



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT MALINDI**  
**CRIMINAL CASE 3 OF 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MOHAMED OMAR MOHAMED.....ACCUSED**

**JUDGMENT**

1. The accused is charged with murder contrary to section 203 of the Penal Code, it being alleged that on 2<sup>nd</sup> January, 2007 at Charo Wamae area, Kibaoni, Kilifi District, he murdered **SALAMA SALIM**.
2. The undisputed facts of this case were that the accused was married to the deceased prior to the material date but a misunderstanding had recently arisen between them causing the deceased to go to her parent`s home. The deceased subsequently befriended one **ZABLON NGUA JEFFA** (Pw 2) and the two became lovers. Thus the deceased frequented Pw 2`s house, which was a stone`s throw away from her husband (accused`s) home. On the fateful day, the deceased was in the house of Pw 2 when her husband came calling, as he and Pw 2 were friends. Although there is some contention as to what exactly transpired thereafter, it is a fact admitted on both sides that at the end of it all, the deceased was stabbed to death in Pw 2`s house.
3. It is the prosecution case that the accused inflicted the fatal injuries on the deceased. On his part, the accused in an unsworn defence statement said that the deceased was accidentally stabbed during a scuffle between the accused and Pw 2 as the former attempted to disarm the latter who wielded a knife.
4. As I see it, two key facts require determination, namely who inflicted the fatal injuries on the deceased and the accompanying intention. In short whether the charge has been proven beyond reasonable doubt. But first it is necessary to set out the ingredients of the offence facing the accused. Section 203 of the Penal Code provides as follows;-

**“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”**

Malice aforethought is deemed in section 206 Penal Code to be established where any or more of the following circumstances are proved;-

- a. An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused

c. An intent to commit a felony

d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony

5. Regarding the issue of who inflicted injuries on the deceased, the prosecution evidence was circumstantial. The accused joined SYLVESTER MRAMBA KAZUNGU(Pw1) and Pw 2 who were seated outside Pw 2`s house at about 1.00Pm. According to Pw 2 the accused confronted him with the allegation that he was having an affair with his wife, the deceased which Pw 2 denied. The accused also allegedly claimed that he had seen the deceased enter Pw 2`s house. Again Pw 2 denied this. Then the accused allegedly told Pw 2 that he would sit and wait for her and asked that Pw 2 help him to reconcile with his wife. So they sat and waited. Pw 1 does not mention this conversation but from his evidence, it does appear that the accused and Pw 2 were seated outside the latter`s house until darkness fell. That is when, according to Pw 1 the accused entered Pw 2`s house and Pw 1 fled, scared because the deceased was in that room.

6. The whereabouts of Pw 2 at that moment was not stated by Pw 1. Pw 2 says he left at 9.00Pm to go watch a match leaving Pw 1 and the accused still seated outside. Pw 2 claimed that he was unaware that the deceased was already in his house and that when leaving, he did not latch the door because he was expecting her to come any time.

7. The accused`s version of events is that he had arrived home at 5.00Pm on the material date. He rested and ate and after 8.00Pm he went to Pw 2`s house. He found him outside his house. He asked that Pw 2 accompany him on the next day to his wife`s home where she had travelled due to a family problem. Pw 2 agreed and the accused suggested they go watch a video. Pw 2 said he would go inside his house to change leaving one STEPHEN and the accused outside. Then Pw 1 came out of the house and left hurriedly so did STEPHEN. But the accused continued waiting for Pw 2. Before long he was drawn into the house by a quarrel. But at the door he met Pw 2 who was armed with a knife. He threatened him that he “was next” and a struggle ensued between them as the accused tried to restrain him. As the struggle continued his wife appeared from behind and was caught by the knife on the chest. He said it was not his intention to kill his wife and that had he known that she was having an affair with Pw 2, he would not have gone to Pw 2`s house.

8. That there was a struggle between PW2 and the accused was denied by PW2 who denied ever entering his house at the material time. The defence did not raise the issue that PW2 was armed with a knife at any time of the incident. Yet PW2 had freely admitted that the knife used to stab the deceased was in his house. PW2 claimed to have left for the video before Sylvester (PW1).

9. In all likelihood, Sylvester (PW1) left first because as he said he was scared having found Salama (deceased) was in PW2`s room while her husband (accused) sat outside with PW2. I think that PW2 being the guilty party has every reason to deny that he and Salama were caught by the accused red handed at his home. I prefer the testimony of Sylvester (PW1) who on seeing the unfolding scenario got scared and he decided to run away. As he did so, met with the accused at the door entering the house.

10. The defence did not suggest to him that there was a quarrel at that moment between PW2 and another person in the house which drew accused to the house. From PW1`s evidence, only the deceased was inside the house at the time. I believe PW1`s evidence in this regard. In the circumstances described by PW1 and PW2 himself, it is unbelievable that PW2 did not know or suspect that the deceased was in his house. PW2 said that the accused had by then told him he had seen the deceased enter PW2`s house and even accused him of having an affair with her. PW2 therefore had every cause to take either of the two actions:-Either to leave the scene as soon as accused entered his house, or to try to resist the accused. The

accused's defence suggests the latter.

11. But what creates doubt over the defence is the proven fact that the deceased suffered multiple stabs on the abdomen. If indeed there was an ongoing struggle between the accused and PW2, as the former describes, there was not enough opportunity in the course of it for the accused to inflict so many stabs on the deceased. Secondly, the accused's version does not quite explain how the deceased was severely caught on the chest by the knife that was the subject of the struggle between two men. It is significant that the accused did not mention that the deceased had already been injured when the accused entered the house. On all accounts PW2 had no reason to stab the deceased; they were in love.

12. Considering all the relevant evidence, my view is that there was in fact no fight between the accused and pW2 because, the latter must have left soon after PW1's hurried departure. Thus the deceased who was in the house alone was left to the wrath of her husband who had caught her in the house of his friend.

13. In the circumstances described by Pw 1 and Pw 2, the accused was the last person to enter the house where the deceased was. He had the opportunity and necessary motive to harm her. Infact, he does not deny she was stabbed. As I have indicated, his version of how the stabbing occurred is unbelievable. All the inculpatory facts consistently point to the guilt of the accused and his explanation is no more than a feeble attempt to evade liability (See KIPKERING ARAP KOSKE VS REPUBLIC (1949) 16 EACA 135.)

14. The court has also considered whether there are co-existing circumstances which would weaken or destroy the inference of guilt (see SIMON MUSOKE V R(1958 JEA 715 AND PARVIN SINGH DHALAY V REPUBLIC, CRIMINAL APPEAL NO.10 OF 1997). No such circumstances exist in this case. The deceased was alive and alone when the accused went into the house of Pw 2. She was so grievously wounded thereafter that she died. There was no fight or altercation between the deceased and anyone else in the intervening period, from the prosecution evidence.

15. It is not believable that the accused felt no anger as he claimed in his defence or that he had no grudge against his wife. His stated reason for going to Pw 2's was that he had seen the wife enter Pw 2's house and was convinced enough to sit waiting over several hours, according to PW1 and PW2.

16. The issue of his wife's estrangement was evidently weighing heavily on him even in his own admission. His assertion that he was unaware of the affair between her and PW2 is not believable in light of the statements he made to PW2 on the material date.

17. Clearly, the deceased suffered not one stab on the chest as the defence suggests but no less than four abdominal stabs. The post mortem form enumerates the injuries as cut wounds (stabs) on the face, left side neck, left side chest and "multiple stab wounds of varying sizes on the chest wall" and deep cut wound on the right arm measuring about 10cm.

18. The cause of death was penetrating abdominal injury secondary to stabs and ruptured liver, indicating the serenity of the stabs. Such are not consistent with the scenario painted by the accused. Thus the evidence by Pw 1 that the accused entered the room where deceased was alone and the circumstances obtaining consistently point to the accused's actions being motivated by the jealousy of a jilted husband. The multiplicity of the stabs inflicted shows the state of the mind of the assailant: he intended to ensure the victim did not survive the attack, or at least that she sustained grievous harm.

19. Malice aforethought can be inferred from this fact alone. The case of DANIEL MUTHUKU MUTHAA VS R (2011)e KLR involved almost similar facts. The appellant challenged his conviction on grounds inter alia that malice aforethought had not been proved. The Court of Appeal stated inter alia;-

***“For our part, we are fully satisfied that malice aforethought was proved. The appellant shot the deceased on the chest – according to him the gun “exploded” and fired four shots. By shooting the deceased, the appellant intended to either kill the deceased or to gravely injure him .....deceased died in the spot. Malice aforethought was self-evident from the fact of the appellant in firing four bullets in***

*the chest of the deceased*

**-See section 206(b) of the Penal Code”**

Similarly, in the present case, the deceased was severally stabbed on the chest and neck by the accused. She died soon after. Malice aforethought is clearly self evident from these acts of vicious and serial stabs.

20. I am satisfied that the prosecution has proved the charge beyond any reasonable doubt and will convict the accused accordingly. I feel compelled however to comment on the unexplained failure by the state to call either the investigating officer or the police officer who arrested the accused. Although the default in this case is inconsequential there being no apparent oblique motives behind it and no failure of justice resulting thereby, the prosecution case will always appear incomplete where such witnesses are not called. I think the state must always endeavour to summon such state witnesses for completeness (See **JULIUS KALEWA VS R (2006)e KLR; HORWARD SHIKANGA & ANOTHER VS R (2008)e KLR**)

Delivered and signed at Malindi this **11<sup>th</sup> May, 2012** in the presence of the accused, Mr. Kemo for the State, Mr. Shujaa holding brief for Mr. Michira for the accused, cc Evans.

**C. W. MEOLI**  
**JUDGE**

COURT – Record and Sentence on 24<sup>th</sup> May, 2012.

**C. W. MEOLI**  
**JUDGE**