



**Republic v Njer (Criminal Case 27 of 2015)
[2024] KEHC 6173 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 6173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 27 OF 2015
MN MWANGI, J
MARCH 15, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MAXWEL ODHIAMBO NJER ACCUSED

JUDGMENT

1. The accused person was charged with the offence of murder contrary to Section 203 as read with 204 of the *Penal Code*. The particulars of the charge were that on 25th July, 2015 at about 2300 hours at the Mombasa-Nairobi Highway Road (sic) near Pentium Petrol Station in Changamwe Location in Mombasa County within Coast Region murdered No. 73701 Cpl Francis Kurgat. The accused person pleaded not guilty.
2. In the support of the said charge, the prosecution called 12 witnesses. 3 witnesses testified before Judge A. Ongeru before I took up the hearing of the case under the provisions of Section 201(2) of the *Criminal Procedure Code*.
3. PW1 was No. 234768 Inspector Francisca Mbindi. She was the Base Commander at Changamwe. Her evidence was that on 2nd April, 2015 at 6.00 p.m., she was at Changamwe roundabout with Corporal (Cpl) Francis Kurgat and Senior Superintendent (SS) Leonard Masika and 3 officers from the County Government. She stated that she looked at the side of the cars coming from town and noticed that they were not moving. She sent Cpl Francis Kurgat to check what was going on. He went down the road and found that there was an accident involving a small car and a lorry Reg. No. KBT 319K 12E/0865 belonging to Multiple Hauliers that had hit a Toyota Saloon car Reg. No. KBP 327V.
4. PW1 testified that Cpl Francis Kurgat instructed the lorry driver to take the lorry to Changamwe Police Station and within a short time, she saw the lorry moving at a high speed. Cpl Francis Kurgat called



- and told her that he had instructed the lorry driver to go to Changamwe Police Station but instead of doing so, he had sped off towards Nairobi direction.
5. PW1's evidence was that within a short time, Cpl Francis Kurgat went in the small car to where she was, and she told him to follow the lorry. He then left but within a short time, PW1 noticed that the cars to Nairobi were on a stand still. She then called Cpl Francis Kurgat so that he could explain to her what was happening, but his phone was picked by SS Masika who informed her that all was not well.
 6. PW1 stated that she went a short distance and found the lorry and a lot of people. She then saw Cpl Francis Kurgat lying down bleeding from his forehead. She also saw that the accused person had been arrested by one Wachira and SS Masika and the latter was holding a small piece of metal bar which had blood. Her evidence was that SS Masika informed her that the accused person had hit the deceased with the metal bar. PW1 asked some people to take the deceased to Hospital and the accused person was taken to Changamwe Police Station.
 7. PW1 testified that after about 45 minutes the people who had taken Cpl Francis Kurgat to Hospital returned and informed her that he had been admitted to Pandya Hospital. She was given his police uniform which was blood stained.
 8. PW1 stated that she kept on visiting Cpl Kurgat in Hospital until 25th July, 2015 when he was transferred to Coast General Hospital where he died.
 9. PW1 stated that when she found the accused person after he was arrested, he was very violent, he appeared drunk and and he was being held by people. She also stated that Cpl Francis Kurgat stayed in hospital from 2nd May, 2015 to 25th July, 2015. She informed the Court that the accused person was the driver of the lorry.
 10. PW2 was Mwangi Kakuti Mwangi, an employee of the Mombasa County Government, attached to Traffic Section. His evidence was that on 2nd April, 2015, he was on duty at Changamwe near the roundabout when he was called and informed that there was a motor vehicle that was being driven very fast and he was asked to stop the said vehicle. PW2 informed his caller that there was a traffic jam. He then saw a lot of people gathered at a vehicle and someone called him to assist his fellow Police Officer. PW2 went to the scene and found his colleague, an Officer, near a mango tree. He saw that the said officer was bleeding from the right side of his face near the eyes.
 11. PW2 stated that he was the first Police Officer to reach there. He called for assistance and took Cpl Francis Kurgat to Pandya Hospital. He stated that he saw an iron rod which had been used to injure Cpl Francis Kurgat.
 12. PW2 stated that the person who had hit Cpl Francis Kurgat had been restrained by members of the public. That the said person was arrested by other Police Officers who went to the scene and he was taken to the Police Station.
 13. PW2 identified the uniform that Cpl Francis Kurgat was wearing on the day of the incident. He stated that he was aware that the injured Police Officer passed away.
 14. PW3 was Jackson Makau Mathoo. His evidence was that on 2nd April, 2015, he was at Kibarani on his way home, whilst driving his employer's motor vehicle a Toyota Vitz. He stated that when at Kibarani, when he was in motion, motor vehicle Reg. No. KBT 319K make Mann hit his vehicle. He testified that when that happened, the accused person who was driving the motor vehicle that hit his vehicle, went and told him that he did not want the Police to be involved. PW3 testified that the accused person asked him to tell him how much money he wanted, but he responded that it was a company car and he could not negotiate. PW3 further testified that Police Officers who were nearby went to the scene



- and told him and the accused person to remove their cars. PW3 removed his but the accused person refused to do so.
15. PW3 stated that a Police Officer asked for a breakdown and after about 5 minutes it arrived at the scene. That the accused person entered his vehicle and started driving it towards Nairobi and the Police Officer called the Commander (Base Commander Changamwe) and requested for the motor vehicle to be stopped at the roundabout.
 16. PW3's evidence was that they entered the vehicle he had been driving and followed the accused person's vehicle. He stated that the accused person almost ran over the Commander. They pursued him and caught up with him and the Police Officer asked the accused person to give him the keys of the vehicle he had, but he did not want to give him the keys. That the said officer took the keys and the accused person got out of the motor vehicle and starting running towards Changamwe. After 10 minutes, the Police Officer called for a breakdown (vehicle) and when it arrived at the scene, the accused person went back to the scene running holding a twisted bar and said that he would kill the Police Officer.
 17. PW3 said that he ran away as the accused person went and found the Police Officer directing the breakdown (vehicle). That the said Police Officer pushed the driver down twice but he rose and stabbed the said Officer in the forehead with the twisted bar, which PW3 identified in Court. He stated that the Police Officer fell down and the driver started running away. PW3 heard people saying that the person who was running away had killed and he should be arrested by the people in the breakdown vehicle. The accused was then arrested and taken to the Police Station.
 18. PW3 later heard that the Police Officer died. PW3 identified the police uniform the said Police Officer was wearing on the day of the incident.
 19. Geoffrey Bosire, the Operations Manager at Multiple Hauliers Ltd testified as PW4. He stated that they have lorries that carry goods and that on 2nd April, 2015 at 6.00 p.m., when at the office, he received a call from Arthur Orina who informed him that a driver of their vehicle had problems with the police and a Police Officer was injured. The vehicle was Reg. No. KBT 319K, which was a tipper. PW4 indicated that the vehicle was being driven by Maxwell Odhiambo (accused person) who had worked for some time at Multiple Hauliers Ltd. PW4 stated that the security department took over the issue and later, they went to the Police Station and took away the vehicle. PW4 identified the accused person's employment letter, identity card, driver allocation form showing that he was allocated the vehicle in issue. PW4 also identified the accused person's driving licence.
 20. Betty Chebet, who is the deceased's wife testified as PW5. Her evidence was that on 3rd April, 2015, in the morning she was called by Cpl Masika (sic) who informed her that her husband (Cpl Francis Kurgat) who was working as a Traffic Police Officer at Changamwe Police Station had been injured. PW5 stated that she travelled overnight and reached Mombasa on 4th April, 2015. On arrival, she went to Pandya Hospital, where she found her husband admitted to the ICU. She found his left eye bandaged and he could not speak. She stated that he was in the ICU for 10 days and was then taken to the general ward.
 21. PW5 stated that he was discharged from Hospital on 2nd May, 2015 and by then he was paralyzed on his left side of the body and he had lost sight of his left eye. She identified his discharge summary from Pandya Hospital. She stated that he continued attending clinics at the said Hospital. PW5 testified that on 29th June, 2015, her husband complained of a severe headache and he started vomiting. PW5 took him to Jocham Hospital where he was treated and admitted until 20th July, 2015 when he became seriously sick and he was transferred to Coast Province General Hospital where he died on 25th July, 2015 at 11.00 p.m. On 28th July, 2015, she identified his body for post mortem examination.



22. PW5 stated that the deceased did not have a problem before he was hit on his left eye and it was the said injury that caused his admission and treatment in Hospital.
23. Dr. Nyali Mbuuko of Coast Province General Hospital testified as PW6. His evidence was that he conducted a post mortem examination on the body of Francis Kurgat on 28th July, 2015. The Doctor stated that there was a scar of a recent wound about the deceased's left eye which was horizontal and about 1.5cm. long. The Doctor stated that internally, he found mucous secretions in the airways and that the lungs showed features of pneumonia. He also noted that the deceased's brain was congested (swollen) and there was pus around the brain.
24. Dr. Mbuuko testified that where the injury on the left orbital roof was, there was a fracture and some brain had been incarcerated by the fracture and that the said part of the brain had an abscess. The Doctor concluded that the cause of death was suppurative meningoencephalitis due to fractured left orbital roof following blunt trauma. PW6 explained that the blunt injury which caused the fracture of the orbital roof led to a bacterial infection of the brain. He signed the post mortem report on 27th July, 2015 and produced it as an exhibit.
25. PW7, George Lawrence Ogunda, a Principal Chemist based at the Government Chemist Mombasa examined 3 exhibits received by their office on 17th August, 2015, under the escort of PC Bernard Bett of Changamwe Police Station as per the exhibit memo form. The exhibits received were (A) a bottle containing the deceased's blood. Exhibit marked (B) was a shirt of the deceased and the exhibit marked (C) was an iron rod. PW7 testified that on examination of the said exhibits, he found that exhibit B (shirt) and exhibit C (iron rod) had blood stains. He stated that the blood sample marked (A), stains on the shirt marked (B) generated a DNA profile belonging to the deceased. PW7 stated that the metal rod marked (C) did not generate any DNA profile. He produced the Government Analyst's Report as an exhibit.
26. Senior Sergeant (SS) Leonard Masika of Nyali Traffic Base testified as PW8. He stated that on 2nd April, 2015 he was working at Changamwe Traffic Base. That on that date at 6.15 p.m., he was along the old Mombasa - Nairobi Road near Pentium Petrol Station controlling a traffic jam. He was in the company of Cpl Kipruto and the Base Commander, Inspector Ndinda. PW8 stated that as he was controlling traffic, he was raised on walkie talkie and informed that there was a vehicle belonging to Multiple Hauliers Ltd which had caused an accident and failed to stop. The motor vehicle registration number was KBT 319K Trailer Reg. No. ZC 0865. PW8 stated that he was required to create a temporary jam so that the said vehicle could not pass. PW8 stated that after doing that, Cpl Kipruto went where he was and when the driver of the vehicle reached them, he was asked why he had caused an accident and failed to stop, and he responded by saying, "Ninyi mmetuzoea sana. Ukitaka gari chukua funguo". PW8 stated that the driver (accused person) then threw the keys at the Corporal and moved away towards the Airport Building.
27. PW8's evidence was that Cpl Kurgat called him again on the walkie talkie and told him that the driver had abandoned the vehicle and he had moved away. PW8 stated that he called the Traffic Control Office and asked to be provided with a big break down vehicle. That on its arrival he instructed Cpl Kurgat to assist the breakdown personnel to tow the vehicle. PW8 stated that as Cpl Kurgat was trying to tow the truck, the driver of the said truck emerged from nowhere and stabbed Cpl Kurgat above the left eye and the said Corporal fell on the road facing downwards.
28. PW8 stated that he was about 10 metres away, when he was informed that his colleague had been stabbed and he had fallen down, and was dying.



29. PW8 testified that on going to the scene, when the driver of the truck saw him, he attempted to stab him using the same iron bar but he blocked the accused person's hand before the metal bar reached him. That the driver then started running away towards Bahati Estate and he gave chase accompanied by the breakdown personnel as they left Cpl Kurgat lying in a pool of blood.
30. That they caught up with the said driver, and at the point of arrest, PW8 recovered the iron bar which the driver had used to stab Cpl Kurgat. He stated that the driver dropped it at the spot where they arrested him. PW8 identified the said iron bar in Court. He also identified the driver as the accused person. PW8 stated that he did not witness the accused person stab Cpl Kurgat who was by then wearing a Navy Blue Police Uniform. PW8 identified in Court Cpl Kurgat's shirt, which was still blood stained.
31. He stated that due to Cpl Kurgat's condition, they were advised to take him to Pandya Memorial Hospital where he was taken to the ICU as he had difficulties in breathing, from where he was discharged after admission for 3 months. That after a few days of discharge the pain continued and Cpl Kurgat was admitted to Jocham Hospital and later to Coast General Hospital where he was also admitted but died while undergoing treatment.
32. PW9 was Cpl Christopher Chege of DCI Office Rarienda Sub-County in Siaya County and formerly of Changamwe DCI, where he was doing general investigations. His evidence was that he was instructed by the DCIO Betty Chepng'eno to investigate a case of a Police Officer who had been assaulted, which revealed that the accused person was the one who had assaulted him after causing an accident along Kibarani, and after the accused person refused to move his vehicle aside after being instructed to do so by Cpl Kurgat.
33. PW9 produced the exhibits that had been marked for identification, and stated that Cpl Kurgat was admitted to Pandya Hospital on 2nd April, 2015 and discharged on 30th April, 2015. That upon discharge, he issued Cpl Kurgat with a P3 Form which was filled and dated 20th May, 2015, where the Doctor classified the injuries as grievous harm. PW9 stated that after discharge from Hospital, Cpl Kurgat was still not feeling well and he died on 25th July, 2015. PW9 stated that he embarked on investigations in a case of murder and in so doing, he recovered a blood stained shirt which had been worn by Cpl Kurgat bearing his force No. 73701. PW9 stated that a post mortem examination was done on 28th July, 2015, at Coast Province General Hospital, and a blood sample was taken from the deceased's body. PW9 prepared an exhibit memo and took the blood sample of the deceased, the metal rod and the deceased's shirt to the Government Chemist for analysis.
34. PW9 also got a copy of the accused person's letter of appointment from Multiple Hauliers Ltd which showed that his job title was a driver. He also produced the accused person's allocation form dated 15th April, 2013, for motor vehicle registration No. KBT 319K. He also produced a copy of the accused person's driving licence and identity card showing that he was Maxwell Odhiambo Njer.
35. Colonel Doctor Samson Mwatuwano Bebora testified as PW10. He stated that he was a practicing surgeon and attended to Cpl Kurgat at the time he was admitted to Pandya Hospital from 2nd April, 2015 to 1st May, 2015.

He stated that the patient was admitted as an emergency case on referral from Bomu Hospital. PW10 stated that the patient had an injury to the head and the brain, and was bleeding profusely. They did emergency surgery to stabilize him. He stated that since the patient had an injury in the head, they operated on the head. PW10 testified that due to the said injury the patient was admitted to the ICU for 10 days, after which he regained consciousness. PW10 testified that the patient had a penetrating injury through the inner aspect of the left eye to the flow and substance of the brain. He explained that



- due to the head injury the patient had, he had right side weakness on his upper and lower limbs. He also had a constituent injury to the eyelid, and that the inner aspect of the eye orbit was shattered. That the patient had complications due to the injuries and he was discharged to go home when he stabilized.
36. PW10's evidence was that the patient bled into the substance of the brain and that is what led to the malfunction of the brain and the permanent damage. He also stated that the patient had several foci of bleeding on the brain and if it had been one blood clot, it would have been possible to drain it, but the patient had several areas of bleeding in his brain. That they gave treatment for the injuries and recommended physio therapy and put him on antibiotics and analgesics. They also made a recommendation for the patient to receive auxiliary care which would take a long time. PW10 produced photocopies of the documents contained in the original file of the patient, as the original file had to be returned to Pandya Memorial Hospital.
 37. PW11 was Dr. Zeinab Mohamed. She was stood down after the defence Counsel, Mr. Wairagu successfully objected to the witness testifying on behalf of Doctor Ibrahim who examined Cpl Kurgat for purposes of filling the P3 Form.
 38. PW12 was Dr. Gabriel Mngola, a Senior Medical Officer at the Coast General Teaching and Referral Hospital, where he has worked since year 2008. He produced the P3 Form for Cpl Francis Kurgat who was said to have been assaulted by Maxwell Odhiambo Njer (the accused person).
 39. PW12 stated that the Cpl Francis Kurgat was examined by Dr. Ibrahim Leo, who had worked with him as an intern in the year 2013 – 2014. PW12 stated that after Dr. Ibrahim qualified as a Medical Doctor, he worked at Coast Province General Hospital and then he was transferred. PW12 stated that from Dr. Ibrahim's observation of Cpl Kurgat, he was sick looking and had paralysis on one side of his body and walked with support. That Dr. Ibrahim found that Cpl Kurgat had a fracture of the right orbit and he also had left intra-cerebral hemorrhage and bleeding into the fluid space in the brain. The said Doctor assessed the approximate age of injuries as 6 weeks and the probable weapon that caused the injuries was a sharp object. The Doctor also observed that the patient had been admitted to the ICU and had been put on medication. PW12 stated that Dr. Ibrahim assessed the degree of injuries as grievous harm as per the P3 Form dated 20th May, 2015 which he signed and wrote his name on. PW12 produced the P3 Form as an exhibit.
 40. The prosecution through Ms Nyawinda, Principal Prosecution Counsel filed written submissions on 10th March, 2023. She summarized the evidence adduced by prosecution witnesses. In submitting on whether the death of the deceased was due to an unlawful act or omission of the accused person, she stated that PW3's evidence which was also well corroborated by other witnesses was that on 2nd April, 2014, the deceased who was a Police Officer was manning the traffic around Changamwe roundabout, whereas the accused person was driving motor vehicle Reg. No. KBT 319K which got involved in an accident with motor vehicle registration No. KBP 321V thereby causing a traffic snarl up.
 41. Ms Nyawinda submitted that when the deceased instructed the accused to drive his motor vehicle to Changamwe Police Station, he refused and the deceased called for a breakdown truck and when the motor vehicle was being towed to the Police Station, the accused person returned with a metal bar and hit the deceased on his forehead while saying that he would kill him. She indicated that the Doctor who produced the P3 Form confirmed that the deceased had a fracture on his orbital roof following blunt trauma and that the deceased was paralyzed on his left side.
 42. Ms Nyawinda submitted that from the evidence on record, the prosecution had established that the death of the deceased was due to the unlawful acts of the accused person, who assaulted the deceased on the forehead using a metal rod which led the deceased to sustain fatal injuries.



43. In submitting that the accused person had malice aforethought, Ms Nyawinda referred to the evidence adduced by PW3 to the effect that when the accused person was told to drive his motor vehicle to Changamwe Police Station, he came out of the said vehicle and ran away only to return to the scene holding a metal bar, while saying that he would kill the deceased, he then proceeded to hit the deceased on his forehead. That the deceased then fell down and the accused person started running away.
44. Ms Nyawinda contended that the accused person had sufficient time to pre-meditate the killing of the deceased and he accomplished his intention as he used the metal bar to hit the deceased on the forehead, and the deceased sustained a fracture of the orbital roof and died within 3 months of the said incident. Ms Nyawinda submitted that the actions of the accused person proved that he had malice aforethought and that the prosecution had proved all the elements of the offence of murder against him beyond reasonable doubt. She prayed for the accused person to be convicted for the said offence.
45. Mr. Wairagu, learned Counsel for the accused person filed written submissions on 16th March, 2023. The defence Counsel referred to the post mortem report produced by the Government Pathologist, PW6, which showed that the deceased's cause of death was suppurative meningoencephalitis following blunt trauma, and that upon examination of the deceased's body, the Doctor found that the deceased's brain was congested (swollen) and that he had pus cells around the brain and at the left orbital roof. That the pathologist also found that there was a fracture in the said orbital roof, and the deceased's brain had become incarcerated in the fracture.
46. Mr. Wairagu contended that the evidence adduced by the prosecution fell below the required standard of beyond reasonable doubt. He submitted that according to PW3 and other persons at the scene where the deceased was injured, the deceased was stabbed with a sharp metal rod which was said to have been covered in blood, yet there was no blood on it when it was brought to Court. Counsel submitted that when the Government Analyst testified, he stated that when he analyzed the alleged blood on the metal rod, it did not generate any DNA profile that could be matched with the deceased's blood. That another witness, PW9, stated that the metal rod was sharp and not blunt.
47. Mr. Wairagu submitted that Dr. Bebora (PW10) who attended to the deceased in the initial stages cast doubt as to whether the metal rod was the murder weapon as according to him, the injury sustained by the deceased could not have been caused by a sharp object, as the Doctor said that the injury was a blunt injury perhaps occasioned by a well-trained fist. Counsel stated that the said evidence was corroborated by the post mortem report that confirmed that the cause of death was meningoencephalitis due to fractured left-orbital roof following blunt trauma.
48. Mr. Wairagu contended that the confusion regarding the injury and the weapon was further compounded by the P3 Form that concluded under Paragraph 3 that the probable type of weapon causing the injury was a sharp object. He further contended that going by the contradictory evidence with regard to what caused the injury to the deceased, it cannot be said that the prosecution proved its case beyond reasonable doubt.
49. Mr. Wairagu stated that the prosecution's failure to produce treatment notes from Jocham Hospital where the deceased was admitted from 29th June, 2015 to 20th July 2015, and from the Coast Province General Hospital, where he was transferred and admitted to, until 25th July 2015, when he passed away, is fatal to the prosecution's case. The defence Counsel stated that from the evidence of PW10, the deceased had stabilized at the time he was discharged from Hospital and had been put on preventive drugs which were meant to protect him from contracting meningitis which he died of. Counsel stated that the deceased did not have any complaints when attending physiotherapy. In addition, that



the deceased attended Coast Province General Hospital for the filling of the P3 Form on 20th July, 2015 and there was no record of him having meningoencephalitis or pneumonia.

50. It was contended by Mr. Wairagu that in that absence of treatment notes from Jocham Hospital and the Coast Province General Hospital for the period 29th June to 25th July, 2015, a wealth of evidence is missing that could inform the Court better on the circumstances under which the deceased died.
51. He submitted that the issue of the incarcerated brain matter and how it came to be, cannot be addressed by the evidence on record, as the incarcerated brain matter was not there at the time of discharge from Pandya Hospital and it was not there when the deceased was attending physiotherapy and when he was attended to, at Coast Province General Hospital for the filling of the P3 Form.
52. The defence Counsel in submitting that the provisions of Section 213(a) of the *Penal Code* do not apply in this matter relied on the case of *John Muia Muli V Republic* [2000] eKLR. He submitted that notwithstanding the foregoing submissions, the circumstances that led to the deceased's injuries were as a result of him being provoked by the accused person. Counsel elucidated that from the evidence of PW3, the action of the deceased taking the car keys of the accused person's vehicle from him, was corroborated by the evidence of PW8 who spoke to the deceased prior to the injury. It was contended that since the accused person was employed as a long distance truck driver, the towing of the vehicle to the Police Station would have adversely affected his employment status.

DETERMINATION

53. Having summarized the evidence adduced against the accused person, the issues that arise for determination are-
 - i. If the accused killed the deceased; and
 - ii. If the answer to (i) above is in the affirmative, if the accused person killed the deceased with malice aforethought.
54. The evidence adduced by PW1 was that on 2nd April, 2015, she, Cpl Francis Kurgat (deceased), and SS Leonard Masika were on traffic duty at Changamwe roundabout together with 3 officers from the Country Government, when she noticed that the vehicles from town (Mombasa) were not moving. She then sent Cpl Francis Kurgat, who went down the road and found that there was an accident involving a small car and a lorry. He informed PW1 about the accident and that the lorry Reg. No. KBT 319K TZ/ 0865 belonged to Multiple Hauliers, had hit a saloon car Reg. No. KBP 321V.
55. PW1 then suddenly saw the lorry moving at a very high speed. Cpl Francis Kurgat called PW1 and informed her that he had instructed the lorry driver to go Changamwe Police Station but the said driver had sped off towards Nairobi direction. Within a short time, PW1 noticed that the vehicles heading to Nairobi were also on a standstill. She sent a driver by the name of Wachira to go and check the reason why the vehicles were not moving. She also called Cpl Francis Kurgat but his phone was picked by SS Masika who informed her that all was not well.
56. She went to a place known as Pentium (Petrol Station) which was within a short distance from where she had been, she found a commotion and a lot of people. She saw Cpl Francis Kurgat lying down as he bled from his forehead. She also saw that the accused person had been arrested by Wachira and SS Masika. She saw SS Masika holding a small piece of metal bar which had blood and he told her that the accused person had hit Cpl Francis Kurgat with the said metal bar. She stated that she instructed some people at the scene to take Cpl Francis Kurgat to hospital and she later went to Pandya Hospital where he was admitted. At the said Hospital, she was given his blood stained uniform. PW1's observation was that the deceased was very violent and appeared to be drunk.



57. PW2 was also on traffic duties on 2nd April, 2015 courtesy of the County Government of Mombasa where he used to work. When at Barclays Bank area, he was raised on radio call and told that there was a motor vehicle that was being driven very fast and he was requested to stop the vehicle, but responded and informed the caller that there was a traffic jam. He then saw a lot of people gathered at a vehicle and someone called him to go and assist his fellow officer. He found that a Police Officer had fallen in the middle of the road and he was bleeding from the right side of the forehead near the eye.
- He called for assistance and took the Police Officer to Hospital. He saw the object that had been used to injure him was an iron rod. He accompanied the Police Officer who had been injured to Hospital. The person who had injured him was arrested.
58. PW3 was driving a Toyota Vitz belonging to the company that had employed him on 2nd April, 2015 at Kibarani, when motor vehicle Reg. No. KBT 319K hit his vehicle. After PW3's vehicle was hit, the accused person approached him and informed him that he did not want any police involvement and asked him to state the amount of money he wanted but he informed him that he could not negotiate as the vehicle belonged to a company. PW3's evidence was that when Police Officers went to the scene, they told him and the accused person to remove their vehicles but the accused person declined and that led the police to request for a break down. They stayed for 5 minutes and a break down arrived at the scene. At that time the accused person entered his vehicle and started driving towards Nairobi. The police called the Traffic Commander so that she could stop the vehicle at the roundabout as PW3 and the Police Officer entered the vehicle PW3 had been driving and followed the accused person up to a Petrol Station. There was a traffic jam and they caught up with him and stopped him.
59. Evidence adduced shows that the Police Officer asked the accused person to give him the keys for the vehicle, and when the Police Officer took the said keys, the accused person got out of the vehicle and started running towards Changamwe. After 10 minutes, the Police Officer called for a breakdown vehicle, and on arrival of the said vehicle to the scene, the accused person ran there while holding a twisted bar which looked like a "key boot". The accused person according to PW3 said that he would kill the Police Officer. PW3 ran away and the accused person went and found the Police Officer directing the breakdown vehicle. The said Officer pushed down the accused person twice but he rose and stabbed the Police Officer on the forehead with the twisted "key boot", after which the said Officer fell down and the accused person started running away. He later learnt that the deceased died.
60. From the evidence adduced in Court by various witnesses, PW3 was the only eye witness to the incident on how the deceased met his death. The other witnesses, such as PW1 and PW2 were close to the scene when the Police Officer (Francis Kurgat) was injured.
61. In his defence the accused person did not deny or admit having assaulted the deceased with an iron rod. Despite being asked several times by this court on whether he would give a sworn or unsworn defence, the accused person remained steadfast in his response that he would remain silent. That was well within his rights. There is therefore no dispute that the accused person injured Cpl Francis Kurgat as there is no evidence to the contrary.
62. The evidence adduced shows that after being assaulted, the deceased was rushed to Hospital and he was admitted to Pandya Hospital in the ICU from 2nd April, 2015 to 2nd May, 2015, when he was discharged from the said Hospital.
63. The wife of Cpl Francis Kurgat testified as PW5 and explained that after discharge from Pandya Hospital her husband could not speak and his left eye was bandaged and that he was in the ICU for 10 days before being taken to the general ward.



64. That his right side of the body was paralyzed and he lost sight of his left eye. She testified of how her husband complained of a severe headache on 29th June, 2015 and started vomiting and she took him to Jocham Hospital where he was treated and admitted until 20th July, 2015. When he became seriously sick, he was transferred to Coast Province General Hospital, where he died on 25th July, 2015 at 11.00 p.m. It was PW5's evidence that her husband did not have an eye problem at the time he was hit on his left eye. She stated that it was the injury that caused his admission and treatment in hospital.
65. In cross-examination, PW5 admitted to not having treatment notes for the deceased from Jocham Hospital and Coast Province General Hospital.
66. PW7, the Government Analyst stated that they examined 3 exhibits forwarded to them by the Investigating Officer, namely, a bottle containing the deceased's blood sample, the deceased's shirt and an iron rod. Although he found that the shirt and iron rod contained blood stains, and the shirt generated DNA profile belonging to the deceased, the iron rod did not generate any DNA profile.
67. On being cross-examined, PW7 stated that the iron rod had human blood on it but he could not generate a profile from it. PW7 was re-examined by Mr. Muthomi, and explained that DNA decays in blood due to environmental factors such as rust in the metal rod, storage of the metal rod and bacteria could also have decayed the DNA.
68. PW8, Sgt. Leonard Masika spoke of how he was in the company of Corporal Kurgat and the Base Commander, Inspector Ndinda when controlling traffic and he was raised on walkie talkie and informed of a motor vehicle from Multiple Hauliers that was involved in an accident and had failed to stop. He was requested to create a temporary jam so that the vehicle could not pass, and he did that. From PW8's evidence, when he created the temporary jam Cpl Kipruto Kurgat went to where he was, and when the driver who had caused the accident reached where they were, he questioned him as to why he had refused to stop and he responded "Ninyi mmetuzoea sana. Ukitaka gari chukua funguo" meaning that the police had become too familiar with them (drivers) and if he (Police Officer) wanted the vehicle, he could take the keys of the said vehicle.
69. PW8's evidence further shows that the driver of the said vehicle threw the keys at Cpl Kurgat and moved away towards the Airport Building. Cpl Kurgat then informed PW8 that the driver had abandoned the vehicle and moved. PW8 requested for a big breakdown vehicle and on arrival of the said vehicle, he requested Cpl Kurgat to assist the breakdown vehicle personnel to tow the truck. According to PW8, as Cpl Kurgat was trying to have the truck towed, the driver of the said truck came from nowhere and stabbed Cpl Kurgat above the left eye and he fell on the road facing downwards. After PW8 was told that "mwenzako ndiye yule amendungwa, ameanguka chini anakufa", which means that PW8's colleague had been stabbed and had fallen down where he lay dying, he approached Cpl Kurgat, and when the truck driver saw PW8, he tried to stab him using the same iron bar but PW8 blocked the driver's hand before the iron bar reached him, and the driver then started running away and left Cpl Kurgat lying in a pool of blood. The personnel of the breakdown vehicle chased the accused person, caught up with him and arrested him.
70. PW8 recovered the iron bar which the driver of the truck had used to stab Cpl Kurgat after he dropped it at the spot where they arrested him. PW8, PW3 and PW1 identified the iron bar in Court. Having done so, and more particularly, with PW8 having been the person who recovered the iron bar at the point of arresting the accused person renders the issue of whether the iron bar was blunt or sharp a non-issue, as the appearance of the iron bar was a matter of how the witnesses perceived it when they saw it, and how they described it in Court.



71. In his examination-in-chief and cross-examination, PW8 maintained that the deceased was stabbed with the iron bar by the accused person, who also attempted to stab him with the said object. On being re-examined, PW8 stated that he looked at Cpl Kurgat's face and saw a stab wound and not bruises on his face.
72. PW9 who was the Investigating Officer produced the iron rod, the charge sheets for the offence of assault, being the offence that the accused person was initially charged with. He also produced a copy of the charge sheet for the offence of careless driving and failing to obey instructions given by a police officer in uniform, where the accused person was charged in Mombasa Chief Magistrate's Traffic Court. He also stated that after the P3 Form he had issued Cpl Francis Kurgat with was filled, they substituted the charge of assault with the charge of causing grievous harm.
73. PW9 produced the blood stained shirt that belonged to the deceased as an exhibit. He explained that he was the one who prepared the exhibit memo that forwarded exhibits to the Government Chemist Mombasa for analysis.
74. In cross-examination PW9 stated that the blood stained iron rod that was used to stab the deceased was not blunt. On being referred to the post mortem report, PW9 stated that the Doctor gave the cause of death as blunt trauma.
75. Dr. Mngola testified as PW12 and with leave of the Court, he produced the deceased's P3 Form which had been filled by Doctor Ibrahim Leo. From the said P3 Form, the deceased at the time of examination had paralysis on one side of the body. That evidence corroborates what the deceased's wife (PW5) said that her husband suffered paralysis on the right side of his body after he was injured.
76. The P3 Form also showed that there was a fracture of the right orbit of the deceased's eye and left intracerebral hemorrhage with bleeding into fluid space in the brain. He was paralyzed on the right upper limb that is, he had right haemoplagia. Dr. Ibrahim Leo stated that the weapon causing the injuries was a sharp object. The Doctor's finding as to the probable weapon that caused the injuries supports the evidence of PW9 to the effect that the blood stained iron bar which was handed to him was sharp.
77. Dr. Samson Bebora who testified as PW10, did emergency surgery on Cpl Kurgat who had an injury to the head and the brain. The said Doctor noted that on admission Cpl Kurgat was bleeding profusely and they did the emergency surgery on his head to stabilize him as the injury was on the head and he was admitted to the ICU. The Doctor found that Cpl Kurgat had a penetrating injury through the inner aspect of the left eye to the flow and substance of the brain. Cpl Kurgat regained consciousness after about 10 days' admission to the ICU.
78. The Doctor noted that as a result of the head injury Cpl Kurgat had right side weakness on his upper and lower limbs. The inner aspect of his eye orbit was shattered. The Doctor also noted the CplPL Kurgat bled into the substance of the brain and that is what led to the malfunction of the brain, and that was permanent damage.
79. Further, the Doctor noted that Cpl Kurgat had several foci of bleeding on the brain and stated that if it was one blood clot, it would have been possible to treat. The Doctor put Cpl Kurgat on antibiotics and recommended physiotherapy. He produced the said patient's treatment notes.
80. On the death of Cpl Kurgat on 28th July, 2015 at Coast Province General Hospital, a post mortem examination was conducted on his body by Dr. Nyali Mbuuko of Coast Province General Hospital. This Court was left with no doubt that the said Doctor who testified as PW6 was very thorough in performing the post mortem examination as he gave a detailed account of his findings and gave very clear answers to the questions put to him in cross-examination.



81. PW6 noted a scar of a recent wound about the deceased's left eye, which scar was horizontal and 1.5 cm long. Internally, the Doctor observed the presence of mucous secretions in the airways and that the deceased's lungs showed features of pneumonia. He noted that the brain was congested (swollen) and there was pus around the brain where there was a fracture and an injury on the left orbital roof and some brain had been incarcerated by the fracture, and the said part of the brain had an abscess. He concluded that the cause of death was meningoencephalitis due to fractured left orbital roof following blunt trauma. He further stated that the blunt injury which caused the fracture of the orbital roof led to a bacterial infection of the brain.
82. On being cross-examined, the Doctor explained that bacteria infected the brain and was eating it and that one can either die or recover from such an infection after receiving treatment. The Doctor stated that the antibiotics that had been given to the deceased were for bacterial infections.
83. The Doctor explained that the deceased would have healed but not the brain as it was difficult to treat the brain that had been incarcerated in the fracture.
84. The pathologist also explained in cross-examination that the primary cause of pneumonia infection was the brain injury because it incapacitates breathing due to brain oedema and as the disease progresses, one has difficulty in breathing.
85. In his submissions, Mr. Wairagu had contended that there was conflicting evidence as to whether the deceased had sustained an injury from a sharp object or a blunt object, as the P3 Form indicated that the probable type of weapon that caused the injury was a sharp object, yet Dr. Bebora's observation on the other hand was that the deceased had a penetrating injury, which could have been caused by a blunt object occasioned by a blow to the head. Mr. Wairagu stated that the Doctor also expressed the opinion that the object could also have been a rugged object. He also stated that a bare knuckle well trained fist can cause such an injury.
86. My understanding of the Doctor Bebora's explanation of what could have caused the injury as to whether it was a blunt object or a rugged object or a well-trained fist was all a matter of opinion, as PW10 was not present at the scene of the incident to see the object that caused the injury on the deceased.
87. This Court cannot therefore agree with the proposition made by Mr. Wairagu in his submissions that the deceased could have sustained the injury from a bare knuckle well trained fist or that he sustained the injury that caused his death at a later date, other than on the day of the injury. Such a suggestion is far-fetched and cannot be true as there is clear cut evidence that the person who injured the deceased was the accused person.
88. As recounted in this judgment, PW3 gave an eye witness account. PW8 was 10 metres away from the scene of the incident and was alerted by a member of the public who informed him that his colleague Police Officer had been attacked and was dying. On going to the scene, the accused person started running away PW8 with the persons who had come to tow the truck that the accused person had caused the accident with gave chase and they arrested him. At the point of arrest, the accused person dropped the blood stained iron rod. It was recovered by PW8.
89. PW10's observation of the injury sustained by the deceased was consistent with the evidence adduced by PW3 that the accused person stabbed the deceased on the forehead with a twisted bar which looked like "key boot" PW1 a Police Officer who was the Base Commander at Chagamwe on being alerted of the incident found the deceased bleeding from the forehead and saw SS Masika holding a small piece of iron bar which had blood. PW2 found the deceased bleeding from his face near the eye.



90. The deceased's wife (PW5) found her husband admitted to the ICU and his left eye was bandaged. The pathologist PW6 observed that the deceased had a scar of a recent wound about his left eye.
91. PW10, a Doctor who treated the Cpl Kurgat before he died noted that he had a penetrating injury through the inner aspect of the left eye to the flow and substance of the brain. The P3 Form shows that the deceased sustained a fracture of the right orbit and there was intra-cerebral hemorrhage with bleeding into the fluid space in the brain. All the above evidence as to the injuries sustained by the deceased are consistent with the injury inflicted on him by the accused person.
92. Mr. Wairagu submitted that since the deceased died of meningitis, he did not die as a result of the injury he sustained in the hands of the accused person. This Court needs not to belabour the point that as per the evidence of PW6 and PW10, the injury on the deceased's left eye was a penetrating injury that left the orbit fractured.
93. As a result of the head injury the inner aspect of the eye was shattered and the penetrating injury led to the brain injury. The Doctor who did the postmortem examination was categorical that some brain matter was incarcerated in the fracture, and although from the deceased's treatment notes he was put on antibiotics, the incarcerated part of the brain was hard to treat and that is how he got bacterial infection of the brain leading to meningitis and subsequent death.
94. PW6 corroborated the evidence of PW10 that the head injury could have led to bacterial infection of the brain leading to meningitis. He stated that they had put the deceased on antibiotics as a preventive measure.
95. PW10 was however clear that due to the head injury, the deceased had several foci of bleeding on the brain. This observation by PW10 is consistent with the findings made by PW6 who found the deceased's brain was congested
(swollen) and there was pus around the brain and the incarcerated part of the brain had an abscess. The finding by PW6 corroborates the evidence of PW10 that in as much as they did surgery and treated the deceased, it was difficult to treat the deceased's brain due to the multiple blood clots on his brain.
96. The post mortem report shows that the deceased had a fracture extending from the left orbital roof into the left front lobe base with part of the deceased's frontal lobe incarcerated in the gaping 2.5 cm fracture. That part of the interior frontal lobe was involved in an open abscess 3.5 x 2 x 2 cm that was communicating with the left ventricle. The pathologist found that the abscess extended into the left brain substance. With the above injuries, it was well explained by PW6 that the cause of death was suppurative meningoencephalitis due to fractured left orbital roof following blunt trauma.
97. The findings of the surgeon, PW10, who did surgery on the deceased are consistent with the findings captured on the P3 Form and the post mortem report. It is therefore evident that the cause of the deceased's death was as result of an infection in his brain that was incarcerated in the fracture in his head following the injury inflicted on him by the accused person.
98. The deceased was injured on 2nd April, 2015 and died on 28th July, 2015, that was about 3 months and 28 days after he was assaulted by the accused person.
99. Mr. Wairagu cited the provisions of Section 213(a) of the *Penal Code* on the definition of causing death. The said provisions state as follows-

“A person is deemed to have caused the death of another person although the act is not the immediate or the sole cause of death in any of the following cases-



- a. If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case, it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill”.
100. With due respect to the defence Counsel, the above legal provisions are not at all applicable in the circumstances of this case. The deceased in this case did not die due to the surgical and medical treatment he received after he was injured by the accused person. His proximate cause of the death was the fracture in his head due to the injury inflicted in his orbit, which led to incarceration of a part of his brain in the fracture. The incarcerated part of his brain got bacterial infection and an abscess in his brain containing pus. As a result, the accused person contracted meningitis which led to his death. The deceased’s death therefore had nothing to do with the medical treatment he received but the injury inflicted on him by the accused.
101. The deceased was injured on 2nd April, 2015 and died on 28th July, 2015. As such, the provisions of Section 215 of the Penal code must be considered. The said provisions state as follows-
- “(1) A person is not deemed to have killed another if the death of that person does not take place within a year and one day of the cause of death”;
- (2) Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done.....”
102. Since the deceased died within 3 months and about 28 days from the time he was injured by the accused person, the provisions of Section 215(1) of the Penal Code do not apply. As to whether the accused person killed the deceased with malice aforethought there is sufficient evidence that he did.
- The evidence of PW3 was not controverted that after the deceased took away the keys for the truck from the accused person and a break down vehicle was called to the scene, the accused person ran away and returned after about 10 minutes armed with an iron bar which PW3 referred to as a “key boot”.
103. When the accused person returned to where the deceased was, he told him that he was going to kill him, and tried to injure the deceased with the said object but the deceased pushed him down two times. The accused person however managed to stab the deceased on his forehead near his left eye and he lay down in the middle of the road bleeding from the said injury.
104. When PW8 went to the scene, the accused person tried to stab him with the same object, which PW1 referred to as a metal bar, PW2 referred to it as an iron rod, PW3 referred to the exhibit as a twisted bar, PW7 referred to the exhibit interchangeably as a metal iron bar or metal bar, while PW9 referred to it as a metal rod. This Court having seen the said object in open Court when it was produced observed that it was a twisted iron bar, although it was described in different names by different witnesses.
105. When he was attacked by the accused person, PW8 managed to deflect the blows aimed at him and then the accused person ran away. He was arrested after PW8 and others gave chase. The fact that the accused person uttered the words that he was going to kill the deceased is evidence that he had already formed the mens rea to kill the deceased. He put his intention into action by arming himself with the iron rod. The accused person also put his words that he was going to kill the deceased into action, when he stabbed the deceased on his forehead.



106. It cannot be said as Mr. Wairagu did, that the deceased provoked the accused person when he took the keys to the truck he was driving. The evidence adduced shows that the accused person had caused a road traffic accident but tried to flee the scene. The deceased however managed to stop the vehicle the accused person was driving and that infuriated the latter. In *R vs Davis Muriuki* [2021] eKLR, the Court laid down the ingredients of provocation in the following manner:

“The essentials of provocation as provided in Section 207 and 208 of the *Penal Code* entails (sic) the following requirements:

- a. There had to have provocative conduct by the deceased.
- b. This had to have caused the accused to respond in anger.
- c. And that there had to have been a reasonable relationship between the provocation and the response.”

107. The defence of provocation is not acceptable in the circumstances of this case to justify the assault and eventual death of the deceased who was executing his lawful duties as a Traffic Police Officer when he was attacked by the accused person.

108. Malice aforethought is defined under Section 206 of the *Penal Code* as follows-

- “(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.”

109. In the case of *Republic V Tubere s/o Ochen* [1945] 2 EACA 63, the predecessor of the present Court of Appeal stated as follows-

“in determining whether malice aforethought has been established the court has to consider the weapon used, the manner in which it is used, part of the body targeted and injured, the severity of the injuries inflicted, the conduct of the accused prior, during and after the killing.”

110. In this case as earlier shown by the evidence on record, the accused person left the scene where his vehicle had been impounded and looked for an object to use to inflict injuries on the deceased. He uttered the words that he was going to kill him, he inflicted a heavy blow on the deceased’s forehead with an iron rod, resulting in a fracture that incarcerated part of the deceased’s brain. That part of the brain could not be treated with antibiotics and eventually, the deceased contracted a bacterial infection on his brain which led to meningitis and death.

111. From the said facts, there is no doubt that before the accused person inflicted the blow on the deceased’s forehead, he meant to actualize his intention, which was to kill the deceased. I conclude that he had



malice aforethought when he inflicted the injury on the deceased's forehead. I agree with Ms Nyawinda that the prosecution proved its case beyond reasonable doubt. I find the accused person guilty of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. I hereby convict the accused person under the said provisions of the law for the offence of murder.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MARCH, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

The accused person

Mr. Wairagu for the accused person

Ms Nyawinda – Prosecution Counsel for the DPP

Ms B. Wokabi – Court Assistant.

