



REPUBLIC OF KENYA

IN THE HIGH COURT OF KAJIADO

CRIMINAL CASE NO.13 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

PRISCILLA WANJIRU SALOME.....ACCUSED

JUDGEMENT

1. PRISCILLA WANJIRU SALOME is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The brief facts of the case are that the accused on the 21st June 2015 was in her house at Oloolua village, Ngong Township when she is alleged to have killed one JOHNSTONE NJERU MBOGO hereinafter referred as the deceased.

2. The accused who denied the offence was represented at the trial by Mr. Nyaata, learned counsel while the prosecution was conducted by Mr. Akula the senior prosecution counsel on behalf of the state.

3. In order to prove the guilty of the accused the prosecution summoned thirteen (13) witnesses and produced a bundle of ten exhibits.

4. The prosecution evidence at the trial can be summarized as follows:

On the 21/6/2015 the accused in company of one lady named Ann Wanjiru and the deceased were in her house having some alcoholic drinks. The deceased was married to PW1 Polly Wanja who testified that in the early hours of the day they were together before parting ways at about 1.00pm. PW1 further testified that she was again to see the deceased at 5.00pm when he left Queens Bar to give them some Ksh.500 for purchase of food. The deceased apparently went back to the same bar as stated by PW1.

5. In a little while on the fateful day PW1 testified that she received information that a murder incident has taken place involving a man as the victim. According to PW1 she rushed towards the scene only to confirm that the victim of the killing was her husband lying on the floor and in the same house were two ladies. The neighbours at this trading center had assembled in response to the alarm and distress call from those who heard and visited the scene. It was further PW1 evidence that the police were called in from Ngong police station who preserved the scene and had the body of the deceased taken to the City Mortuary. She was later to identify the body of the deceased during the postmortem.

6. PW2 Sgt Benson Ndabi attached to Oloolua police post was one of the first officer to arrive at the scene. In his testimony PW2 told this court that the deceased had already been rushed to the hospital but the two ladies suspected to have caused the death were held captive by members of the public. PW2 further stated that the initial investigations revealed that one Kariuki had recovered the knife used to

inflict stab wounds against the deceased.

7. The rest of the police officers PW3 Cpl Emma Mutindi and PW4 APC Gerald Njaramba testified that on the 21/6/2015 they were on duty at their respective stations when at different times they were informed of the murder incident at Oloolua. PW3 and his workmates who included PW2 arrived at the scene and confirmed the details of the murder and the victim involved as 'Kafupi' allegedly known to them prior to this day. PW2, PW3 and PW4 further narrated that at the scene there were two ladies suspected to have committed the offence. The two ladies were arrested by the police officers to undergo investigations in connection with the murder of the deceased. Later on according to their evidence one by the name Ann Wanjiru was released to be made the prosecution witness against Priscillah Wanjiru, the accused before court.

8. In the same hearing PW5 Ann Njeri the owner of a wine and spirits shop at Oloolua center told this court that the accused, the deceased and another lady left her shop for another plot nearby. It was after sometime that PW5 saw a lady come out of that plot in a hurry beckoning her that something unusual has happened. The witness further said that she could see the deceased being carried away but was not able to tell the court who injured him.

9. One Celestine Mwanigha testified as PW6 a security officer at Oloolua center. She testified that while at her place of work, screams were heard from a voice of a lady in the form of ***"umetunga mwingine, kwa nini umetunga."*** According to PW6 as she was on that message a lady came out of the plot running. It was at that moment that she took action to apprehend her and returned her back to the house. PW6 further told this court that in her presence the two ladies one being the accused person started blaming each other for causing the death of the deceased. While at the scene PW6 testified that PW7 Dickson Kariuki entered and recovered a blood stained knife which allegedly was used to inflict the fatal wounds.

10. According to PW7 on arrival in the house he confirmed that the deceased was his fellow artisan who worked as a mason in the area. He was able to observe that the deceased has suffered serious injuries. That is when he administered some beatings to extract information from the two suspects. It was in the course of that they volunteered in providing information on the whereabouts of the murder weapon, the knife. He took possession of it which he later surrendered to the police at Ngong station to be used as evidence. PW7 further told this court that he is the one who telephoned the police and looked for transport to take the deceased to the hospital. That the two ladies were left behind under the custody of PW6 and other members of the public.

11. PW8 PC Kiplimo Boit told the court that the initial investigations revealed that the accused and another lady were in company of the deceased taking alcoholic drinks in the house belonging to the accused. The offence in question in the evidence of PW8 occurred as a result of a quarrel between the two ladies and the deceased person. It was this same house PW8 testified that the deceased was injured when the quarrel escalated into a violent attack. The witness also alluded to the exhibits like mobile phone, the blood stained knife, t-shirt, bra, black trouser recovered from the scene with traces of evidence to the crime.

12. The other prosecution witness IP Fredrick Musili testified as a digital and computer forensic expert in matters touching on this case. The factual foundation of PW9 evidence was a request made by PW12 PC Brian Mulupi seized of investigations of the murder. According to PW9 a mobile phone make M-Horse XIME No. 863353014232085 paired with SIM cards Safaricom S/No. 89254029241011533043 of PIN 9024 and Airtel S/No. 8925403132105618737 had chain of material evidence connecting the accused with the offence. PW9 further testified that on the basis of these exhibits from PW12 he was desired to ascertain an extract message from exhibit A mobile phone with SIM card No. 254 721168401 had communicated with phone No. 254 722 500166. In the explanation given by PW9 it was confirmed that a message text from the accused person to PW13 mobile phone in the following words was sent, 'ujue utaitwa kama mshaidi useme were uliambiwa na Salome Amema Ann akindungana.' In support of his analysis PW9 produced forensic exhibits report exhibit 6 (b) to back up the contention that such text was sent across the two cellular networks.

13. PW10 IP John Ambole previously attached to Ngong police station at the time of this incident played the role of visiting the scene. His evidence is in all material respect in congruence with that of PW2, PW3, PW4 and PW8.

14. PW11 Susan Ngugi a government analyst was in receipt of blood sample of the accused a blood sample of Ann Wangeci, a knife, a cream t-shirt, a black pair of long trouser, a green t-shirt, brazier, and blood sample of the deceased. According to the testimony of PW11 the request from PW12 was to ascertain the presence of evidential material more specifically as to their probative value to the death of the deceased. In her examination PW11 came up with the finding that the DNA profiles generated from the blood stained knife, the cream t-shirt, the green t-shirt all matched the blood sample of the deceased. Secondly PW11 told this court that the DNA generated from the blood stains on the long trouser and the brazier matched the blood sample of one Ann Wangeci. The analyst report marked exhibit 8 was admitted as evidence.

15. The evidence of the witness PW12 PC Brian Mulupi dealt with investigations of the offence on how the deceased met his death. In his address to the court PW12 told this court that he recorded statements from the various witnesses. In the course of the investigations PW12 received the exhibits including the murder weapon, the knife collected from the scene. There was also further evidence of retrieving the mobile phones of the accused which was forwarded to the cyber crime department for forensic analysis. According to PW12 the analysis by the forensic expert PW9 it emerged that accused had communicated with PW3 in respect of how the murder must have been executed. PW12 equally told this court that he collected the blood samples from the suspect Ann Wangeci and also the deceased. In order to verify the link between the blood stained knife with the blood sample of the deceased. PW12 forwarded the exhibits to the government analyst PW11. According to PW12 relying on all the essential parts of the evidence which came into his possession he caused the accused to be charged with the offence before court. In buttressing the evidence of the investigations to support the indictment PW12 tendered before court exhibit 1, 2, 3, 4, 5, 7 (a), (b), (c), 9 and 10 in favour of the prosecution case.

16. PW13 Alice Wanjiru gave concurrent evidence on how she had interacted with the accused on the fateful day of 21/6/2015. In her evidence PW13 stated that at one moment she noticed the accused Ann and the deceased whom she referred as **'kafupi'** together in a bar next to the wine shop. The three later left the bar for the accused's house leaving her behind the wine shop which was a short distance away. According to PW13 it reached a time when she wanted to leave for work therefore necessitating her to go to the accused house.

17. On arrival at the accused house PW13 told this court she heard through the door as she knocked for attention the three of them quarreling. The witness PW13 realizing that nobody was opening the door she decided to abandon any idea of talking to the accused and left for work. The last contact PW13 had with the accused was through telephone calls which went unanswered including a text message. In the evidence of PW13 the short message in Swahili touched on the incident and read thus **'ujui utaitwa kama mshaidi useme were uliambiwa na Salome Ameona Ann Akindugana Ni sawa N U delete hiyo message.'** There was no response to the message though according to PW13 accused persisted in making calls and texting in reference to the issue.

18. In her defence the accused gave a brief history and her moments on the 21/6/2015. She specifically alluded to the fact that they spent substantial part of the day with Ann Wangeci having some alcoholic drinks within the Oloolua centre. The accused further explained that she was later to be joined by the deceased and Ann Wangeci in her house. It was at this time a quarrel ensued between them which she heard while at the rear of the house. According to the accused in a short while she realized something was a miss which was the assault upon the deceased. She therefore made a decision to scream on noticing blood oozing from the injuries sustained by the deceased. However the accused denied being involved in stabbing the deceased nor sending a text message to PW13 regarding on how the deceased must have been killed. The accused further defence was that after ensuing screams a member of the public immediately came to the scene and kept vigil over them. Thereafter the police officers who gave evidence were informed to take over the scene and the investigations of the case.

19. In the final submissions by Mr. Nyaata, the learned defence counsel submitted that the prosecution evidence falls short of the threshold of a case proven beyond reasonable doubt. Mr. Nyaata further submitted that the elements of the offence of murder and the analysis of the evidence by the witnesses did not satisfy the legal principles on circumstantial evidence. The aggregate of the evidence according to Mr. Nyaata is consistent with identifying one Ann Njeru Njau as the perpetrator of the crime and not the accused. Learned counsel placed reliance on the case of ***Republic v Derrick Waswa Kuloba v Republic [2005] eKLR, Republic v John Ndungu Njoki & Another [2012] eKLR and Republic v Benson Njoroge [2016] eKLR*** to support the position that the case against the accused has not been proved beyond all reasonable doubt.

20. I will now examine the evidence to establish whether or not the accused committed the offence by inflicting the fatal wounds which led to the deceased death. The accused was indicted with the offence of murder contrary to section 203 which provides that ***“any person who malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

21. In the light of these provisions under the Penal Code the prosecution has the burden to establish the following ingredients beyond reasonable doubt:

- (1) The death of the deceased Johnson Njeru Mbogo.
- (2) That the death of the deceased was due to unlawful acts or omission caused by the accused.
- (3) That in killing the deceased the accused did so or acted with malice aforethought.

24. In each of the above elements the prosecution bears the greatest responsibility as illustrated under section 107 (1) of the Evidence Act that states, ***“whoever desires any Court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exists.”***

25. An accused person has the right to be presumed innocent unless proven guilty beyond reasonable doubt. (See ***Article 50 (2) (a) of the Constitution***). This right on presumption of innocence is an emphasis to the prosecution that not only do they have to prove each ingredients of the offence but also that the offender before court was the perpetrator.

26. In the case of ***Miller v Minister of Pensions [1947] 2 ALL ER 372 KB*** the court speaking through Lord Denning observed as follows on the standard of proof in criminal cases:

“The degree is well settled. It need not reach certainty, but must carry a high degree of probability.” He continues ***“proof beyond reasonable doubt does not mean proof beyond a shadow of doubt; the law would fail to protect the community if it admitted fanciful probabilities or 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 a sentence of course it is possible but not in the least probable, then the case is proved beyond reasonable doubt.”***

27. It is a well entrenched jurisprudence in our criminal justice system that the conviction of an accused rests solely on the strength of the prosecution case. The accused shoulders no responsibility to prove his innocence.

28. It is therefore trite that the burden of proving the accused person’s guilt rests upon the prosecution throughout the trial save that the standard of proof referred to is not that beyond the iota of doubt.

29. In reviewing the sufficiency of evidence presented by the prosecution this court will look at each element of the crime against the accused.

30. **(1) The death of the deceased:**

On the fact of the death of the deceased there cannot be any doubt as to his survival. PW1 Polly Wanja the wife who was with the deceased a few hours before his death confirmed that he died on 21/6/2015. The postmortem report admitted by consent positive identifies the body upon which the postmortem was conducted at the City Mortuary as that of the deceased. The police officers from Oloolua and Ngong police station who testified as PW2, PW3, PW4, PW8 and PW9 confirmed that they had personal knowledge as they visited the scene and made arrangements to have the body taken to the City Mortuary, that the deceased met his death on the 21/6/2015. The accused person who also spent some time with the deceased on the material day also does not dispute that the deceased is dead. This element is therefore proved beyond reasonable doubt.

31. (2) The second element is that of unlawful death of the deceased:

The general principle of law is that all homicides are considered unlawful unless committed in execution of the law, in reasonable defence of property, self or occurred in circumstances not within unlawful act of omission or commission. (See the case of Republic v Guzambizi S/O Wesonga [1948] EACA 65).

32. The law on this matter is plain as defined under section 213 of the Penal Code. Under this provision the code defines circumstances upon which the court can draw an inference as to the cause of death include acts which are not the immediate or sole cause of death.

33. As held by the Court of Appeal in the cases of Republic v Cleya & Another [1973] EA 500 and in Benson Ngunyi Nundu v Republic Cr. Appeal No. 171 of 1984 UR. In both instances the legal proposition is that cause of death is usually proved by medical evidence like a postmortem report in absence of the postmortem cogent circumstantial evidence which can satisfy the criteria set out under section 213 of the Penal Code.

34. What these provisions do explain is that to constitute a crime there must be an act or an omission to hold an offender criminally liable. The test of criminal responsibility in this case is not whether the death is an immediate and direct consequence of unlawful act of the accused, but all circumstances she could reasonably foresee it happening due to her acts of omission or commission. The unlawful and voluntary act must be clearly shown to have been aimed at the deceased.

35. The prosecution case adduced evidence from PW1 Wanja, the wife of the deceased who saw him alive a few minutes before receiving a report of the injuries suffered. When PW1 visited the scene she observed and saw the deceased with two stab wounds on the left side of the body. This was confirmed by PW7 Dickson Kariuki who on visiting the house where the murder took place recovered the blood stained knife apparently used to inflict harm against the deceased.

36. The prosecution further relied on the postmortem report examination which was produced in evidence without calling the maker under section 77 (1) of the Evidence Act. According to the examination and the report the cause of death were the stab wounds caused by a sharp object which was later identified as the knife – exhibit 1.

37. The investigating officer PW12 Brian Mulupi caused the blood sample of the deceased to be extracted during postmortem which he forwarded to the government analyst. This was done alongside the blood stained knife recovered at the scene of the crime. According to PW11 Susan Ngugi from the government forensic laboratory the two exhibits were subjected to a DNA profile to establish whether there is a link between the blood stains in the knife with that of the deceased. In the evidence of PW11 the DNA profile generated produced a positive match between the blood stains on the knife and the blood sample of the deceased. The government analyst PW1 also testified that the cream t-shirt allegedly worn by the deceased was heavily stained with human blood. That is the same blood group found in the stains of the knife. PW7 further testified that he made attempts to escort the deceased to Ngong hospital but unfortunately succumbed to death before receiving any medical treatment.

38. During the testimony by the accused she admits the deceased sustaining injuries while in her house but denies that she played any role to that effect. The accused instead blamed her friend Ann Njeru as the

culprit alluding to the initial quarrel she heard and subsequent injuries on the body of the deceased.

39. The impression created by the accused was that of a by stander and at no time did she participated in the acts of omission or commission which caused physical harm to the deceased. There is no evidence from the accused to answer to the question whether her rear part of the house obstructed her from seeing the commotion between the deceased and the alleged Ann Njeri. She nevertheless refers to exchange of kind of bitter words from the two and shortly a voice ***'why have you done this to me'***.

40. The picture portrayed by the accused does not even indicate existence of a fight between the alleged accomplice Ann Njeru and the deceased. This was the accused own rented house and the presumption is unless rebutted could be the one who understands the storage or position of any cutlery including the murder weapon in this case.

41. The accused assertion that on realizing the assault she was an innocent sympathizer raising an alarm before being stopped by PW6 is not supported by credible defence to controvert circumstantial evidence by the prosecution. It is significant to note that neither the defence of self has been alluded to by the accused to the effect that deceased did any act to call upon the use of excessive force of using a sharp weapon against him.

42. I am of the view that the circumstantial evidence tendered establishes that the knife exhibit was used to cause grievous harm to the deceased. The knife according to the postmortem report penetrated the chest. The inflicted injury caused the death of the deceased before he could get to Ngong hospital for treatment.

43. The attendant circumstances that are present in this case when the murder was committed constitute the following:

The accused calls the deceased and her friend to her house where they consumed alcoholic drinks. A quarrel ensues in the course of the intoxication as supported by PW13. The location and setting was in the accused house. The deceased as confirmed from the postmortem report was stabbed severally from which he died on the spot. The accused was not able to raise an alarm and get help against the alleged accomplice in time to prevent the murder from taking place.

44. What came out clearly was an accused person taking flight from the scene after the mission was accomplished. She feigned innocence and started laying blame to her friend. The circumstantial evidence by the prosecution manifests that the accused was part of the joint enterprise and can also qualify as an aider, a bettor, consuler and or procurer.

45. I find therefore that the evidence available establishes that the death of the deceased was unlawfully caused by causing grievous harm from which he finally succumbed to death.

46. **(3) The third element is that of malice aforethought:**

Malice aforethought is a term of art but the circumstance to draw the inference on manifestation of it is defined under section 206 of the Penal Code. The prosecution will prove any one or set of circumstances do exist in a particular case by calling evidence that the accused had the necessary intention to kill the victim.

47. Under the provisions of section 206 the Code states as follows:

“Malice aforethought is said to be proven if any of the following circumstances exist:

(a) An intention to cause the death of the deceased; or

(b) An intention to cause grievous harm to another whether such person is the person actually killed or not.

(c) 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 killed or not accompanied by indifference whether death or grievous injury occurs or not by a wish that it may not be caused.

(d) An intention to commit a felony.

(e) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.”

48. As stated in the case of Republic v Andrew Mueche Omwenga [2009] eKLR, it is clear from this definition that *“for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission...”*

49. In Bonaya Tutut Ipu & Another v Republic [2015] eKLR the court stated inter alia that *“malice aforethought is a mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proven in any prosecution for murder depends on the peculiar facts of each case.”*

50. In yet another case Paul Muigai Ndungi v Republic [2011] eKLR the Court of Appeal held that *“malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person.”*

51. This provision under section 206 has also been considered way back in 1945 in the case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the predecessor of the Court of Appeal stated inter alia that *“in determining whether malice aforethought has been established the court has to consider the weapon used, the manner in which it is used, part of the body targeted and injured, the severity of the injuries inflicted, the conduct of the accused prior, during and after the killing.”*

52. From the provisions of section 206 of the Penal Code and the principles from the decided cases it is the obligation upon the prosecution to prove the following: (1) That the accused in causing the death of the deceased had the necessary intention to cause death or grievous harm.

(2) On the other hand she had the knowledge that her acts of omission or commission will result in the death of the deceased.

53. In my view it does not matter under section 206 in the accused knowledge it was not foreseeable that death of grievous harm would not be caused by her action. The prosecution case in this case set a trajectory on the basis of the accused and the deceased having spent some time together getting intoxicated. In the later hours of the day they left Queens Bar for the accused house where its alleged they continued to take alcoholic drinks. The testimony of PW13 reveals that when she went to knock the accused house she heard people quarreling to a point that none could hear knock on the door. It is clear from PW13 that it became necessary to leave the compound without talking to the accused as she was in a rush to report to work.

54. It is also to be noted from the evidence of PW6 – Celestine a neighbour to the accused who heard a voice from a lady saying *“umetunga mwingine, kwanini umetunga?”* This caught the attention of PW6 who in quick response came face to face with a lady running away. PW6 positively identified the lady as the accused who was known to her prior to this fateful day.

55. On her part she could not isolate whether the voice was that of the accused or the other lady in the house. It is apparent to the court that apparent blame game between the two in reference to the stabbing of the deceased is reflected in the testimony of PW6.

56. Thirdly the prosecution invited this court to infer circumstances on malice aforethought from the severity of the injuries inflicted upon the deceased. This was in reference to the dicta in the authorities cited of Republic v Godfrey Ngotho Mutiso [2008] eKLR and Jared Masomo v Republic where the Court of Appeal pitched that ***“malice aforethought was manifested by virtue of the multiple injuries aimed at the most vulnerable parts of the body by use of a lethal weapon.”***

57. The answer to me in this case where the accused acted with sole purpose and intention to cause death or grievous bodily harm is to be deduced from PW6, PW13 and the postmortem report. One very important consequence of this case is the fact that the prosecution relied on circumstantial evidence to discharge the test on malice. Although the accused did not allude to this aspect of a fight between the deceased and the two of them in her house, there is a piece of evidence in the analyst report by PW11. The necessary evidence to give this court an inference of existence of a fight is the DNA profile generated by PW11 on Ann Njeru. According to PW11 the investigating officer recovered a blood stained brazier and long trouser belonging to Ann Njeru. The blood stained bra and long trouser together with blood sample matched that of Ann Njeru.

58. The unanswered question by the prosecution is whether Ann Njeru or accused faced imminent threat or danger to her bodily harm to warrant her to defend herself. In other words in the circumstances of this case bearing in mind the nature of the weapon and stabbing of the deceased the prosecution has not proved the unlawful act was planned and premeditated by the accused in advance. The argument made here by this court is that the accused and another not before court inflicted the injury that killed the deceased. Much as the prosecution anchored their case on the text message from the accused phone to PW13 blaming her friend Ann Njeru. There is no evidence to exonerate the accused to be an innocent bystander.

59. As pointed out elsewhere my Mr. Nyaata learned counsel for the accused and also Mr. Akula, senior prosecution counsel for the state there is no direct evidence as to the occurrence of this murder in the house of the accused. There were only three adults in the house being the victim, Ann Njeru and the accused. The investigating officer for reasons availed to him did not recommend for the indictment of Ann. This therefore made the blame game to continue as seen from the testimony of PW10 forensic evidence, PW12 and as confirmed by PW13. What PW13 testimony did was to eliminate the version by the accused that she was a stranger to the cause of death which ended the deceased life prematurely.

60. The cases encompasses the elements of plurality of more than one person at the scene. The circumstances prior, during and after indicate of a common plan, design or purpose which amounts to the commission of causing serious bodily harm. The participation of the accused person being part of the design and execution is not farfetched nor speculative. The prosecution has shown that accused person did not possess the knife before going to her house. The murder weapon being the knife was recovered at the scene by PW5. The information on the location where it was hidden after the incident was disclosed by the accused and another not before court. The accused seems to create an impression that when the assault between the deceased and one Ann Njeru took place she simply did nothing. In reality it is a strain upon credibility to believe that the accused had nothing to do with the murder of the deceased.

61. From the evidence submitted by the prosecution and the arguments by both learned counsels I am of the conceded view that malice aforethought to commit the murder has not been proved beyond reasonable doubt. I find guidance from the holding in the two Court of Appeal decisions referred as Nebart Ekaita v Republic [1994] eKLR and Nzuki v Republic [1993] KLR 171.

62. In the first case the Court of Appeal stated *inter alia* as follows:

“It remained a matter of guessing whether or not the appellant knew there was a risk that death or grievous bodily harm would ensue from his sustained assault of the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute malice requisite to the proof of the offence of murder contrary to section 203 of the Penal Code cannot be excluded. In the circumstances we are unable to uphold the appellant’s conviction for murder.”

63. In *Nzuki case (supra)* the Court of Appeal held interalia that, ***‘the mere fact that the accused 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 DPP 1975 AC 55).’***

64. In applying the above principles to the evidence by the prosecution it is my conceded view that cogent evidence on malice was not tendered before this court. The attack presumably might have occurred at the moment in company of the deceased without any premeditation. This therefore negates the aspect of malice aforethought. However in the present case from the prosecution evidence the deceased died as a result of the unlawful act of being assaulted by the accused and another not before court. The severe injuries were of such gravity that he died on his way to the hospital. In this case the accused had the necessary intention when the lethal knife was applied with force to stab the deceased. The deep wounds sustained are exemplified in the postmortem as indication of the force used being excessive.

65. I am satisfied that the offence of manslaughter has been proved beyond reasonable doubt. The earlier charge of murder contrary to section 203 of the Penal Code is hereby substituted with that of manslaughter contrary to section 202 as read with section 205 of the Penal Code. I find the accused guilty of the offence and do convict her of manslaughter as per the provisions of section 205 of the Code.

Dated, delivered and signed in open Court at Kajiado on 26.9.2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Accused

Mr. Nyaata for the accused

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant