



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 32 OF 2015**

**LESIT, J.**

**REPUBLIC..... PROSECUTOR**

**-VERSUS -**

**TERESIAH MUENI KILONZO..... 1<sup>ST</sup> ACCUSED**

**WYCLIFF OKWEBA ONCHIRI ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused **TERESIAH MUENI KILONZO**, hereinafter the 1<sup>st</sup> accused, and **WYCLIFF OKWEBA ONCHIRI** the 2<sup>nd</sup> accused are jointly charged with one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**.

2. The particulars of the information are:

**“On the 4<sup>th</sup> day of March 2015 at Dandora Phase IV Estate in Njiru District within Nairobi County murdered MAXWEL NYAMBANE MORANGA.”**

3. The prosecution called a total of nine witnesses. The prosecution’s case is that the 1<sup>st</sup> accused was a girlfriend of PW1 and that they lived together in a house in Dandora Phase IV. On the material day PW1, his cousin the 2<sup>nd</sup> accused were joined in his house by the 1<sup>st</sup> accused and her two friends Faith PW5 and one Akinyi.

4. According to PW1, the 1<sup>st</sup> accused and her two girlfriends were drunk. The 1<sup>st</sup> accused was complaining of feeling like vomiting so Faith PW5 pulled out a basin and placed it in front of the 1<sup>st</sup> accused.

5. At that point is when the deceased knocked on the door and called out PW1 by name. As PW1 stood to open the door for the deceased, the 1<sup>st</sup> accused who was next to the door, took a knife from under the table in the house, opened the door, stabbed the deceased once on his chest and closed the door. The 1<sup>st</sup> accused was disarmed of the knife by the 2<sup>nd</sup> accused.

6. The deceased was later found upstairs in the area where clothes are hanged to dry. He died there.

7. The cause of death of the deceased was established by Dr. Ndegwa PW4. The doctor formed the opinion that the cause of death was strangulation due to penetrating chest injury due to single stab wound. The left ventricle of the heart was stabbed leading to haemorrhage.

8. PW9 was the Investigating Officer. He was among the first Police Officers to arrive at the scene of crime. He caused scenes of crime personnel to photograph the scene before removing the body to City Mortuary. He also arrested both accused persons, PW5, one Akinyi, PW1 and one Erick. He said he was not able to recover the murder weapon. After his investigations he charged the two accused with this offence.

9. The two accused persons gave sworn defence. In brief the 1<sup>st</sup> accused did not deny that she drank heavily that day together with her friends PW5 and one Akinyi. She admits that they went to her house shared with PW1 and while there the deceased came knocking. She then says she went out of the house to find a woman who she did not see clearly holding a knife which she took from her. She said that she thought the woman was Akinyi. That soon thereafter the 2<sup>nd</sup> accused took the knife from that woman and left the house for the balcony. The 1<sup>st</sup> accused stated that when she returned to the house, she found PW5 and Akinyi there.

10. The 1<sup>st</sup> accused stated that when the 2<sup>nd</sup> accused returned to the house, he announced that ***“these girls have stabbed Nyabane”***. The 1<sup>st</sup> accused said that the 2<sup>nd</sup> accused then revealed the knife. The 1<sup>st</sup> accused denied stabbing the deceased on the material day.

11. The 2<sup>nd</sup> accused in his defence gave similar evidence to that of PW1. He said that as he, together with PW1, PW5, the 1<sup>st</sup> accused and one Akinyi sat inside PW1’s house, the deceased knocked at the door and called out to PW1 to go out and discuss a matter with him. That before PW1 could stand, the 1<sup>st</sup> accused who was seated near the door took a knife from a basin under a table, opened the door, stabbed the deceased once and then closed the door.

12. The 2<sup>nd</sup> accused stated that he then stood and forcefully took away the knife from the 1<sup>st</sup> accused and dropped it on the chair where Akinyi was seated. He said that he went out to check on the deceased. The 2<sup>nd</sup> accused said that when he stepped outside the house, he could not see the deceased outside, and that it is only after PW1 said that the deceased was upstairs that he rushed there to check on him. The 2<sup>nd</sup> accused said that when police officers visited the scene the murder weapon could not be found. He denied murdering the deceased.

13. The burden lies with the prosecution to prove the charges against the accused persons beyond any reasonable doubt. It must adduce evidence to prove three ingredients for the offence of murder under **section 203** of the **Penal Code**. These are, one that the accused persons carried out an unlawful act or omission; two that in the execution of the unlawful act or omission they caused injury to the deceased person out of which the deceased person died; and three that at the time of the unlawful act or omission was executed, the accused persons had formed the intention to either cause death or grievous harm to the deceased person.

14. Intention to cause death is malice aforethought. **Section 206** of the **Penal Code** gives 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:**

**1. 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,**

**2. 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;**

**3. An intent to commit a felony;**

**4. 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.”**

15. The accused persons are charged jointly of this offence. Consequently, in addition to the above ingredients of the offence, the prosecution must adduce evidence to prove a fourth ingredient which is the fact that the accused persons were executing a common purpose at the time the injuries leading to the deceased's death were caused. That is the requirement of **Section 21** of the **Penal Code** which defines common intention in the following terms:

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

16. Mr. Oduor for the two accused persons in his filed submissions raised issue with contradictions in the evidence of the prosecution witnesses in regard to the lighting conditions at the scene of incident; regarding the ownership of the knife the murder weapon in this case and also regarding its whereabouts after the 2<sup>nd</sup> accused disarmed the 1<sup>st</sup> accused. Counsel also raised issue with evidence of PW1 and PW5 for having said nothing about any presence of blood at the scene of incident and at the balcony where the deceased was found.

17. Mr. Oduor raised issue with evidence of PW1 and PW6 urging there was contradiction whether PW1 ever went to the balcony where PW6 said in her evidence that she met him. Counsel also raised issue of identification of the 2<sup>nd</sup> accused by PW6 urging that since PW6 did not know him before the incident, there was need for an identification parade.

18. Mr. Oduor submitted that the 1<sup>st</sup> accused denied the offence and implicated one Irene. Counsel urged the court to believe her defence and find that she had nothing to do with the deceased death. Regarding the 2<sup>nd</sup> accused defence, Mr. Oduor urged that he denied the charge and instead implicated the 1<sup>st</sup> accused. Counsel urged that such defence which implicated a co-accused was the weakest kind of evidence and should be disregarded.

19. The prosecution case was prosecuted initially by Ms. Ndamu and towards the end by Ms. Onunga. Ms. Ndamu gave oral submissions at the close of the prosecution case. No other submissions were made by the prosecution. In her submissions, learned prosecution counsel urged that the prosecution had proved its case on the required standard. Counsel urged that the prosecution had adduced evidence of eye witnesses that saw the 1<sup>st</sup> accused stab the deceased.

20. Regarding the case against the 2<sup>nd</sup> accused, Ms. Ndamu urged that he was seen with the knife, the murder weapon after the deceased was stabbed. Learned counsel urged that PW9, the investigating officer in this case was not able to recover it at all, not even from the 2<sup>nd</sup> accused. Counsel urged that the 2<sup>nd</sup> accused should be asked what interest he had with the knife, otherwise he be found to have been a party to the offence.

21. Having considered the evidence by the prosecution and the accused persons defence, I find that the issues for determination are as follows:

**(i). whether the evidence that the prosecution witnesses adduced was sufficient to establish beyond doubt that the accused persons stabbed the deceased;**

- (ii). whether there were material inconsistencies in the prosecution evidence;
- (iii). whether there was a need for ID parade to be conducted;
- (iv). whether the prosecution has established the motive for this offence;
- (vi). whether the prosecution has established malice aforethought against the accused;
- (vii). whether the prosecution has established common intention between the accused persons to commit this offence;
- (viii). whether the prosecution failed to avail crucial witnesses in the case;
- (ix) Whether failure to produce an exhibit affects the prosecution case;
- (x). whether the defences of the accused persons was plausible and tenable.

22. I will deal with the first two issues together. These are whether the prosecution witnesses adduced **sufficient evidence to establish** beyond any reasonable doubt that the accused persons stabbed the deceased and whether there were **material inconsistencies in the prosecution evidence**.

23. Regarding the sufficiency of the prosecution case, the prosecution is relying on the testimony of two eye witnesses. These are PW1 and 5, the boyfriend and friend of the 1<sup>st</sup> accused respectfully. PW1 was also a first cousin of the deceased, and from his evidence the two of them [PW1 and the deceased] lived together before the 1<sup>st</sup> accused moved in with him. PW6 corroborated the evidence of PW1 that he and the deceased shared the house in which PW1 lived until the 1<sup>st</sup> accused moved in with PW1.

24. PW1 and 5 told the court that they were seated inside the house of PW1 when they saw the 1<sup>st</sup> accused pick a knife from under the table in a basin with utensils, open the door and stabbed the deceased with it. PW6 testified that after stabbing the deceased, the 1<sup>st</sup> accused announced “ **nimemudunga**” meaning, “ **I have stabbed him**”. The whole incident took place inside the house where the three of them as well as the 2<sup>nd</sup> accused and one Irene were seated. That evidence received support from the 2<sup>nd</sup> accused in his defence.

25. Mr. Oduor for the accused made it an issue that none of the witnesses mentioned the nature of lighting at the scene where the incident occurred. I noted that during the cross examination of PW1 and 5, no questions were put to them to suggest that the circumstances of lighting were such that they could not see anything, or that they were mistaken.

26. It is true the incident took place after 8 pm because that is the time that PW1 said he reached his house from his work place. The incident took place at the door to PW1’s house. All the witnesses, PW1 and 5; as well as both the accused persons knew each other very well before the incident.

27. Considering that the 1<sup>st</sup> accused just before she stabbed the deceased once in the chest according to the eye witnesses, was inside the house seated on the arm of a chair between PW5 and Akinyi; considering that the 1<sup>st</sup> accused was the one closest to the door of the house; considering also that no one left the house or entered the house in the intervening period; taking into account the fact the five of them were seated chatting in the house, I find that PW1 and 5, and indeed the 2<sup>nd</sup> accused were very clear who was in the house at the time and also who committed the act that they witnessed. The statement by the 1<sup>st</sup> accused immediately she stabbed the deceased that she has stabbed someone adds credence to the evidence of the eye witnesses and takes away any possibility of doubt of who exactly stabbed the deceased.

28. I am satisfied that PW1 and 5, as well as the 2<sup>nd</sup> accused knew where each of them was seated in the

house immediately before the attack, and that they clearly saw the 1<sup>st</sup> accused arm herself with a knife before opening the house and stabbing the deceased. The words the 1<sup>st</sup> accused spoke soon thereafter shows that the 1<sup>st</sup> accused knew exactly what she had done and also to which person.

29. The post mortem report confirmed the evidence of PW 1, 5 and the 2<sup>nd</sup> accused that the deceased was stabbed once in the chest. The pathologist found a single stab wound on the deceased chest, and in his opinion after carrying out the post mortem, the chest injury resulting from the stab was the cause of death.

30. I find that the defence did not raise the issue of lighting at the scene at the time of incident throughout the trial until the final submissions in the case. This was clearly an afterthought. I find that there is no doubt from the evidence adduced in this case that it was the 1<sup>st</sup> accused who stabbed the deceased, causing his death.

31. The defence raised issue with the ownership of the knife urging that PW1 used to borrow a knife from PW5's mother, PW6. PW5 and 6 did testify that PW1 borrowed their knife but very few times. Both witnesses were however clear that the knife used in this offence did not belong to PW6. I find that the ownership of the knife was immaterial given the circumstances of this case. What is important is that the witnesses stated clearly that there was a knife in a basin of utensils under the table in PW1's house and that that was the one the 1<sup>st</sup> accused took and used to stab the deceased. I find that the question of the owner of the knife is not material to this case.

32. The defence urged that there was inconsistency regarding the place the knife was picked from by the 1<sup>st</sup> accused before the attack. The evidence regarding where the knife was obtained from was consistent in the evidence of PW1 and 5 and the 2<sup>nd</sup> accused confirmed the same facts in his defence. All of them said that the knife was in a basin under the table in the house. PW1 initially said that the knife was on a basin on the top of the table but corrected that fact in his evidence in chief. I find that the evidence of the prosecution was consistent regarding the place and position from which the 1<sup>st</sup> accused obtained the knife.

33. Issue was raised regarding the sequence of events after the incident. The first is about the knife, where it went after the incident after the 2<sup>nd</sup> accused disarmed the 1<sup>st</sup> accused. From the evidence of PW1 and 5, it is clear that the 1<sup>st</sup> accused was disarmed by the 2<sup>nd</sup> accused after she stabbed the deceased. Both accused persons admitted as much in each of their defence. PW1 and 5 are clear that after disarming the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused left the house holding the knife. There was the evidence of PW6 and 7 who said that they saw the 2<sup>nd</sup> accused with a blood stained knife.

34. PW6 testified that she came to her door from upstairs where she had seen the deceased bleeding when she met the 2<sup>nd</sup> accused. He was holding a knife. PW6 testified that the 2<sup>nd</sup> accused told her that the knife was the one used to stab the deceased. PW7 on her part testified that she had gone to the balcony to see the deceased after PW6 had raised the alarm when she found the 2<sup>nd</sup> accused holding a knife in his hands.

35. I find that the prosecution witnesses are consistent regarding who stabbed the deceased. The witnesses are also clear and consistent that the 2<sup>nd</sup> accused disarmed the 1<sup>st</sup> accused and that he was holding the knife when PW6 and 7 saw him outside PW1 house.

36. Mr. Oduor in his submissions urged that the absence of evidence regarding presence of blood at the scene creates doubt in the prosecution evidence. I do not see the significance of the presence or absence of blood at the scene. The issue of whether or not the deceased bled at the door where he was stabbed is not crucial. This is because the evidence is clear that the deceased left immediately he was stabbed. He did not hang around the scene of crime at all. The issue of blood where he was finally found and where he eventually also died is of no importance to the case.

37. There is no doubt where the incident occurred. The fact he left so soon after he was stabbed can

explain why none of the witnesses talked of seeing blood at the scene of stabbing. I find that whether there was blood at the scene of stabbing is neither here nor there.

38. Regarding contradictions in the evidence of the prosecution witnesses in regard to the lighting conditions at the balcony where the body was found, Counsel for the accused persons urged that PW8 contradicted PW7 in that she said that there was no light at the balcony while PW7 said that there was light at the balcony. I have considered the evidence of PW7 and 8 and find that both of them were clear that where the deceased was lying at the balcony was not dark. Nothing turns on this point.

39. Learned defence counsel took issue with the evidence of PW1 and PW6 regarding whether PW1 ever went to the balcony. Counsel urged that the two witnesses' evidence regarding that fact was inconsistent. I have considered the evidence of the two witnesses. PW6 stated that she met PW1 outside her house and that he told her that someone's child was dying upstairs. PW1 in his evidence clearly said that immediately the deceased was stabbed he went outside his house to look for him. He said that when he did not see him outside the door he went upstairs where he found him. I find no contradiction between the evidence of PW1 and 6 as to whether PW1 went to the balcony. Nothing turns on this point.

40. As to whether there was a need for ID parade to be conducted. Counsel raised issue with the evidence of identification of the 2<sup>nd</sup> accused by PW6 urging that since PW6 did not know him before the incident, there was need for an identification parade. The evidence of PW6 was that she knew the 2<sup>nd</sup> accused before the incident because she had seen him around several times. She however said that she did not know him by name. I do not see any need for identification of the 2<sup>nd</sup> accused by PW6 as it was clear that she was well acquainted to him.

41. As to whether the prosecution has established the  **motive** for this offence. **Section 9 (3) of the Penal Code** stipulates as follows:

**“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.”**

42. Regarding motive in the case of **Choge vs Republic (1985) KLR 1**, the court of appeal held as follows:-

**“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”**

43. In **Libambula Vs. Republic [2003] KLR 683**, the court defined motive in the following terms:

**“Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap. 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”**  
(Emphasis added)

44. The evidence of PW5 was to the effect that after the 1<sup>st</sup> accused stabbed the deceased, and after the 2<sup>nd</sup> accused disarmed her, the 1<sup>st</sup> accused left the house she shared with PW1 and went towards the local supermarket. PW5 testified that she and Irene followed her and sought to know from her why she stabbed the deceased. According to PW5, the explanation the 1<sup>st</sup> accused gave was that the deceased was trying to

seduce her and that he had also taken her belt and had broken her picture frame.

45. It is noteworthy that at the time this statement was made by the 1<sup>st</sup> accused to PW5, none of them was aware that the deceased was going to die from that attack, or even that he had died. It is also noteworthy what PW1, who was a first cousin of the deceased had said of the relationship between 1<sup>st</sup> accused and the deceased. PW1 stated that after he introduced them and cautioned the deceased to treat the 1<sup>st</sup> accused as a sister because he might wed her, he most of the times left them together in the morning and found them together in the evening. He said that he was not aware of any ill feelings between the two of them and was shocked by the 1<sup>st</sup> accused action. That evidence of PW1 clearly shows that the deceased and 1<sup>st</sup> accused spent a lot of time together. There was therefore a chance of resentment as a result of too much familiarity. In the circumstances I find that an opportunity for the possibility of a grudge arising between the two existed and was therefore not farfetched.

46. The defence did not cross examine PW5 regarding the alleged statement by the 1<sup>st</sup> accused that she had a grudge with the deceased. Neither was any question put to PW5 to suggest that she had lied about it. That admission made to PW5 by the 1<sup>st</sup> accused soon after she stabbed the deceased gives some light of an existing grudge between the 1<sup>st</sup> accused and the deceased. That also explains the 1<sup>st</sup> accused quick reaction to pick a knife, open the door and stab the deceased without saying anything the moment she heard him calling.

47. PW1, 5 and the 2<sup>nd</sup> accused all attest to the fact that the deceased not only knocked the door but that he also called out PW1's name and asked to speak to him. I do find that from the facts of the prosecution evidence, I can safely draw an inference that the 1<sup>st</sup> accused had a motive for this attack. There is however no evidence of a grudge existing between the 2<sup>nd</sup> accused and the deceased.

48. As to whether the prosecution has established **malice aforethought** against the accused persons. Malice aforethought is proved if the prosecution adduces evidence to demonstrate any of the circumstances constituting malice aforethought as set out under **section 206** of the **Penal Code**. The facts of the prosecution case shows clearly that the 1<sup>st</sup> accused armed herself with a knife, opened the door where the deceased was, raised her hand and stabbed him once in the chest. The 1<sup>st</sup> accused then announced that she has stabbed him, in Kiswahili language. Those words were heard by PW5. Thereafter the 1<sup>st</sup> accused walked away.

49. Malice aforethought can be inferred from the facts if it is shown that an accused person had 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.

50. In this case the 1<sup>st</sup> accused picked a knife from a basin which had other utensils. She then opened the door, stabbed the deceased and then closed the door and announced that she had stabbed him. Soon after that she walked away from the scene. I find that the accused choice of a knife, her choice to stab the deceased on the chest all show that her actions were deliberate and calculated to cause grievous harm or death. The 1<sup>st</sup> accused leaving the scene without any care as to the condition of the deceased is proof of indifference for what she had done. The fact she declared that she had stabbed the deceased was further proof that she was aware of what she had done and that it could cause serious injury or death to the deceased. I find that the prosecution had proved malice aforethought as against the 1<sup>st</sup> accused. None was proved as against the 2<sup>nd</sup> accused.

51. As to whether the prosecution has established **common intention** between the accused persons to commit this offence. The evidence by the prosecution shows that the 1<sup>st</sup> accused found the 2<sup>nd</sup> accused and PW1 at home when she went there in the company of her two friends, PW5 and Irene. There is no evidence to show that the 1<sup>st</sup> and the 2<sup>nd</sup> accused had met earlier that day, or indeed on any other day to

discuss anything in connection with the deceased death. It was the burden of the prosecution to adduce evidence to establish joint intention. No such evidence was called. Consequently I find that the prosecution has failed to prove common intention.

52. As to whether the **prosecution failed to avail crucial witnesses** in the case. Mr. Odour learned counsel for the accused submitted that the prosecution failed to call crucial witnesses. The first one was the scene of crime officer who took photographs of the scene. Counsel urged that the scene of crime should have been called to produce photographs he took at the scene to resolve the issue of the presence or absence of blood around the place where the incident took place.

53. The other witness was one Irene. Counsel urged that the 1<sup>st</sup> accused denied the offence and implicated Irene as the one who stabbed the deceased. Counsel urged that Irene was referred to by PW1, 5 and both accused. He urged that failure to call her meant her evidence could have contradicted the prosecution in favour of the accused persons.

54. It is the duty of the prosecution to call witnesses to adduce evidence sufficient to enable the court to know the truth. Where the prosecution has difficulty to compel their witnesses to attend court, it has an obligation to inform the court in order to solicit the court's assistance. The court has sanctions it can impose to enforce attendance including warrant of arrest for the defaulting witnesses, as long as it is proved that they are deliberately avoiding court.

55. This is not just the holding of this court, the duty to call witnesses was elaborated in the celebrated case of **Bukenya and Others Vs. Uganda (1972) EA 549**, where the court held that the prosecution was duty bound to avail all witnesses necessary to establish the truth, even if their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

56. In this case the prosecution adduced evidence of nine witnesses. It applied for adjournment to call four other witnesses which the court declined for reason the prosecution had had sufficient time to avail witnesses. It was the view of the court that to allow any further adjournment was not in the interest of justice and especially of expeditious trial.

57. Regarding the evidence availed, I would say that it was sufficient to enable the court come to a just conclusion of the case. Failure to call the scene of crime officer does not affect the prosecution case at all. Mr. Oduor argued that he was a crucial witness to establish whether there was blood at the scene. As I have already found, the presence or absence of blood was of no importance to the case.

58. Failure to call Irene did not affect the case at all either. The evidence of eye witnesses called was sufficient to aid the court establish the truth. In the circumstances I find that there is no justification for the court to draw an adverse inference against the prosecution as suggested by the defence. Nothing turns on this point.

59. The other issue is whether failure to produce an exhibit, the knife which is the murder weapon in this case affects the prosecution case. In **EKAI V. REPUBLIC (1981) KLR 569** the court held:

**“That failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”**

60. The Court of Appeal in the case of **KARANI V. REPUBLIC (2010) 1 KLR 73** delivered itself thus:

**“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So**

**long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit”.**

61. The Court of appeal took a similar approach in RAMADHAN KOMBE V REPUBLIC, Mombasa C.A. NO. 168 OF 2002 - where it held:

**“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant’s defence. We have no hesitation in rejecting this submission”**

62. I am well guided by the above quoted cases. I find that the failure to recover the murder weapon was not fatal to the prosecution case. The circumstances leading to the deceased death have been explained in detail by the prosecution witnesses and the accused persons in their defence. It is quite clear that the deceased was stabbed by the 1<sup>st</sup> accused using a knife. That knife was seen by the witnesses with the 1<sup>st</sup> accused and later in the possession of the 2<sup>nd</sup> accused person after he disarmed the former. Second the weapon used to cause death is patently clear, it was a sharp edged object. The Pathologist PW4 in his evidence confirmed that the cause of death was extrangulation due to penetrating chest injury due to a single stab wound. I find that there is no doubt it was a knife that was used to inflict the fatal injury on the deceased and as such failure to produce that knife is not detrimental to the prosecution case.

63. As to whether the **defences of the accused persons** was plausible and tenable. Mr. Oduor urged the court to consider the defence by the 1<sup>st</sup> accused and the fact she denied the offence and implicated someone else. Regarding the 2<sup>nd</sup> accused defence, Mr. Oduor urged that he denied the charge and instead implicated the 1<sup>st</sup> accused. Counsel urged that such defence which implicated a co-accused was the weakest kind of evidence and should be disregarded.

64. In regard to the 1<sup>st</sup> accused, her defence was that she did not stab the deceased. She stated on oath that she, drank heavily that day together with her friends PW5 and one Akinyi. She admits that they went to her house which she shared with PW1 and while there the deceased came knocking. She then says that she went out of the house to find a woman who she did not see clearly holding a knife which she took from her. She said that she thought the woman was Akinyi. The 1<sup>st</sup> accused stated that the 2<sup>nd</sup> accused came outside the house and took the knife from her (the accused) and went away to the balcony. The 1<sup>st</sup> accused stated that when she returned to the house, she found PW5 and Akinyi there.

65. In regard to the 2<sup>nd</sup> accused he denied stabbing the deceased or having had any role in his death. He stated that it was the deceased who knocked at the door to PW1 and 1<sup>st</sup> accused house and asked to speak to PW1. That the 1<sup>st</sup> accused straightaway took a knife from a basin of utensils, opened the door, stabbed the deceased once and closed the door. The 2<sup>nd</sup> accused said that he then disarmed the 1<sup>st</sup> accused to prevent her from doing anything more and threw it on the seat where PW4 and Akinyi were seated. He denied the charge.

66. The issue is whether the defence of each of the accused persons was reasonable and plausible. Generally both accused made self-serving statements. I have carefully considered the defence of the 1<sup>st</sup> accused. I note that she admits being present at the scene at the time the deceased was stabbed. She however claims that a lady stabbed him, and that she thought it was one Akinyi but then, when she re-entered her house she saw Akinyi inside. Akinyi was not a witness, neither was she a co-accused. I have already found that failure to call her as a witness did not weaken the prosecution case.

67. I noted that the defence did not suggest to any of the prosecution witnesses that it was Akinyi who stabbed the deceased, or that any other person could have done it. Neither was there any suggestion that

the witnesses lied against the 1<sup>st</sup> accused.

68. In the Court of Appeal case Of Ernest Abanga Alias Onyango Vs Republic, CR. A NO.32 of 1990(UR), the court observed:

**“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:**

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

**This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.**

69. I am well guided by the above authority.

70. Unlike what Mr. Oduor submitted, the 1<sup>st</sup> accused was not sure who, according to her story stabbed the deceased. I am fully aware that the 1<sup>st</sup> accused has no burden of proving her defence. The burden lies with the prosecution to prove the charge against the accused persons beyond any reasonable doubt. I do not wish to repeat here what my findings were of the prosecution evidence. Suffice it to state that having carefully considered the entire case, I find that the prosecution proved beyond any reasonable doubt that it was the 1<sup>st</sup> accused who stabbed the deceased as a result of which he died. I find that the accused gave a deliberate lie and that her defence was incredible, false and an afterthought. I find that her defence was far from the truth. It was false because she was the one who stabbed the deceased and four persons have testified to that fact whose evidence I believe to be true.

71. I am aware that the accused did not raise intoxication as her defence. That notwithstanding, having been adduced in the evidence of the prosecution, it cannot be ignored.

72. **Section 13(2) of the Penal Code** stipulates what constitutes a defence of intoxication. It stipulates as follows:

**“13 (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.”**

73. I have taken into account the evidence of PW5 that she and Akinyi celebrated with the 1<sup>st</sup> accused that afternoon as a result of which the 1<sup>st</sup> accused got drunk just before the incident. PW1 and the 2<sup>nd</sup> accused confirmed the fact that the 1<sup>st</sup> accused was drunk and that she was even nauseated and quite uncomfortable just before the deceased came to the scene. There was also PW8 who saw the 1<sup>st</sup> accused vomiting at the public toilet just before she entered PW1’s house. It is therefore clear that the 1<sup>st</sup> accused had taken alcohol, a matter she also stated in her defence.

74. The question is whether at the time the 1<sup>st</sup> accused stabbed the deceased, she was incapable of knowing what she was doing or to know that what she was doing was wrong? I find that the 1<sup>st</sup> accused had taken alcohol that day. She was however able to come home on her own. The amount of alcohol consumed did not prevent her from walking and from reasoning. She was able to hear the deceased knock on the door and even recognized his voice. Her senses were very much alert. She was swift. She immediately took the knife from among other utensils and struck the deceased. She later explained to PW5 and Akinyi why she stabbed the deceased. She was very clear to PW5 that she knew what she had done, and went ahead to justify her action.

75. I have also taken into account that PW5 and Akinyi had taken the same alcoholic drink as the 1<sup>st</sup> accused. In fact PW1 said that PW5 apologized to him on her own behalf and that of the 1<sup>st</sup> accused for having taken alcohol that day. There was nothing different taken by the 1<sup>st</sup> accused that PW5 had not herself taken in terms of content.

76. Having considered the evidence in regard to the alcohol intake by the 1<sup>st</sup> accused, and her state of mind at the time of this incident, I find that the 1<sup>st</sup> accused was not under the influence as not to know what she was doing. I find that her senses were alert, that her moves were swift. Her actions were deliberate and well calculated. I find her mind was not under the influence of alcohol as to make her incapable of knowing what she had done or of knowing what she had done was wrong. Further to that, the accused person got herself intoxicated voluntarily. I find that the defence of intoxication does not apply to the case against the 1<sup>st</sup> accused.

77. For the 2<sup>nd</sup> accused he made a self-serving statement and implicated the 1<sup>st</sup> accused. His defence is in tandem with the evidence of the prosecution. What the 2<sup>nd</sup> accused stated in his defence was not novel, it was substantially similar to what PW1 and 5 said in relation to the events leading to the stabbing of the deceased. There was also similarity in relation to the disarming of the 1<sup>st</sup> accused by the 2<sup>nd</sup> accused immediately after she stabbed the deceased. Up to that point the 2<sup>nd</sup> accused defence is corroborated by the evidence of PW1 and 5.

78. There is disparity regarding the knife after 2<sup>nd</sup> accused took it from the co-accused. Did the 2<sup>nd</sup> accused throw it on top of the seat where PW5 and Akinyi were seated before walking out of the house? Or did he leave with the knife? Explanation by the 2<sup>nd</sup> accused that he left the knife on the seat in PW1's house was not true. He was seen by two persons with the knife outside the house of PW1. The two eye witnesses of this fact were PW6 and 7. These were independent witnesses who were unaware of the events leading to the stabbing of the deceased.

79. PW6 knew of the stabbing of the deceased from PW1 who also informed her that the deceased was dying in the balcony. She proceeded there and confirmed the story and went back downstairs screaming. She said that she met the 2<sup>nd</sup> accused at her door holding a knife. She said that the 2<sup>nd</sup> accused showed her the knife and told her that it was the murder weapon. PW7 said that she found the 2<sup>nd</sup> accused holding the knife at the balcony where the deceased was lying bleeding.

80. It is instructive that in cross examination of PW6 and PW7 by the defence none was challenged about their claim that they saw the 2<sup>nd</sup> accused with a knife, neither was any question put to them to suggest they were not telling the truth about it. I find that the 2<sup>nd</sup> accused left PW1's house with the knife, the murder weapon in this case and was seen carrying it outside the house of PW6 by PW6, and also at the balcony by PW7. I find that the 2<sup>nd</sup> accused disposed off the knife, and therefore his defence that he never left the house with the knife is not true.

81. The issue is whether taking away the knife and disposing of it is proof 2<sup>nd</sup> accused was a party to the deceased death? The learned prosecution counsel submitted that the 2<sup>nd</sup> accused should be found to have been a party to the offence for having taken away the knife and failed to produce it to PW9.

82. That seems to be the reason the 2<sup>nd</sup> accused was charged over the disappearance of the knife after he took it. I have already found that the evidence adduced by the prosecution does not support a narrative that the 2<sup>nd</sup> accused was acting in concert with the 1<sup>st</sup> accused. The relevant question is what offence the 2<sup>nd</sup> accused committed in relation to the knife, whether the 2<sup>nd</sup> accused was an Accessory After the Fact.

**83. Section 396(1) of the Penal Code** provides for the offence of Accessory after the fact and stipulates as follows:

***“A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”***

84. A person can only be an accessory after the fact, not merely in relation to concealing or disposing off exhibits. It has to do with aiding a person he knows is guilty of an offence to escape punishment. Hiding the murder weapon could not assist the 1<sup>st</sup> accused escape punishment for what she did in this case.

85. I think that it is expedient to consider the 2<sup>nd</sup> accused motive when he took the knife from the 1<sup>st</sup> accused. In his defence he said that he was disarming the 1<sup>st</sup> accused. PW1 and 5 also said that in their own assessment, he was merely disarming the 1<sup>st</sup> accused to prevent any further injury. The movements of the 2<sup>nd</sup> accused after he took away the knife are very clear from the eye witnesses. PW1 and 5 said that he went outside the house with the knife. He was also seen with the knife, first by PW6 outside her door and later by PW7 at the balcony. PW6 and 7 both said that he was carrying the knife. PW6 said that the 2<sup>nd</sup> accused even showed her the knife and told her that it was the murder weapon.

86. I find that the 2<sup>nd</sup> accused intent was to disarm the 1<sup>st</sup> accused and not to aid her escape punishment. He was unwise to dispose of it instead of giving it to the police. His foolish act does not however constitute an offence. I find that no offence was proved against the 2<sup>nd</sup> accused.

87. In the result I find that the prosecution has proved the offence of murder against the 1<sup>st</sup> accused beyond any reasonable doubt and I convict her accordingly. As for the 2<sup>nd</sup> accused I find that the charge was not proved against him. I give him the benefit of doubt and acquit him accordingly.

**DATED AT NAIROBI THIS 23<sup>rd</sup> DAY OF NOVEMBER, 2017.**

**LESIIT, J**

**JUDGE**