



**Republic v Kimathi alias Feisal (Criminal Case 49 of 2017)
[2025] KEHC 321 (KLR) (23 January 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE 49 OF 2017
EM MURIITHI, J
JANUARY 23, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

FRANCIS KIMATHI ALIAS FEISAL RESPONDENT

JUDGMENT

Introduction

1. The accused Francis Kimathi Alias Feisal was charged with murder contrary to section 203 as read with 204 of the Penal Code with particulars that he “on the night of 2nd July, 2017 at an unknown time at Bula Pesa area Isiolo Sub-County within Isiolo County murdered Jospine Ngorot.”

The Prosecution’s Case

2. The DPP called 8 witnesses to prove the charge. PW1 Najma Abdi testified that on 2.7.2017 while at home she heard the deceased and the accused fighting. The accused who was their shamba boy, was kicking and boxing the deceased who was his wife and they tried to separate them but in vain and the deceased had fainted. She had removed the deceased by the back gate and the accused followed her while still beating the deceased. The deceased and the accused had gone to their house at the farm and the next day they found the deceased’s body with blood around the house. The door was locked and had to be broken and the body was on the ground covered with clothes.
3. On cross-examination, she said she did not know why they were fighting and she could not ask because the accused was so violent, but she did not know if the accused was drunk. She said the incident was between 7-8pm and there was moonlight. On re-examination, she said on that day there was moonlight and the two fought for about 30-40 minutes, and the accused had worked for her family for less than one year.



4. PW 2 Amina Adan Boru testified that on 2.7.2017, at about 1900hrs the deceased had gone to their home wailing and asking for assistance. When PW2 came out, the accused caught up with the deceased and continued beating her until she fell down. He continued beating her despite PW2's plea, he swore to continue beating her and become very violent. PW2 raised alarm and neighbours came and separated them shortly but the accused refused to leave without the wife. The deceased had gone into PW2's house and the accused kept making noise and throwing stones on the roof until they agreed to let the wife go. They then let them go. PW2 called Wario, the area Chief, who came the next day and they went to the house of the couple and found outside the plot there was blood and there was no response when they called out. Mr. Wario peeped into the house and saw body on the ground and they then broke the door and found the body on the ground covered with a blanket. He then called the police who took photographs of the scene then took away the body.
5. On cross-examination she said she saw accused beat the deceased but did not know the reasons for the beating; that the accused was their employee was their shamba boy and she had seen him beat and kick the deceased under the moonlight. She said the accused lived with the deceased and a young boy about 2 years.
6. PW3 Lochuua Mary testified that on 3/7/2017 at about noon she heard wailing that her daughter had been killed by the husband. She went to the scene and police came and picked the body, and took it to the mortuary at the General Hospital. She later went to the hospital and identified the deceased for post mortem.
7. PW4 David Miriti, a police reservist within Isiolo testified that on 3.7.2017 at about 9am he was home when a lady of Somali origin called Fatuma came to him and reported that somebody had been killed at their compound. He went to the scene, and on entering the house he found the body laid on the ground and covered with Kikoi and next to the body were four stones. There was a large crowd gathered outside, and he was told that the deceased had a husband called Kimathi who worked at Kachere Primary School as a cook. At the school they were told that he had been to the school and requested for money to go and attend to a sick wife was denied money and he declared that he would not work. The co-workers told them that he could have gone to Bargatula. Upon searching for the accused, they found him at a motor vehicle stage with things packed in a kikoi. Upon being arrested his reaction was that he had not killed anybody.
8. On cross-examination, he said that the accused told them when they arrested him he had no child and that from the scene of crime and where they effected the arrest was about 3 kilometres.
9. PW5 Wario Elgoi an area manager working under the assistant chief testified that on 3.7.2017 at about 10 O'clock he had received a call from PW2 one Amina Adan to the effect that at their plot a lady had been assaulted the whole night and she could have died. He went to the scene and found the door locked from outside, and upon peeping through an opening, he saw a body on the ground covered with Kikoi. They were told the suspected husband could have gone to work at Kachere Primary School and upon going to the school but did not find him and they reported to the police who took photos and remove the body to the mortuary. At about 3 O'clock, he received a phone from one Mr. Shoko to the effect that the suspect had been seen somewhere, taking a motorcycle and went to the place with PW4 and they found the suspect on a motor cycle ready to take off. Upon arrest he declared having killed nobody even before they spoke to him. On cross-examination, PW5 said they found the body on the floor and beside it were some four pieces of stones and upon arrest, the accused just declared that he had not killed anybody without being asked.
10. PW 6 Dr. Mohammed Abdikadir Guyo, Bachelor of Medicine and Surgery MBChB for Kampala University 2013 who conducted the Post mortem on 10/7/2017 at Isiolo Hospital Mortuary reported



that on 10/7/2017, Josphine Ngorot's body was covered in black blanket, African woman of 35 years, Good physique. 5 foot 1 inch. The body had been preserved at Isiolo hospital. The body had injury on the head on four parts:

- i. On the back occipital region.
- ii. Parietal left on side of head and one on frontal region.
- iii. There were bruises in left arm.
- iv. The head had injury which was deep 4 cm x 2cm wide. There was blood on the mouth and noise. Mother to deceased, Mary Rocho identified the body and thumb printed the form.

11. The Cause of death was given as excessive bleeding and injury on the brain by knife injury. Death certificate read it was a sharp object which was believed is a knife. The Post mortem was conducted about 7 days after the incident. The body was discovered in the house and then brought to the mortuary. Post mortem form on Josphine Ngorot is marked PEx1. There were no questions in cross-examination.
12. PW7 NO. 108640 PC Vincent Macharia of Isiolo DCI office, attached to crime scene investigating who is gazetted under No. 1145 OF 29/1/23 presented a report and certificate by Micah Kipkoech Ngeno with he had worked for 1 ½ years. Micah Kipkoech Ngeno received a report that he was required to attend an incident of killing at Mabatini Isiolo. He went with Cpl Ekatang of DCI Isiolo and PC Martin of Isiolo Police Station. When they arrived at the scene, they were shown a house made of Iron sheets and inside they found a half-naked body of a female on the side of a mattress. It was reported that deceased had been assaulted by her husband on the night of 2/7/2017 and she had sustained injuries on the head, neck and back. On the mattress and other clothes there were blood stained. Outside the house there were stones with blood stains indicating that there were fighting outside the house and stones may have been used. They documented the scene and processed photographs of the body and surrounding scene. There is a certificate dated 28/12/2012 by Micah Kipkoech Gazette No. 217 of 28/12/2012. Certificate dated 28/12/ PEx. No 2 (a). The photographs 11 of them as PEx 2 (b). On cross-examination, he said the stones were found on the outside of the house and he did not know whether there clothes belonging to the accused and he could not tell whether the clothes belonged to the deceased or the accused.
13. PW 8 NO. 61999 Cpl. Moses Murithi of CID Isiolo, the Investigating Officer testified that he took over from Francis Ekaptani who was the original Investigating Officer. When he read the file, he understood the prosecution case that the accused committed the offence, according to the statements of the witnesses that he read on the file. On the date of the incident on 2/7/2017 in the night. The report was made on 3/7/2017. People went to the home of the accused to see what had happened in the night of 2/7/2017 as the deceased was being beaten in the night. The deceased and accused were living as husband and wife. When on 3/7/2017 at 10:00 am they went to the home, they found the house had been locked and they could see somebody was lying on the floor. It was a single room house. They broke the door and went inside and found the body. The accused was not there. The deceased had blood on the head one of the members of the public and an elder called Wario went to report at Isiolo Police Station. Police came back with Wario to the house. The police looked for the accused who was the deceased husband. They were told that the accused worked at Kachere Primary School. They went to look for him there and were informed that the accused had reported in the morning and said he wanted to go and attend to his sick wife. He asked for some money. He was not given the money but he went away. He did not get back to the home. The police went back to the home and took pictures and processed the scene and took body to the Isiolo mortuary. On that date 3/7/2017 at 3:30pm, Wario the elder was informed that the accused had been seen. He took police reserve PW4 and went to the area



where they were told accused ad been seen they went to the area and got the accused. They arrested him and took him to Isiolo Police Station where he was placed in custody and later. On 10/7/2017, police officer investigating the case together with the family of the deceased went to Isiolo hospital mortuary and identified the body and postmortem was conducted and Accused was later charged. From the file, there were eye witness who said the accused had been beating and chasing the deceased. The witnesses had tried to separate them. The accused said he had to go with his wife. The members of the public is allowed them to go. On the following day, on the following day the deceased is discovered on their house.

14. On cross-examination, he said that he did not get to know the reason for the fighting and the public tried to stop the beating and at one time he had taken a stone and he was restrained and he was asked to leave. He said he had to take his wife. At the roadside, the accused was beating the deceased using his fists and kicks and he did not know whether he used other weapon at home. He also said he did not get any information that accused has been drunk, and he did not get any person telling him why the accused admitted the act. He could not tell whether there were any clothes of the accused recovered at the scene of Crime, and that it is as if accused had taken his clothes and was on the run.

The Defence

15. When put on his defence the accused Francis Kimathi testified as DW1 the accused admitted killing the deceased in circumstances set out below. He said that he accepted the Murder charge – [COURT – The courts directed counsel to confirm from the Accused that he wishes to plead guilty to the offence of murder]. He said he did not intend to kill and narrated that on 2/7/2017 in the evening at 8:00pm, he had left work where he was working at Kachere Primary School at Isiolo. He found his wife Josphine Nakurumi was not at the home at the place they were staying, and he went to look for her at the market. He did not find her at the Isiolo stage market and he started drinking beer when he did not find her. He left at 5:30pm and headed home. At Manyatta Punda, he passed and found his wife and mother of PW1. He said his wife had out down his small child Martin Kathurima and they were drinking. He asked her why she was not at home and she was drinking. They started fighting with his wife and arguing. They were both drunk having had taken Chang'aa. They started fighting and the mother of PW1 separated them. He walked away towards his plot, which was just nearby. After he got home, he went back to where his wife was drinking and asked her why she had not come home and they again disagreed and fought. He said he did not use any stone, and had only fought using his hands. He said that she told him that he was not her husband, and he then left and went back to Isiolo at the market and continued drinking. After sometime, he went away towards home again and arriving at his home at 7:30 pm, and he found his wife still drinking at the same place with PW1 mother. He took her and went home with her. He explained the incident saying that they were drinking and they just argued and started fighting. As they were fighting he pushed her at the door and left her there with the child and went back to town. He said he did not know what happened next.
16. When asked that PW1 and PW2 said he had hit her with stones, he said he never used stones, and they had only fought with fists and kicks. He said he got to know on the following day that she had died on Monday at 1:00pm when he found himself at the police. He said that when he left her, he did not recall whether she was bleeding and he had found himself at the police station and told that he had been arrested while drunk. He said he was told the next day that he had killed someone. He said that when they fought, he never went back home, and he just continued drinking. He left his wife with the child and he found himself at the police station and told that the child had been taken to the mother of the deceased. He said he did not know how the deceased got into the house as testified, having left her at the door. He said they were both drunk and he did not intend to kill her. He said he was angry that she used to go drinking leaving their child aged 1 ½ years unattended from the money he brought home.



17. On cross-examination, he said the incident happened in 2017 and he was testifying in 2024 and he could recall not what happened. He said he was the one who bought the beer/changaa and he knew it was wrong to kill. He said did not get injured anywhere but Josphine had injuries. He insisted they had fought. He said that from his home to the place where they were drinking is about 20 minutes of walk and he went there two times when he left their house to the market then when he found her at the drinking place and he was walking the distance. It was put to him that he was not drunk if he could walk all the trips.

Issue for determination

18. On the ingredients of the offence of murder, (see Republic vs. Nyambura & 4 Others [2001] KLR 355), the issue that arose on the evidence was whether the death of the deceased was proved; whether it was established that the accused's unlawful act caused the death; and whether the accused caused the death with malice aforethought.

Death of the deceased proved

19. On the test for the ingredients of the offence of murder, the Court notes that the death of the deceased was established by multiple witnesses including the person who discovered the body PW2; the mother of the deceased PW3; the area police reservist PW4 and Area Manager PW5 who went to respond; and the doctor who examined the body, PW6; as well as the scenes of crime officer who processed the scene, PW7.

Death caused by Accused's unlawful act

20. It was also established on the evidence that it was the accused who beat the deceased by bloodied stones, or fists and kicks in his evidence, and he was the last person to be seen with the deceased alive when he said he would not go home unless he was allowed to go with his wife. His said his wife was found dead with stab wounds on the head among other injuries on her body. The cause of death was established as secondary to the injuries. The said action of beating the deceased was unlawful. It was not shown or alleged that in beating the deceased he was acting in self-defence, in circumstances as would excuse the killing. See Mokwa vs. Republic [1976–80] 1 KLR 1337, that:

Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force.”

Despite the accused alleging that they had fought with the deceased, he confirmed on cross-examination that he did not get injured anywhere but Josphine had injuries, and he cannot possibly have been acting in any self-defence!

Malice aforethought

21. The question then arises under the elements of murder test whether the accused acted with malice aforethought. In the Submissions of the DPP dated 1/10/2024, Counsel urged that the defence of intoxication under section 13 of the Penal Code was inapplicable as it had not been shown that the accused had become insane and did not know that what he was doing was wrong, as follows:

18. The doctor's finding at the post mortem corroborates the evidence of PW1 and PW2. The question is whether the accused had malice aforethought.



The Court of Appeal decision of *Daniel Muthee v Republic CA NO. 218 of 2005* (UR) considered what constitutes malice aforethought and observed as follows: -

When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code'.

Therefore, the accused must have known when he repeated attacked the deceased with blows and kicks that the injury occasioned could cause death. The accused had all the intention to cause death to the deceased. Consequently, the prosecution has proved that the accused had formed the necessary malice aforethought to cause the deceased death.

Lastly, on the accused testimony of intoxication as negating malice aforethought, section 13 of the Penal Code provides for 'intoxication to constitute a defence to a criminal offence. It provides that it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily, or otherwise, at the time of such act or omission'.

In the instance case, the defence of intoxication can be availed when the intoxication produces such a condition to render the accused losing the requisite intention for the offence. The onus of proof about the reason of intoxication and thus becoming incapable of having particular knowledge is on the accused. There is no evidence that the accused was so drunk that he did not know what he was doing within the meaning of section 13 of the Penal code. The accused was fully aware of his actions and through his testimony gave a vivid picture as to what had transpired on that fateful day. As such, his conduct is not consistent with a person so drunk as to have lost the capacity of moral judgment. Therefore, the defence of intoxication is not plausible in the circumstances.

20. Having considered the entire evidence adduced in this case, the prosecution has proved a case against the accused beyond any reasonable doubt. I urge this honourable court to find the accused guilty of murder contrary to section 203 of the Penal Code and convict him accordingly.”
22. For the defence, by Submissions dated 30/9/2024, it was urged that the accused was so drunk as to be incapable of forming the specific intent required for purposes of malice aforethought in a murder case, as follows:

The accused on the other hand in his defence admitted to unintentionally killing the deceased herein. He testified that, on the material day, he went on a drinking spree and came home only to find his wife, the deceased, drinking at a den leaving their child unattended. That angered him and he began quarrelling with the deceased and which led to a fierce exchange of insults resulting to the accused turning violent and severally hitting the deceased. He admitted to kicking the deceased at her home and leaving her overnight



only to later learn she had succumbed. He ruefully stated that it was his intoxication with chanq'aa that led him to behave in such a crude manner and had not intended it.

Was malice aforethought then proved by the prosecution?

Section 13 of the Penal Code does provide for the defence of intoxication, it reads as follows;-

1. Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
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. b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- 3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.
- 4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
- 5) For the purpose of this section, "intoxication' includes a state produced by narcotics or drugs."

The accused testified in this case to have consumed a lot of chanq'aa and when a quarrel broke out between him and the deceased concerning the neglect of their child by the deceased, and the deceased started insulting him, he lost it and he started assaulting the deceased. He did not intend for the eventual death of the deceased herein. It was that temporal moment of insanity or rather his intoxication that led him. without intent, to inflicting serious injuries on the deceased in which she succumbed.

[Counsel cites Bakari Magangha Juma V Republic [2016] eKLR. (Court of Appeal) and the Republic V. Nickson Peter Sadera [2020] eKLR (Bwonwong'a, J.)]

From the foregoing Your Lordship, our humble submission is that though indeed the accused person admitted to the commission of the offence, he had not intended it. He had no mens rea on his part and therefore not guilty of murder but of manslaughter."

Verdict

Self-defence

23. The un rebutted evidence of the accused was that he was angered by alleged neglect by the deceased of the 1 ½ year old child while the deceased was drinking with the mother of PW2. It is his allegation that he had quarrelled and fought with the deceased that is irreconcilable with the Prosecution evidence. There is evidence of fighting. Only defenceless beating, which PW1 described as kicking and boxing, where the deceased had to run away wailing and seek refuge from PW2's house and was only



surrendered to the deceased when he started throwing stones on the roof of their house and insisted he would not leave without his wife. There having been no fight, no excuse by self defence could arise.

Any provocation?

24. Could the circumstances of this case support a case of provocation? The evidence by the defence was that the accused was upset that the deceased had left their child unattended to go drinking with PW1's mother, and when confronted she had answered that the accused was not her husband. This may have in ordinary parlance provoked the accused into assaulting the deceased in anger. Provocation in the legal sense would, in terms of section 207 of the Penal Code, reduce the charge of murder to one of manslaughter only. The conduct for which explanation is sought on the basis of provocation must be such as an ordinary person would commit in the same circumstances. Legal provocation is defined in section 208 as follows:

“208. Provocation defined

- (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.
- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.”

26. This Court would NOT accept an ordinary person who is faced with a case of neglect of their child by his wife would assault his wife to death by stabbing.

27. The accused and the deceased were husband and wife, and the killing by the husband as a result of multiple battering has all the indications of gender-based violence, which the court must in all cases discourage.

Defence of Intoxication in this case

28. The facts of this case show that the accused was beating his wife the deceased as witnessed by the PW1 and PW2. She was rescued when she ran for safety at PW2's house but the accused insisted that she be released to him as her husband, which was done. The following morning her body was discovered with injuries on the head, which the medical examination of PW6 confirmed were the cause of her death. The accused was the last person seen with the deceased alive before she was discovered dead the



following day with stab wounds on the head. On the Prosecution evidence and the principle of last seen with, the accused is presumed to be killer of the deceased unless he can rebut the presumption.

Adverting to the principle of last seen with, the Court of Appeal (Omolo, Shah & Tunoi, JJA) said:

Common sense demanded that the appellant explain where he parted company with the deceased on the material date, since that was a matter which was peculiarly within his knowledge and only him could be expected to know and explain it (Section 111(1) *Evidence Act*) and because he did not do so, a rebuttable presumption arises that he knew under what circumstances the deceased was killed. It is a presumption of fact which a court is entitled to make under the provisions of Section 119 of the *Evidence Act*, Cap 80 Laws of Kenya. Coupled with that the body of the deceased was recovered from inside a latrine within the appellant's homestead. In view of that evidence, is it believable that a person or persons other than the appellant might have killed the deceased? And, is it believable that the deceased was killed in the course of an attempted robbery on the appellant? These are facts and circumstances which counsel for the appellant, might have had in mind when he submitted before us that the circumstantial evidence on record does not exclude other possible explanations as to how the deceased died. However, in our view, the circumstances we outlined earlier leave no doubt as to the guilt of the appellant. Whoever dumped his body in the latrine from where it was recovered must have spent along time opening up and closing the floor of the said latrine. He could not, in our view, do so without being noticed, or without attracting attention, unless it was the appellant or some other person with the appellant's knowledge and approval which would then make him a principal offender.”

29. In the present case, the accused left with the deceased when she had been rescued from him and they went away home together as husband and wife, and the recovery of her stabbed body the following day inside their house and the circumstances of his arrest at a bus stage obviously preparing to flee is telling that the accused was the perpetrator of the act of stabbing to the death of the deceased in their house after he had collected her from the PW2's house.

Intoxication negating Mens rea?

30. The lingering question is whether the drunken state of the accused left him incapable of forming the necessary mens rea for murder in terms of malice aforethought. In his defence, the accused admits killing the deceased due to intoxication, and has raised a section 13 (Penal Code) defence.
31. The principle of law relating to intoxication as a defence by reason of inability to form necessary intent and set out in Bakari Magangha Juma case, supra, as follows:

The third situation, contemplated by section 13(4), arises where by reason of intoxication the accused person is incapable of forming a specific intent, which is an element of the offence charged. Sometimes this situation is referred to as “intoxication or drunkenness negating mens rea”. In *Said Karisa Kimunzu v. Republic*, CR App No. 266 of 2006 (Msa), this Court stated thus regarding intoxication or drunkenness negating mens rea:

“But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person



charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son."

32. From the foregoing, we are satisfied that the respondent's assertion that the defence of intoxication is only available to an accused person where he is proved to have been insane by reason of intoxication is absolutely without merit. In *Julius Obare Angasa v. Republic*, Cr. App. No. 271 of 2008, this Court quoted *David Munga Maina v. Republic*, Cr. App. No. 202 of 2005 and addressed the issue directly as follows:

"...a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The court is under a duty to consider such a defence where it is raised..."

33. In this case, the appellant having raised the defence of intoxication and having led evidence of his state of intoxication on the material day, which was never challenged or controverted by the prosecution, the trial court was duty bound to take it into account for the purpose of determining whether the appellant was capable of forming malice aforethought, in the absence of which he could not be guilty of murder. If the trial court were to be satisfied that the appellant killed the deceased but without malice aforethought, it would have been entitled to convict him of manslaughter rather than murder. (See for example *Karisa Wara v. Republic*, Cr. App. No. 267 of 2006; *Peter Kariuki Kaburu v. Republic*, Cr App. No. 234 of 2009; and *Boniface Gathege Wacheke v. Republic*, Cr. App. No. 12 of 2010)."

Malice aforethought is defined as follows:

206. Malice aforethought Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) 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;
 - (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."
34. Although there is evidence of the accused beating the deceased on the previous evening, there is no evidence as to what transpired when the accused went away with his wife leading to the discovery of the dead body of the deceased the following morning. The Doctor's findings at postmortem examination report (PEX.1) reporting on the external appearance that the deceased "Sustained serious head injuries following fatal stab wounds on the head. Stabbed 4 times – one at the occipital, 2 at the parietal (left) and 1 at the frontal areas" and the cause of death given as "bleeding intra cerebral hemisphere due to severe injuries on the head from a stab wound."



35. There was the rebuttable presumption that the accused was the killer. In seeking to respond to the last seen with principle, the accused's testimony was that they were fighting and he pushed her and she fell at the door, and on account of his drunkenness he did not know what happened thereafter. He pleads intoxication in terms of section 13 of the Penal Code, and sought that he be convicted for manslaughter only.
36. As counseled by the Court of Appeal in Bakari case, the Court will consider whether the accused in this case was capable of forming the necessary intent prescribed for the offence of murder being malice aforethought defined under section 206 of the Penal Code.
37. On full consideration of the evidence before the Court, it is clear that the accused's conduct was lucid and calculated, and he must be taken to fully intend the consequences of his conscious act of assaulting the deceased wife.
38. The accused was not shown to have done any other drunken thing save the vicious stabbing and killing the deceased. The accused was not found at his house in a blackout or drunken stupor; he very lucidly and calculatingly went to his place of work and requested for money with the pretext of taking his wife, who was already dead to hospital. He then made a conscious decision to run away from the area, and was arrested at a bus stage area with his things in a Kikoi just before he could flee, according to the testimony of the police reservist PW4 and the Area Manager PW5.
39. The accused was upset when he came home and found the wife out of the home and when he went out looking for her, he found her drinking with PW2's mother and she had put their 1 ½ year old child aside, and when asked to go home she had refused and told him that he was not her husband. He was not drunk at this point.
40. The incident took place after he came from work, about 7:00pm and finding the deceased out of home he went out looking for her at the market, not finding her but coming back he found her drinking at PW2's mother. He asks her to go with him and she refuses. He goes away and comes again insisting that they go home and a quarrel arises and a fight according to the accused ensues. The accused twice went looking for his wife over a 30 minute walk distance before confronting her at PW2's place where she was allegedly drinking with PW2's mother. He was completely aware of the situation.
41. However, according to the two prosecution witnesses PW1 and PW2 this is happening at between 7:00 - 8:00 pm, (and the accused himself says the incident was at 7.30 pm having left his work at Kacher Primary School at 5.30pm) and the accused cannot within the period of only about one (1) hour have drunk enough Changaa as he claims to be intoxicated beyond ability to form the necessary men's rea for murder. On cross-examination he had said that it was taking him 30 minutes each trip on the two occasions he went looking for the deceased. There was simply no time between the time he came from work at 7:00 and 8:00 when the fighting began for the accused to have been intoxicated to the level beyond ability to form the specific intention for murder.
42. Under section 206 of the CPC, malice aforethought is established when there is intention to kill, do grievous harm, or being indifferent whether killing or grievous harm results or where there is intention to commit a felony. After the beating to the deceased witnessed by PW1 and PW2 and the accused refusing to leave without his wife, it is clear his intention was to go home with her and chastise her away from the glare and help of the people who had earlier rescued her.
43. Beating a person is a felony, and act which qualifies for malice aforethought if death results, and acts of stabbing on the head as established by the postmortem can have been intended to kill or do grievous harm and the accused must have known that his such act would probably cause death or grievous harm.



44. The intoxication in this case, if any, does not prevent the accused from forming the men's rea for murder in terms of malice aforethought within the meaning of section 206 of the Penal Code. In this case, there are on the facts several considerations outlined above which affect the application of defence of intoxication raised by the Accused. The alleged intoxication did not affect his ability to form the specific intention for the offence of murder.
45. The Court must find that the accused caused the death of the deceased with malice aforethought and, consequently, the offence of murder contrary to section 203 as read with 204 of the Penal Code is established against the accused. The Court finds that the Prosecution has established against the accused the offence of murder contrary to section 203 as read with 204 of the Penal Code. The accused is convicted for the offence of murder, as charged.

Orders:

46. Accordingly, for the reasons set out above, this Court finds that the Prosecution has established the case for murder against the accused, and the Court convicts him for murder contrary to section 203 as read with 204 of the Penal Code.
47. The Accused's mitigation and sentencing proceedings will be taken on a date to be fixed in consultation with Counsel for the Accused and the DPP

Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Masila for the DPP.

Ms. Wanjiku Muna for the Accused.

