



**Republic v Yulu (Criminal Case 77 of 2017)
[2022] KEHC 14724 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 77 OF 2017
GMA DULU, J
OCTOBER 27, 2022**

BETWEEN

REPUBLIC PROSECUTION

AND

NICHOLUS MBITHI YULU ACCUSED

JUDGMENT

1. The accused person herein stands charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of offence are that on the night of December 26, 2013 at Mbiini market, Mbiini sub-location in Mukaa district within Makueni county murdered Felix Mwongela Mutuku.
2. He has denied the charge. The prosecution has called seven (7) witnesses in their effort to prove the charge against the accused person. On his part, the accused person tendered sworn defence testimony and called two defence witnesses.
3. Pw1 was Lewis Mulei Mutuku whose evidence was that he was a brother of the deceased working for KRA Mombasa when on December 25, 2013 at 8:30 pm he was with the said Felix Mwongela Mutuku, Jonah Mutungi Muli and they entered a club.
4. Minutes thereafter, a fight broke out involving a group of people and his brother (Felix) ran to where they were, holding his ribs and said that he had been stabbed by the accused, whom this witness knew by appearance. The witness by then was at the counter about 3 meters from where Felix had gone to greet friends. There were electric lights.
5. The witness noticed that Felix was bleeding a lot, placed him in his car and took him to Sultan Hamud hospital where he was given first aid and referred to Machakos, where again he was given first aid and referred to Kenyatta National Hospital, where he died next morning while undergoing treatment.



6. In cross-examination, he stated that the deceased had not taken beer in that club that day but they had already taken beer elsewhere. He said that the fight occurred at the table where the accused sat with friends. He also said that he saw accused holding a knife but did not see him stab the deceased.
7. He said he had seen the accused severally before, and that when he and his cousin took his brother to hospital in his vehicle KBR 632M, the accused remained in the club. He was not aware of any dispute between the deceased and the accused.
8. Pw2 was Timothy Musau from Kasikeu, whose evidence is that on December 25, 2013 at 8:30pm he was at Mbuni Sparks Bar as a barman. While serving customers, he heard a commotion and noises from those taking alcohol. He went to the back of the counter and found Mbithi Yulu taking sprite, and Mwongela, Mulei and Muli were present. He then asked Susan Mumbua (Pw5) the sales girl. What the matter was, and after three minutes he saw Mbuthi Yulu throwing a soda bottle towards the door.
9. It was his evidence that minutes later, Susan told him to organize to close the bar, and that though Mwongela, Muli and Felix came to the bar that night, he did not see any of them leave the bar. It was his further evidence that on December 26, 2013 at 5pm, he was told by Susan that Mwongela had been injured, and did not see him again.
10. In cross examination he said he did not see anybody fighting and maintained that the accused was taking a soda. He stated that Mwongela, Muli and Felix were taking beer while standing at the counter. He stated that he did not see any blood stains the next day.
11. Pw3 was Steve Mutuku Munyao the father of the deceased who works with the Water Department at Wote. It was his evidence that on December 25, 2013 at 9pm while asleep, he was called by Pw1 and informed that his son had been stabbed in a bar at Mbiini. He was later informed by Muli about the person who stabbed his son.
12. It was his evidence that his son was taken to Sultan Hamud hospital, Machakos Bishop Kioko hospital and Kenyatta National hospital for treatment but died the next night. He witnessed the post mortem examination of the deceased. According to him, the accused was his neighbour who lived less than 1km from his home.
13. In cross-examination, he stated that though he was with the deceased at Machakos Bishop Kioko hospital, he never talked to him. He stated that John Muli is his nephew.
14. Pw4 is Jonah Mutungi Muli whose evidence is that on December 25, 2013, he left home with Felix Mwongela, and Lewis Mulei for Mbiini market and entered sparks bar at 8:30 pm and bought drinks which were opened at the counter.
15. According to him, a brawl started among people who were seated who pushed and separated those at the counter and in the process, one of his shoes was removed. When he went back to look for his shoe, he did not see Felix or Lewis, and while there, a person told him that Felix had been injured.
16. It was his evidence that he ran downstairs from 1st floor and found Lewis and Felix in the vehicle. Felix lay down in the vehicle with blood on his side and his shirt had a hole.
17. According to this witness, he asked Felix what had happened, and he told him that he had been stabbed by Mbithe. His condition worsened and they rushed him to Sultan Hamud hospital where they were referred to Machakos. Felix was in an ambulance and he was driving Lewis's car. They were joined by Felix's parents at Kiungwani.



18. According to this witness, they were referred to Kenyatta National hospital and though they took Felix there for treatment, he died on December 27, 2013. He stated that there was electricity lighting at the bar, and that he did not know the cause of the commotion.
19. In cross examination, he stated that he did not see any weapon, nor witness the deceased being stabbed. He stated that deceased did not explain how he was stabbed. In re-examination, he stated that Felix had not started drinking in the bar before the incident.
20. Pw5 is Susan Mumbua an employee of Sparks bar since 2002. It is her evidence that on December 25, 2013, she was on duty at Sparks bar from midday and between 6:30 pm and 7pm Mwongela, Mulei and Jonathan arrived. According to her, Mwongela and Mulei were her cousin's children, and when he was serving them at a table outside, they said that they would have their drinks at the bar counter. She served them at the counter, and shortly thereafter heard noise from the back of the bar and noted some people holding their bottles while some threw their bottles at the counter.
21. According to her, as people left, he met Mbithi near the fridge near the counter and on enquiring from him, he appeared worried and said he was looking for his wallet which he had dropped.
22. On checking further, she did not see Mulei and Mwongela and noticed broken glasses and bottles on the floor. She remained in the bar until 10:30 pm and as she prepared to leave, she was informed that Mwongela had been injured and taken to hospital.
23. On the December 26, 2013, when she came for work, she noticed blood outside the premises on the road.
24. This witness was declared a hostile witness and was cross-examined by Ms Gakumu for the prosecution. She was referred to page 2 of her witness statement and she confirmed that there was a commotion and flying beer bottles and the fridge which fell. She stated that Mbithi told her that he had come to collect his wallet and confirmed that a knife was mentioned in the statement, and that he carried a knife in his hand.
25. She also confirmed in the statement it was recorded that Mulei's vehicle was still parked at the bar. She confirmed that she knew Mbithi Yulu the accused person as a customer. She also stated that there was electric light at the bar that night. The witness statement was produced as exhibit 1(a) and 1(b) – (handwritten and typed).
26. In answer to questions from the defence counsel Mr. Maingi Musyimi, she stated that she was cousin to the deceased. She confirmed that the witness statement was recorded on December 27, 2013 and that it was read back to her. She said that she gave the statement in Kiswahili and Kikamba but it was written in English and not translated to him.
27. She stated that the accused said that he was looking for his wallet, but also stated that she never saw any knife. She said there were many people in the bar which is on the upper floor. According to her, the accused entered at 3pm and started drinking alcohol. He maintained that the noise was from the back of the bar from where people threw bottles. She stated that the fridge fell as people passed by and that bottles fell and broke.
28. She confirmed knowing Pw4 as a customer and neighbour. She said that the bottles of drinks of Pw1 and Pw4 fell down and broke. She maintained it was a worker who informed her about the injury. She said she left between 10:30 pm and 11:00pm and that she saw no vehicle at that time.



29. On further questions from the prosecutor, she confirmed recording the statement, and that she saw the accused between the fridge and the counter. She confirmed that Pw4 was in the bar that night.
30. Pw6 was Cpl Wesley Cheruiyot whose evidence was that on December 26, 2013 a report was made at Sultan Hamud police station by Stephen Mutuku that his son Felix M. Mutuku was stabbed with a kitchen knife by Nicholus Mbithi on December 25, 2013 at around 8:30 pm at Spark bar of Mbiini market.
31. According to him, Felix was with his brother Lewis Mutuku and Mutunga Muli. Following the report, the police rushed to the scene at 4pm where Susan Mumbua (Pw5) gave them the details of what happened. He recorded statements from witnesses but was not able to talk to the deceased because he died.
32. According to him, the accused disappeared for a whole year, discontinued his studies, but was tracked and arrested at Kibwezi.
33. In cross-examination, he stated that he was informed that there was a scuffle and that on arrival he found that the scene or bar on 2nd floor had been cleaned. He stated that witnesses said there were blood stains at the bar and parking, but he found no such blood stains. He stated that the murder weapon was not recovered.
34. Pw7 is Dr Benard Owino Midai a senior pathologist at Kenyatta National hospital who conducted the postmortem examination of Felix Mwangela Mutuku who was identified by two people.
35. According to this witness, the postmortem was conducted on December 30, 2013 at 4pm. He found signs of surgical intervention. There was a stab wound on right side of the chest and bleeding under the skin on right side hand signifying wounding. It shows a struggle or defence injury. Internally there was repair of diaphragm through surgery, and blood in the chest.
36. According to this witness, cause of death was shock due to bleeding due to penetrating wound through the thoracic penetration. The witness produced the post mortem report form filled and signed by himself as an exhibit.
37. In cross examination, he stated that the injury was on front side of the chest but penetrated to the abdomen. He stated that the struggle was more defensive in nature.
38. When put on his defence, the accused tendered sworn defence testimony and called one witness. He stated that he was a businessman, married with 4 children, and that he graduated from Multimedia University in 2019.
39. According to him, on December 25, 2013 the alleged date of offence, he was doing his business at Kasikeu Location where he was born. In the evening he went to Sparks bar for refreshments and found friends and classmates and sat at the back.
40. At around 7:30 pm he left with Mulandi Mutiso and walked home about 2 kilometers away leaving everything fine at the bar. On December 28, 2013, he left to his other business at Kibwezi and he was not hiding nor was summoned for anything. He operated between Kibwezi and Kasikeu because he had businesses in both places.
41. He stated that he knew Susan Mumbua as a neighbour. He denied carrying a knife and said that he saw her for the first time outside the court after his arrest.



42. In cross-examination, he stated that he started business at Kibwezi in 2013. He said that on December 26, 2013 the date of the alleged incident Wambua was in his shop, but he left alone to the bar at 4pm. At the bar he met many friends including Mutunga Willy, and Kinama Mulonzi and another nicknamed muzungu.
43. He also saw people he knew like Susan Wambua Mbithi Musau and another he could not remember. According to him, Mbithi Musau was Pw2, and he knew him before.
44. He insisted that he left the bar at 7:30pm with Mulandi Mutiso. He was aware that Mbithi Musau was in the bar serving customers. He said that the following day, he did not visit the market.
45. He insisted that on 28th he went to Kibwezi and said that in January he visited his shop at Kasikeu but said he did not visit Sparks bar. He said that he knew Lewis Mulei in court. He denied knowing Felix Mwongela Mutuku the deceased. He said he did not see Lewis Mulei Mutuku at the bar.
46. He agreed that he was arrested on November 29, 2014 at Kibwezi in Kyulu bookshop, which was not his shop. He said he was taken
to Kibwezi police station and same day officers from Sultan Hamud police station picked him, and at the station informed him that he was suspected to have murdered Felix Mwongela Mutuku.
47. He said that he informed police that he knew Alfred Mutungi, who was also in the bar. He said that Alfred is also called Willy Mutunga. He denied going to Nairobi the day after the incident.
48. He said that he heard in January 2014 that there was an incident at Sparks bar on December 26, 2013 in which a person was injured. He said he was informed by many people including his brother Julius Musembi, but he did not make enquiries from anyone including Susan Mumbua. He said he left the bar with Mulandi Mutiso who was his witness.
49. Dw2 was James Mulandi Mutiso a neighbour of the accused. It was his evidence that on December 26, 2013 he was at a club at Mbiini market with the accused person from 5pm. According to him, the club which had a front and back part was full of people, and he was brought drinks by the accused person as he did not have money.
50. It was his evidence that at 7:30 pm he left the club with the accused and they walked home, a distance of 2km. When they left the club, there was nothing unusual. He did not know Felix Mwongela. On December 29, 2013 he heard that there was a scuffle at the club but did not follow up the matter.
51. In cross-examination, he said he did not know Lewis Mulei Mutuku but knew Mumbua the bar attendant who served them. He said that if accused said he was served by Lewis that was not true. He said he did not know the other people in the club that night. He insisted that they left at 7:30pm.
52. He said that he knew accused had a shop at Kibwezi but did not know if he had another shop there. It was his position that the accused merely told him that he wanted to open a shop at Chumani, but he did not see that business he said he heard the rumor about the scuffle on 29th. He said he did not meet the accused on December 27, 2013, but later said he met him around home on December 27, 2013.
53. He said accused person called him on phone to attend court, but they had not talked. He was shocked to be phoned by the accused. He said he did not know where the accused went to after they parted. He said that Susan Mumbua might say there was a scuffle in the club, but they left the bar when nothing unusual had happened.
54. He said that the accused had not talked with him since 2013 until the previous day when he phoned him to say he was charged with murder.



55. This is a case of murder. Being a criminal case, the prosecution has the obligation to prove all the elements of the offence beyond any reasonable doubt. An accused person has no burden to prove his innocence.
56. The elements of the offence of murder are whether the deceased died. Secondly, whether the accused killed the deceased. Thirdly whether the killing was with malice aforethought. Each of the elements has to be proved beyond any reasonable doubt.
57. Did the deceased die? The evidence of the prosecution, even that of the defence is that the deceased died. The defence witnesses heard of the death. The prosecution evidence including that of the father of the deceased, and the doctor Oduor who conducted the post mortem examination was that the deceased died. He died of bleeding secondary to a penetrating wound on the right front side of the chest penetrating to the abdomen. The post mortem examination form was produced as an exhibit.
58. I find and hold that the deceased died, and that the prosecution proved beyond reasonable doubt both the death of the deceased and the cause of death.
59. Did the accused cause the death of the deceased? The evidence on record is circumstantial evidence as no one witnessed the stabbing or even the alleged commotion at the bar. The accused is now alleged to have caused the death.
60. The legal parameters for such evidence to sustain a conviction were considered in the case of Joan Chebichii Sawe v Republic (2003) e KLR where the Court of Appeal applied what had been stated in the earlier case of R v Kipkering arap Koske & another 16EACA135 where it was held that –
- “In order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”
61. The accused was at the bar that night. He said he left early at 7:30pm, and that it was calm then. The people who connect him to the incident are Pw1 Mulei Mutuku who said that there was a fight in the bar and that the deceased told him that the accused stabbed him. Pw1 also said that he saw accused holding a knife. Pw5, the bar attendant Susan Mumbua stated that she saw the accused after the scuffle with a knife looking for his wallet, but was declared a hostile witness. Pw4 Jonah Mutungi Muli who was with the deceased said the deceased did not say how and by whom he was stabbed.
62. I am aware that the evidence of Susan Mumbua being that of a hostile witness has lower value than that of an ordinary untainted witness. In Abel Monari Nyanamba & 4 others v R (1996) e KLR the Court of Appeal had occasion to address itself on such evidence and stated as follows
- “The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.”
63. In the present case however, we have the evidence of another witness Pw4 Jonah Mutungi who said that the deceased told him before he went into a coma that it was the accused who had stabbed him. The deceased having gone into a coma thereafter and died, then that qualified to be a dying declaration.
64. In my view, the prosecution proved beyond reasonable doubt that the accused person was at the bar during the scuffle and that he stabbed the deceased. His defence of alibi in my view was an afterthought. His conduct of disappearing for almost a year in a locality where he was aware of the death of the



- deceased shows deliberate attempt to avoid or evade arrest. In my view also, that was also an important factor in explaining why the prosecution was not able to find or recover the murder weapon.
65. I thus find that the prosecution proved beyond any reasonable doubt that the accused person killed the deceased.
66. Was the killing with malice afterthought? Malice aforethought is defined under section 206 of the *Penal Code*. It is an intention to cause death or do grievous harm.
67. In my view, from the evidence on record, the killing was not pre-meditated. The accused did not go to the bar to kill anybody, let alone the deceased. It is the deceased who left the place where he was to take drinks with his brother and friends and went to another table where a scuffle developed. There was also a scuffle in the bar. Consequently, the death or deaths that might occur in such a scenario cannot be said to be with malice aforethought.
68. However, the force used, the weapon used on an unarmed patron in that bar cannot be said to be excusable homicide or death caused due to self defence of the accused. In my view, though malice aforethought was not proved, the death of the deceased was caused unlawfully. Thus the accused committed the lesser offence of manslaughter contrary to section 202 of the *Penal Code*.
69. Consequently, and for the above reasons, I find that the prosecution did not prove the offence of murder against the accused person. I find however, that the prosecution proved the offence of manslaughter against the accused person. I thus convict him of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

DELIVERED, SIGNED & DATED THIS 27TH DAY OF OCTOBER 2022, IN OPEN COURT AT MAKUENI.

GEORGE DULU

JUDGE

