



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Manga (Criminal Case 13 of 2017)
[2024] KEHC 712 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 13 OF 2017
PJO OTIENO, J
JANUARY 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

MORRIS CHISIENYA MANGA ACCUSED

JUDGMENT

1. The accused person, Morris Chisiyenya Manga, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were given to be that on the 24th day of March, 2017 at Emukwenje village, Musanda location in Mumias West sub-county within Kakamega County, the accused murdered, Benson Atitwa Nyarotso.
2. He denied the accusations and pleaded not guilty to the charge. In order to discharge the burden of proof under Section 107(1) of the *Evidence Act*, the prosecution tendered evidence from Eight (8) witnesses.

The Evidence

3. PW1, Rose Indakwa Sabuko, testified that on 30/3/2017 she was at home when a Boniface Wafula entered the homestead, through the fence at about 6:30-7PM, and informed her that, Ben had been stabbed. She rushed to the scene and Boniface informed her that the person who had stabbed Ben was the one running, whom she was able to identify as the accused having known him for almost 20 years. At the scene, she found Ben lying on the ground with the stabbed wound bleeding. She held him, his body was warm and he was alive. They rushed him to St. Mary's Hospital where he was pronounced dead and the body taken to the mortuary.
4. On cross-examination she stated that she did not witness the incident and that on arriving at the scene the accused was walking away before he started running and had worn a white vest and blue trousers. When he identified to her as the person that had stabbed the deceased, the accused started to run away.



- She indicated that nobody told her why the deceased was stabbed and she did not find any weapon at the scene.
5. On reexamination she stated that the incident occurred in 24/3/2017.
 6. PW2, William Malo Kasamani, gave evidence that on 24/3/2017 at about 12:30 PM he was at home where they were holding a 'matanga' following the death of his mother. While in the house he had shouts from the place where the grave was being dug. He decided to head there and on his way he met with Ben who informed him that he had been stabbed. The deceased removed his T shirt and was bleeding from the left side of his chest. They then called for a vehicle which took the deceased to hospital. He came to learn from the deceased's step mother while recording his statement with the police that he had died. He stated that the other grave diggers claimed that it was the accused who had stabbed the deceased.
 7. On cross-examination, he stated that the deceased did not inform him of the person who had stabbed him and that it was the other persons, with whom the deceased was digging the grave who told him about the accused having stabbed the deceased.
 8. PW3 was Sarah Nafula Khamala who testified that on 24/3/2017 she was washing dishes at the funeral vigil of a neighbor, about four steps from where people were digging a grave, while drinking beer. A quarrel ensued between the accused and the deceased and she saw one of the grave diggers hold the deceased across the chest while the accused stabbed the deceased with a knife on the left side of the chest. He then pulled out the knife and licked the blood that was on the deceased's chest. They then all ran away and the deceased fell to the ground. She called other people at the vigil who called the deceased's mother who took him to hospital. The witness told the court that she was very near to the grave diggers and that there was a burning fire which provided lighting at the place
 9. On cross-examination, she stated that the deceased wore a striped shirt while the accused had worn a vest, that both had taken beer as they dug the grave. He added that from his statement to the police, the accused was given a knife by the person who held the deceased.
 10. PW4, Jack Nabuku Nyarotso, father to the deceased and a high school teacher, testified that on 24/3/2017 at about 6:30PM he left school for home. At home, his nephew Bonnie came and informed him that his son, the deceased, had been stabbed and was bleeding profusely. He decided to return to the school and prepare students for preps and as he wanted to head to the scene of the incident, his wife informed him that Ben had died. He was then told that it was the accused who stabbed the deceased following a quarrel over politics. Upon cross-examination, he stated that it was Simon Ougu who informed him that it was the accused who stabbed the deceased.
 11. PW5, Dr. Dixon Mchana, a consultant pathologist attached to Kakamega County General Hospital, testified that on 29/3/2017 he conducted an autopsy on the body of the deceased which body had a single stab wound measuring 2.3 x 1 cm on the left side of the chest beside the breast bone at the level of the third rib and had cut the left rib at the front. Internally, there was perforation into upper chamber of the heart with bleeding around the heart. There was also early collapse of the left lung with blood leaking into the lung. He formed the opinion that the cause of death was internal bleeding due to penetrating wound following assault. He produced the post mortem report as P. Exh 1
 12. On cross-examination, he told the court that when a body has been preserved with formalin, one cannot use blood for DNA marching and that a piece of the nail was taken for DNA marching in case the murder weapon was recovered.
 13. PW6, Johnson Okinda, a cousin to the deceased testified that on 29/3/2017 he attended to the post mortem examination of the deceased alongside other family members at St. Mary's Hospital Mortuary



- and identified the body to the doctor. On cross-examination he refuted claims and suggestions that that the deceased and the accused were politicians.
14. It would appear that there occurred a confusion by which the pathologist, who had earlier testified as PW5, was called a second time and recorded as PW7. He essentially reiterated what he had said before save that in cross-examination, he pointed out that the internal bleeding could result from a burst blood vessel but hastened to add that a fall may not result in internal bleeding
 15. PW8, Cavin Handa, testified that on 24/3/2012, he together with other youths were digging a grave when a quarrel ensued between the accused and the deceased. They started fighting and Ben fell down whereas the accused fled off with the knife. Ben had a stab wound on the left. On cross-examination, he stated that they were digging the grave at around 6PM and that he did not witness the accused stabbing the deceased.
 16. PW9, No. 62149, Corporal John Kalamu attached at DCIO office Hamisi and formerly of Mumias, testified that on 24/3/2017 he received information from inspector Oduor that someone had been assaulted to death. The following day they proceeded to the home of William Maloba where they established that the incident occurred while a group of young men were digging a grave. A quarrel ensued between the accused and the deceased over politics leading to the accused stabbing the deceased. They proceeded to the accused's home but he had fled after his house was burnt down. They gathered information that he was hiding at Sega and with the help of the police from the area; they arrested him on 1/4/2017.
 17. On cross examination he stated that the incident occurred in the afternoon between noon and 5PM and that the weapon of attack was not recovered.
 18. After the court ruled that a prima facie case had been established against the accused person and he having thus been placed on his defence he elected to give sworn testimony to the effect that before his arrest he run the business of hawking sweets among other things and that on 24/3/2017 he was attending the funeral of one Francis Odera where he assisted in making firewood and arranging seats. After the funeral he went home only to be arrested on 1/4/2017 at Sega market. He refuted claims that he participated in grave digging and averred that he did not see the deceased, who was a close friend, at the funeral and that he does not know who killed the deceased.
 19. On cross-examination, he contested the claims that he differed with the deceased on the day he died and reiterated that on the date the deceased died he was in a funeral elsewhere and did not see or meet the deceased.
 20. On being questioned by the court, the accused stated that his home was 300 meters from that of the deceased and that he only came to learn about his death on 1/4/2017.
 21. His testimony marked the close of the defence case and the parties proceeded to file their respective submissions.

Submissions by the State

22. It is the submission of the prosecution, that it has proved all the ingredients of the offence of murder as set out in section 203 of the penal code against the accused person on the strength of the account of the two eye witnesses namely; Kevin Kanda Ogayo and Sarah Nafula Khamaal who saw the accused stab the deceased with a knife leading to his death. The counsel then cites Republic Vs Ann Njoki Macharia (2018)eKLR for the proposition that malice aforethought may be inferred from the nature of the weapon used and the manner of use, the part of the body targeted and the conduct of the accused before, during and after the attack.



Accused Person's Submissions

23. The accused person, through his advocates, submits that the investigating officer misled the court in stating that he was informed by one William Maloba Kasamani that prior to the death of the deceased he had informed him that he had been stabbed by the accused making it a dying declaration whereas in true sense as per the testimony of William Maloba Kasamani, he was informed by other grave diggers that it was the accused who stabbed the deceased making it hearsay evidence. Counsel then cited to court section 33 of the [Evidence Act](#) as well as Pius Jasanga s/o Okumu Vs Republic on what constitutes a dying declaration and the caution the court must administer to itself while considering evidence presented as dying declaration.
24. It is then underscored, that none of the prosecution witnesses witnessed the accused stabbing the deceased and that the accused did not see the deceased on the day of the incident. The decision in Joseph Kimani Njau Vs Republic (2014) eKLR was cited on the obligation of the prosecution to prove the elements of murder before a conviction can be entered. In the instant case the defense takes the position that such elements were never sufficiently proved and thus the accused ought to be acquitted.

Issues, Analysis and Determination

25. By the stipulations of the penal code, any person, who of malice aforethought, causes death of another person by an unlawful act or omission is guilty of murder. That is the foundation of the elements of the offence the prosecution must prove, beyond reasonable doubt, for it to sustain a conviction. It therefore follows that in every judgment on a case of murder, the court is obligated to determine if; the person named as the victim of the offense is indeed dead; if the death was out of unlawful acts of omission or commission attributed to the accused and if in so committing such acts, the accused was propelled by malice aforethought in causing the death of the deceased.
26. On the death, PW5, Dr. Dixon Mchana produced a post mortem report dated 30/3/2017, which confirmed that Benson Atitwa Nyarotso is deceased. The death of the deceased was also confirmed by PW1 who indicated that the deceased was pronounced dead on their arrival at St. Mary's Hospital. None of the witnesses gave to the court any version to create doubt on the death of the deceased. The court finds that the death was proved beyond any reasonable doubt.
27. It having been determined that the deceased is indeed dead, it was also credibly established that the deceased died from a penetrating stabbed wound while at the venue where he and others were digging a grave. The question that this court is called upon to determine is whether the accused killed the deceased. It was the evidence of PW3 and PW8 that they witnessed the quarrel that ensued between the accused and the deceased and the fighting that followed leading to the death of the deceased. PW8 gave evidence that he was one of the grave diggers and that as the accused and the deceased fought, the deceased fell to the ground whereas the accused fled off with a knife. PW3 also testified to have witnessed the fight between the accused and the deceased and that the accused stabbed the deceased with a knife before running away.
28. The testimonies of the two eyewitnesses, which remained unshaken, confirm that it was the accused who was responsible for the fatal stab and the consequent death of the deceased. That was the undoubted position as at the close of the prosecution's case when the court adjudged a prima facie case to have been made out.
29. When put on his defense, the accused's testimony was that he only attended the vigil to arrange seats and prepare firewood and that he never stepped at the grave and neither did he see the deceased on the day he died. On being questioned by the court, the accused indicated that he lived 300 meters from the



deceased's home and only came to learn of his death a week later. It is difficult to believe that line of defense that one would fail to be aware of the death of his close neighbour and friend leaving within 300 meter. The court finds the testimony utterly incredible and incapable of displacing the case established by the prosecution. It is thus the finding by the court that it was the accused who inflicted the fatal stab that killed the deceased.

30. There is no allegation that the accused had a legal or justifiable basis to attack and injure the deceased in the way disclosed by the evidence on record. Once the accused is established to have occasioned the death of the deceased, the only legal escape route is a defense justifying and establishing the act as lawful so as to fit within the limitations to right to life as protected and guaranteed under Article 26 of *the Constitution* of Kenya. At the close of the defense case, no justification was availed to remove the conduct of the accused from the proved unlawful tag. The conduct is thus adjudged unlawful, with no justification at all.
31. On the state of mind otherwise coded as malice aforethought, the holding by the court of appeal in *Nzuki v Republic* [1993] KLR 171 remains the guiding light on the quality of evidence that the court must be satisfied to exist in the case. In the decision the court said: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the rest of which is always subjective to the actual accused:

- i. The intention to cause death.
- ii. The intention to cause grievous harm.
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences, to ensue or not in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder”

32. Malice aforethought can also be inferred from the manner in which the deceased was killed such as the weapon used and the part of the body where the deceased was attacked. See *Republic Vs Ann Njoki Macharia* (supra)
33. All the prosecution witnesses testified that the deceased was attacked on the chest. PW3 and PW8 witnessed the accused using a knife to stab the deceased. PW5 confirmed that the deceased died due to a stab wound on the chest.
34. For the accused to use a knife, known to have lethal effects, to stab the deceased on the chest, the wall of the cavity known to host most of the human vital organs and vessels, it is the finding by the court that the accused must have intended inflict grievous harm to the deceased if not to outrightly kill him.
35. In conclusion, the court finds and holds that the prosecution has proved beyond reasonable doubt the offence of murder against the accused. The accused is found guilty of the offence of murder as charged and is convicted accordingly.



DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JANUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Munyendo for Wilunda for Accused

Ms. Chala for the Prosecution

Court Assistant: Polycap

