

proposed that they take a walk to Kamahinda Shopping Centre to get some drinks. As R tells it, Mercy was Accused Person's girlfriend – and so she ended up “hanging out” with the John Munji. On getting to the shopping centre, the boys went into a bar and purchased some drinks, leaving behind the girls outside the bar. Eventually, the three young people – with the exception of R – got alcoholic beverages. It is unclear how much each had to drink – but there is concurrence among R, John Munji and the Accused Person that at least John Munji and Mercy were, by the end of it all, quite drunk. R did not take any alcoholic beverage at all.

7. Drinks in hand – a soda for R and alcohol for the other three -- the four young people headed back towards the church. Before they got the church, however, more worldly needs prevailed: the four young people stopped at the junction of Kabaa-Kagwe road a nearby tree providing a setting for a romantic make-shift lounge of sorts. The Accused Person and Mercy sat under the tree deep in conversation while R and John Munji started dancing to music blared from the Accused Person's mobile phone.

8. After a while, two old men happened on the scene. It would appear that their presence was as unwelcome as their message. One of them, the Deceased, had stopped by to complain that the noise coming from the music playing from the Accused Person's mobile phone was disturbing the peace in the neighbourhood. The Deceased's home, it turned out, was right opposed where the young people had congregated.

9. The Deceased apparently demanded that the music be switched off. The Accused Person would have none of it and an angry confrontation ensued between the Deceased and the Accused Person. Everyone who was at the scene is unanimous that the Deceased was drunk which must have been a factor in the escalation of the confrontation. The Deceased insisted that the music be put off; the Accused Person stood his ground that he would not do so.

10. The parties are also unanimous that it was the Deceased who took the first step in transforming the verbal duel to a physical altercation: he slapped the Accused Person and the duel escalated to a physical one.

11. Up to this point, all the accounts by all the witnesses – including the Accused Person – are largely similar with R providing the lead story due to her credible details and consistency. There is one other area of remarkable convergence in the narrative of both the Prosecution and the Defence: somewhere along the way, the Accused Person, a good friend to John Munji, had noted that John Munji was too inebriated and that he was carrying a knife. To protect his friend, the Accused Person requested to carry the knife for him. Both John Munji and the Accused Person agree on these facts. As such, both the Prosecution and the Defence agree that it was the Accused Person who was carrying John Munji's knife during the altercation with the Deceased.

12. After the physical attack by the Deceased, however, the stories by the Prosecution witnesses and the Accused Person sharply diverge. R is insistent that during the scuffle between the Accused Person and the Deceased, she clearly saw the Accused Person – from less than five (5) metres away – taking a knife from his waist and stabbing the Deceased on the thigh.

13. On seeing this, R says she ran to Mercy who was a little far aside talking to another young man who had joined them later and tried to explain to her what she had seen. However, Mercy was, apparently, too drunk to understand the import of what had just happened. According to the R, the Accused Person urged all of them to go home because he had committed a “sin” (“dhambi” was the Swahili word R says the Accused Person used). R, apparently indignant that she had done nothing wrong, refused to go home and held her friend Mercy by the hand into the church – which was barely 100 metres away. Later on, R would call Mercy's cousin to take her home since she was thoroughly drunk.

14. In every material way, John Munji's testimony mirrored that of R about how the fight unfolded and how the Accused Person stabbed the Deceased on the thigh. None of the other witnesses claim to have been present when the stabbing took place. Peter Kamau Thuo, who testified as PW5 had left the scene when it happened as had his friend, Peter Kuria Wandene, who testified as PW6. So had PW7, Samuel

Mutua Kinyanjui, who was the Deceased's brother. All these three witnesses testified to seeing the confrontation and argument but none saw the actual stabbing. They had all left the scene when the stabbing took place.

15. Four other witnesses testified in the case. John Ciuri Muturi is a friend of the Accused Person and testified as PW4. His testimony confirmed that the Accused Person had possession of the knife on the night of the homicide and that the Accused Person left the knife at his (Ciuri's) house the following morning with instructions that John Munji will pick it up late the following morning. Samuel Thande Mwaura is the Assistant Chief in the area and testified about the efforts to secure the scene of crime and how they tracked the Accused Person. Corporal Richard Nyakura was the Investigating Officer in the case. He tied up the Prosecution case – testifying about the investigations conducted in the case and formally produced the various items as exhibits.

16. Finally, Dr. Johannes Oduor, a pathologist, testified and produced the post-mortem report filled by Dr. Peter Ndewa. This was pursuant to a consent by the Defence that Dr. Oduor may testify and produce the report on behalf of Dr. Ndewa. His evidence uncontested evidence was that the Deceased died from excessive bleeding from a penetrating stab wound on the left medial thigh. It is, therefore, common between both the Prosecution and the Defence that a single stab wound caused the death of the Deceased. It is also common by both the Prosecution and the Defence that the stab wound was caused by the knife which the Accused Person had secured from John Munji and which he had at the time of the incident.

17. The only disagreement, therefore, is how the stab wound occurred.

18. The Defence theory is that neither R nor John Munji saw the Accused Person stabbing the Deceased. Instead, the Defence's theory advanced in his unsworn statement is that as he tangled with the Deceased following the violent confrontation between them, the knife fell off. The Accused Person testified that at that point both the Deceased and the Accused Person struggled to get to the knife – each aware that his life would be in danger if the other got the knife. As they both struggled, the Accused Person stated, the Deceased fell on top of the knife and the Accused Person fell on top of him. It must have been from that that the Deceased sustained the stab wound, the Accused Person hypothesised. The Accused Person further testified that after the Deceased so fell, he got his opportunity to flee from the danger. He then ran off to Matimbei Shopping Centre where he met John Ciuri and they retired to Ciuri's house.

19. The Accused Person's version of events is a beautiful theory murdered by improbabilities. For one, would have been impossible for the Deceased to sustain a penetrating stab wound as a result of falling on a knife that was on the ground – unless, of course, the knife was planted with the blade facing upwards. From his own version of events, the Accused does not say this happened – and it is improbable that this happened. Secondly, the Accused Person does not contest that he went home with the knife and left it with Ciuri for John Munji to collect it the following day. Yet, this detracts from his own theory: if indeed the Deceased fell on the knife and sustained his injury when the Accused Person fell on him, the knife would have been under the Deceased. Yet, the Accused Person says that after the Deceased so fell, he got his opportunity to flee. Nowhere does his version contain the dramatic part where he lifts the Deceased from the ground, recovers the knife from underneath him and then flees.

20. Differently put, I have come to the reasoned conclusion that the version of events as told by the Accused is so improbable that it cannot reasonably possibly be true. (See *S v Shackell (4) SA 1 (SCA)*). While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable and while the test is not whether it's version is improbable but if it can be said to be so improbable that it cannot reasonably possibly be true, in the instant case, it is not possible to say that the Defence version of events has reasonable inherent probability that it is true. All considered, I conclude that the Defence's version is highly improbable. In reaching this conclusion, I have not only weighed the Defence evidence against that offered by the Prosecution in totality but I have also considered keenly considered the only theory the Defence has offered to impugn the Prosecution narrative: that it is possible that there was an error in the recognition evidence of R and John Munji.

21. I find the argument of a possible mistaken recognition completely implausible. The Defence submits

that it is possible that the two Prosecution witnesses did not actually see the Accused Person stabbing the Deceased because of the lighting conditions that night. However, we have it on the unshaken evidence of at least four witnesses (R; John Munji; John Ciuri; and Paul Kamau Thuo) who were at the scene or around there that night that there was moon light and it was sufficient to illuminate the surrounding for someone to see who was next. It is important to recall that R testified that she was merely 0.3 metres away when she saw the Accused Person stabbing the Deceased. R knew the Accused Person and they had spent the whole night together. It would be incredible and an act of hyper-formalistic analysis to claim that at the point of stabbing a *Turnbull* analysis would render the lighting conditions insufficient for recognition as the Defence argues.

R v Turnbull [1977] QB 224.

22. There are two other reasons why I have found the version of events as given by the Prosecution witnesses to be credible and beyond reasonable doubt:

23. The most detailed version of the events was given by R. I already concluded that I found her to be a straightforward and honest witness. Her story is, in addition, corroborated from an unlikely source: the evidence of PW6 – Peter Kuria Wandene – on a particular detail which evinces its veracity: R testified that after she saw the Accused Person stabbing the Deceased, she approached Mercy who was, by the time, speaking to a young man who had stopped by the scene and told her that they should go. The young man who Mercy was speaking to was Peter Kuria Wandene. He is not even an acquaintance of R's.

However, he repeated this aspect of the narrative: as she was speaking to Mercy, it was R (who she only referred to as “the other girl” who came to, inconveniently, one would imagine, call Mercy to go home. This pettifogging aspect of Peter Kuria Wandene's testimony tallied in exact details with R's narrative in a way that underlines the veracity of R's statement.

24. The Defence also made a big deal of the fact that there were some inconsistencies – especially about time – in the accounts of the Prosecution witnesses especially after the stabbing. For example, the testimonies of John Munji and John Ciuri about whether they met up with the Accused Person later that night or not seem to be contradictory. There also appears to be some contradiction about the time that the stabbing happened.

25. I have carefully reviewed the record and testimonies of the witnesses. I am confident that the inconsistencies are immaterial and are not the product of contrived evidence but a reflection of the reality in life that witnesses' memories of events especially of stressful events such as the one that unfolded on the fateful night are not always perfect. Our standards do not demand perfection. They demand that the Court be persuaded that the Prosecution case has been proved beyond reasonable doubt.

26. As noted by the Uganda Court of Appeal in *Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6* it is not very contradiction that warrants rejection of evidence – see **Erick Onyango Ondeng' v Republic [2014] eKLR CRIMINAL APPEAL NO. 5 OF 2013**. As the court put it:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

27. My conclusion is that the alleged inconsistencies in question here are not material at all and they can, in my view, be explained. They do not, overall, impact on the credibility and reliability of the Prosecution evidence.

28. Having concluded that the Prosecution narrative was established beyond reasonable doubt, the question that remains is whether all the elements for the offence of murder were established. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

29. To successfully gain guilty verdict in murder charge, the Prosecution therefore is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by malice aforethought.

30. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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.
- c. Intent to commit a felony.
- d. 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.

31. From my analysis of the evidence above, it is quite clear that the first two elements of the offence of murder are well established:

- a. There was the death of the Deceased which is not disputed;
- b. That death was caused by the unlawful acts of the Accused Person. As analysed above, I have accepted the Prosecution narrative that the Accused Person stabbed the Deceased which led to his death. I have rejected the Accused Person's theory that the Deceased fell on the knife thereby occasioning his injury.

32. The question that remains is whether the Prosecution has established the third element of premeditation in this case. Indeed, I am persuaded that there was no element of premeditation. The two most important Prosecution witnesses who saw the stabbing were categorical that the Deceased attacked the Accused Person. In fact, R, whose evidence I accepted as straightforward and truthful described the Deceased as "drunk" and "violent". He slapped the Accused Person after the Accused Person refused to switch off the music and he followed it up with a violent attack on him hence precipitating the physical altercation. It was in the midst of that altercation that the Accused Person whipped the knife he had and stabbed the Deceased.

33. It appears clear that this attack happened in the midst of the physical duel and in the heat of the anger and passion. This was an act committed in the throes of an emotional state and in the absence of premeditation or contemporaneous commission of another felony. It was also committed in the act of self-defence since the Accused Person was under attack by the Deceased. However, it is clear that the Accused Person responded with excessive force. There is no evidence at all that the Accused Person faced imminent death or risk of serious injury and there has been no suggestion or evidence that the Accused Person held an honest even if mistaken belief that it was only by repelling the Deceased using the knife that he would have preserved his life.

34. Consequently, even though the Deceased was the unlawful aggressor, it was unjustifiable for the Accused Person to respond with deadly force. The Defence of self-defence, though suggested by the

circumstances, is “imperfect” in this case since the Accused did not hold a reasonable belief that it was necessary for him to repel the attack with deadly force to avert an imminent infliction of death or serious bodily harm to himself. Further, the Accused Person acted in conscious disregard of human life when he stabbed the Deceased and then fled the scene without stopping to ensure that the Deceased got the help that he needed. Consequently, the Deceased suffered from excess loss of blood.

35. In the end, therefore, my conclusion is that in the absence of the third element of premeditation, the offence of murder is not established against the Accused Person. Instead, the Prosecution has established all the elements for the lesser but cognate offence of manslaughter: the unlawful killing of a human being. Consequently, this Court finds the Accused Person guilty of the lesser but cognate offence of manslaughter contrary to section 202 as read together section 205 of the Penal Code and is so convicted.

Dated and delivered at Kiambu this 23rd day of March, 2017.

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JOEL NGUGI

JUDGE