attacked by the accused herein. That darkness had not set in and that people tried to restrain the accused to no avail. That after all that, the deceased, Vincent and himself headed for Club Spider and as they were going round, the accused came from the front and stabbed the deceased on the left side of the chest; in the process, as he was also trying to escape, he also got stabbed by the accused. It was his evidence that they thereafter took the deceased for medical attention at St. Michael Hospital but were told to take him to Kieni Hospital but he died before they could transfer him.
4. PW2 Vincent Cosmos Mwangi stated that on the fateful day, PW1, Geoffrey, Victor and himself were walking along Starehe Street when the accused person appeared from nowhere and stabbed the deceased. That there was a commotion and PW1 was also stabbed. He looked for a motor bike to take the deceased to hospital. It was his case that the deceased was taken to St Michaels Hospital where he died.



5. PW3, James Mwiti Maragwe stated that the deceased was his son and that on the fateful day, PW 2 went to his shop and informed him that the deceased had been stabbed and that he wanted him to accompany him to St Michael Hospital. That they went to the said hospital only to find that the deceased had passed on. That on November 19, 2020, he attended the post-mortem and identified the body of the deceased to the doctor who performed the post mortem.
6. PW4, Geoffrey Muriithi stated that on the material day, him together with his friends were walking and on reaching Tropical Pub, the accused appeared from the front side of the pub, went straight to the deceased and stabbed him. That though it was at night, the place was well lit and he rushed to find a motor cycle which they used to take the deceased to hospital. That the hospital doctor thus advised them to call the parents of the deceased and so he went to pick PW3 and upon bringing him to the hospital, they found that the deceased had already passed on.
7. PW5, Robert Nyakinyanya, the investigating officer stated that on that date, him together with other officers were on patrol when the D.C.I.O. received a call from the O.C.S. Runyenjes Town. They proceeded to the scene and on arrival, they enquired from the guard on what was happening. That the guard informed them that there was a fight outside the bar and the victim had been rushed to hospital and so they headed to the hospital where they found the victim on a wheel chair. That the doctor told them that the victim had passed on and so they took the body to the mortuary. They were also informed that the accused herein was responsible for the death of the deceased. It was his evidence that they headed to the accused person's home but he was not there but his mother promised to inform them once the accused person gets back home. That at around midnight, the accused mother called him and informed him that the accused was back and they proceed to arrest him.
8. PW6, Dr. Ndirangu Karomo stated that he carried out the post mortem on the body of the deceased and that on external appearance, there was a penetrating chest injury on the left hemi thorax; in the internal appearance, the left lung was lacerated with moderate haemothorax (bleeding). That in the cardio vascular system, there was a punctured pericardia sac with a punctured left ventricle. In one of the chambers of the heart, there was haemo pericardio. It was his evidence that the cause of death was massive internal and external haemorrhage following a penetrating chest injury in an assault. After the close of the prosecution's case the accused was placed on his defence upon the court finding that the prosecution had established a prima facie case.
9. The accused gave sworn testimony and stated that on the material day, he left work for home and went to celebrate his graduation from Sensei Institute of Technology in Nakuru. That he went to Tropical Club and bought a bottle of kane and a jug of keg. That after drinking, he left for Spider Club where as he was drinking, he met the deceased who requested him to buy him alcohol but he refused. It was his evidence that the deceased started abusing him and soon after, some young men started beating him up but he ran away. That he decided to go home and upon reaching, he realized that he still had some Kshs. 500/= and so he decided to go back to Tropical Club armed with a knife for self defence. That upon buying some drink, he left to go out and puff some cigarette and while there, he met the deceased and a gang who started beating him up and so he decided to leave for home and upon reaching, his mother informed him that the police were looking for him. He reiterated that he did not stab anyone. Upon cross examination, he stated that ordinarily, he takes between half and one cup of kane but he does so on weekends only, as he is always busy during the week days.
10. After the close of defense case, the defense filed written submissions while the prosecution chose to rely on the evidence on record. The accused on his part submitted that the prosecution failed to prove the case against him beyond any reasonable doubt and therefore, he should be acquitted. That the prosecution failed to prove malice aforethought on the part of the accused person and there was no



evidence tendered to prove mens rea. The accused raised the defence of intoxication and relied on the case of *Said Karisa Kimunzu v Republic* Criminal Appeal No. 266 of 2006 as cited by the Court of Appeal in the case of *Bakari Juma v Republic* Criminal Appeal No. 107 of 2014 eKLR.

11. I have given due consideration to the evidence on record and the submissions of learned counsels for the parties. The issue for determination is whether the prosecution proved its case to the required standards. The burden to prove all ingredients of the offence of murder falls upon the prosecution in all instances save for a few statutory offences. The standard of proof is one of beyond reasonable doubt. This threshold has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. (*Miller v Minister of Pensions* [1947] ALL. E.R. 372.)
12. The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. The prosecution must prove beyond reasonable doubt that there was death of a human being; that it was unlawful; and there was malice aforethought on the part of the accused.
13. The first issue for consideration is proof of death. In the instant case, there is no dispute about the deceased's death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW6 who carried out the postmortem on the deceased's body and after the examination, reached the conclusion that the cause of death was massive internal and external haemorrhage following a penetrating chest injury. Accordingly, it is my view that the prosecution has satisfied this element beyond reasonable doubt.
14. The next issue is whether the death of the deceased was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report prepared by PW6 revealed that the deceased's cause of death was massive internal and external haemorrhage following a penetrating wound on the chest. In the circumstances, I am persuaded beyond reasonable doubt that the deceased died out of an unlawful act. The law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016] eKLR where it was held:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”
15. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution's evidence as presented before the court and I find that there is sufficient evidence that the accused herein inflicted injuries on the deceased. This evidence was adduced by PW1, PW2, PW4 and PW6.
16. The accused person does not deny having a fight encounter with the deceased at Tropical bar but only pleads that he was too drunk to know what he was doing to the extent that he was incapable of forming an intent to kill the deceased herein. He specifically raised the defence of intoxication.
17. As to whether the accused had malice aforethought, malice aforethought is the mental element (mens rea) of the offence of murder. Section 206 of the *Penal Code* defines it as follows;
 206. Malice aforethought shall be deemed to be established by evidence proving any one 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 of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

18. This being a murder charge, the prosecution had the onus to prove mens rea and actus reus. The actus reus has been established. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the case of *Joseph Kimani Njau v Republic* (2014) eKLR the Court of Appeal stated:

“In both 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 actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ...”

In the present case,...we find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is unlawful act or omission that causes death of another.”

19. Under section 13 of The *Penal Code*, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

20. Intoxication can provide a defence for offences of specific intent but not for offences of general intent. For offences such as murder which require a particular intent or knowledge, a person who performs the act causing death while in a state of intoxication is liable to be dealt with as if he or she had the same knowledge as he or she would have had he or she not been intoxicated, unless it is shown that the substance which intoxicated him or her was administered to him or her without his or her knowledge or against his or her will. Alternatively that, by reason of intoxication he or she was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law was aptly summarized by the House of Lords in *Director of Public Prosecutions v. Beard* [1920 AC 479] thus:

“There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts



proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.”

21. The defence of intoxication can be available only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof on the reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. In the instant case, the accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he adduces such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill.
22. Although the accused adduced evidence that he had been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 13 of The *Penal Code*. To the contrary, in his defence the accused gave a detailed account of his version. He narrated how he met the deceased who demanded alcohol from him and how the deceased started abusing him and soon after, some young men started beating him up too, and that he ran away and headed home and upon reaching, realized that he still had some Kshs. 500/= and he decided to go back to Tropical Club armed with a knife for self defence. That conduct is not consistent with a person so drunk as to have lost the capacity of moral judgment.
23. The evidence taken as a whole clearly shows that the drink the accused had consumed had not impaired his judgment in any way. The fact that an accused took various amounts of alcohol at different venues cannot excuse the commission of a criminal offence unless it gives rise to a mental incapacity within the terms of section 13 of The *Penal Code*. [See *Kongoro alias Athumani s/o Mrisho v R* (1956) 23 EACA 532].
24. Having regard to the foregoing, I find that the accused in killing the deceased had the malice aforethought and that the defence of intoxication is not plausible in the circumstances. The accused person’s actions of stabbing the deceased on the chest is clearly suggestive of his intentions. [See *R v Tabulayenka s/o Kirya*, [1943] EACA 51 cited in *Dickson Mwangi Munene & another v Republic* [2014 eKLR].
25. In the result, it is my finding that the prosecution has proved the charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code* against the accused person beyond any reasonable doubt. I find the accused guilty of the said offence and I convict him accordingly.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the State

