



**Republic v Kathambi (Criminal Case 2 of 2018)
[2024] KEHC 8914 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 2 OF 2018**

**AC MRIMA, J
JULY 25, 2024**

BETWEEN

REPUBLIC STATE

AND

ELIZABETH KATHAMBI ACCUSED

JUDGMENT

Introduction

1. The accused herein, Elizabeth Kathambi, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the offence were as follows: -

On the 7th day of March 2018 at Kipsongo area within Trans Nzoia County, murdered ALFRED SIMIYU.

3. When the accused was arraigned and charged before Court, she denied committing the offence thereby prompting the hearing of the case against her.
4. After the close of the prosecution’s case, the Court found that a prima facie case had been established against the accused. The accused was placed on her defense. The Accused elected to give an unsworn testimony and called no witness.

The Prosecution’s case:

5. The Prosecution called a total of 5 witnesses.
6. PW1 was a brother to Alfred Simiyu, the deceased in this case. He was one Wilfred Juma Wasike. PW2 was one Masul Wasafwa Wanyonyi, a business man at Kipsongo Centre. PW3 was Dr. Dennis



- Nanyingi who produced the deceased's Post Mortem Report on behalf Dr. Namasaka. Leonard Fwamba Muniafu testified as PW4. He was a neighbour to the accused. The Investigating officer was one No. 101655 PC (W) Christine Nyerere then attached to Kitale Police Station. She testified as PW5.
7. It was the prosecution's case that on 30th April 2017 at around 10am, as PW4 was from his farm walking towards his home, he came across the accused who had a piece of wooden stick in one of her hands. He witnessed the accused beat the deceased twice using the stick as the deceased lay prostrate on the ground. One of the strikes was on the hand. As the accused wanted to beat the deceased for the third time, PW4 intervened and held her. The deceased was then bleeding from the head.
 8. PW4 knew the deceased as well; as a mason and the one who built a house for the accused. As they stood next to a boda boda stage, people descended to where they were and began attacking the accused for what she had just done. PW4 shielded the accused and as a result she was also injured in the process. He, however, managed to rescue the accused and also took the deceased along. He took the accused to Kitale Police station and rushed the deceased to Kitale County Referral Hospital.
 9. Thereafter, PW4 looked for and informed the brothers to the deceased including PW1 of what had transpired. He later recorded his statement with the police.
 10. PW2 was aged 70 years old. He knew the deceased since 1964 as a mason and he used to occasionally use him to build houses for him. On the fateful day at around 11:00am, as PW2 was in Church, he was informed by some children that the deceased had been beaten by the accused and had been taken to hospital.
 11. After the Church service, PW2 visited the deceased in Kitale County Referral Hospital where he actually found him admitted with bandages on the head and arm. He served him some food and left. He called to inform PW1 only for PW1 to tell him that he had already been so informed by the Area Chief. PW2 also recorded his statement with the police.
 12. PW1 was a Carpenter. The deceased was his elder brother aged around 65 years old, unmarried and without children. He stated that on 30th April 2017 at around midday, the Area Chief called him and informed that the deceased had been assaulted by a woman and that some good samaritans had taken him to hospital. That, at around 4pm, he went to the hospital. He found his brother admitted with bandages on the head and the right arm. He left at around 6pm and returned the following day to see how the deceased was fairing on.
 13. On 2nd May, 2017 PW1 returned to the hospital. He was then introduced to the accused by the deceased. The deceased told PW1 that he used to build houses for the accused and also did other general duties. It was PW1's further statement that in the course of discussions with the accused, the accused told him that she was the one who had injured the deceased and went ahead to request that the matter be discussed and settled amicably. PW1 told the accused that they wait for the deceased to be treated first and then they will discuss the matter going forward.
 14. According to PW1, he later accompanied the accused to see the deceased's another brother who worked in Kitale town. That, they also discussed the matter and thereafter all headed to the hospital to consult further with the deceased. That, on reaching the hospital, they found the deceased was unable to engage and they agreed that, in the meantime, they continue supporting the deceased with the treatment and food.
 15. It was PW1's testimony that on 11th May, 2017, he was surprised to see the deceased coming back home from the hospital. The deceased told him that the accused had discharged him from the hospital and that they had gone to the Police and had the assault case which the deceased had lodged against the



- accused withdrawn. In PW1's assessment, the deceased was still unwell and wondered why he had been discharged.
16. On the following day, PW1 went to the police find out why the deceased had been discharged from hospital while still unwell and the complaint withdrawn. PW1 confirmed that, as a result of his intervention, the accused was charged with assault. He also stated that it was PW5, who was the investigating officer, who preferred the charges against the accused.
 17. In cross-examination, PW1 stated that the deceased used to drink alcohol, but he did not know that the deceased suffered from Tuberculosis disease. PW1 also attended the post mortem examination for the deceased.
 18. On cross-examination, PW1 clarified that the deceased had been discharged from hospital, but they could not settle the bill for his release and that was why the accused assisted them. He also admitted that the accused, thereafter, used to take the deceased to hospital for checkups and also bought drugs for him. He also affirmed that the deceased died on 7th June, 2017 at their home and that the body was taken to the Kitale County Referral Hospital mortuary for preservation.
 19. The death was reported to the police. PW5 then continued with the investigations. She recorded statements from witnesses and organized for an autopsy.
 20. The Post mortem examination on the body of the deceased was conducted on 13th June 2017 by Dr. Namasaka. He observed the body externally. He noted that the body was wasted due to poor nutritional status, but was well preserved in the mortuary.
 21. The Doctor also observed that there were multiple hypopigmented discoloration on both legs and a closed mid shaft humerus fracture on the right arm. Further, the parietal bone area was bruised.
 22. Internally, both lungs adherent to the chest wall bilaterally appeared black with modular deposits in the upper lobes. The modules contained cheesy material. The head had a linear fracture of the parietal bone, but the brain matter was intact.
 23. The cause of death was opined to be cardio-respiratory arrest secondary to chronic pulmonary Tuberculosis/COPD secondary to fracture of the right humerus and fracture of the skull following blunt trauma.
 24. It was clarified that the tuberculosis disease was an ongoing one, but the primary cause of the death was the trauma/assault. The Post Mortem Report was then filled in and signed. It was produced in evidence by PW3.
 25. On completion of the investigations, PW5 recommended the charging of the accused with the information of murder. The recommendation was approved by the Office of the Director of Public Prosecution who drafted the information. The accused was accordingly charged.
 26. PW5 then had the assault charge she had initially preferred against the accused in Kitale Chief Magistrates Criminal Case No. 2143 of 2017 withdrawn.
 27. Further, PW5 informed the Court that the deceased had narrated to her how the accused inflicted the injuries on the head and arm by use of a piece of wood.
 28. After close of the Prosecution's case, the Court found that the accused had a case to answer. She was placed on her defence.



The Defence:

29. The accused elected to give an unsworn testimony without calling any witness. He stated that she was a retired civil servant who had worked for 40 years. She had 5 children and 9 grandchildren.
30. The accused admitted knowing the deceased as a mason who had built a house for her in Namanjalala area. The accused further stated that there was a balance of Kshs. 200/= which the accused to pay the deceased once she confirmed that the work was complete.
31. According to the accused, the deceased was a drunkard and he used to constantly ask for work from her. That, she would occasionally give him some casual jobs and even at times just assisted him as a needy person.
32. It was the accused's testimony that on 30th April 2017, as she walked to Church accompanied by a neighbour's young girl, she met the accused who was very drunk. He demanded for the balance of Kshs. 200/=. The accused asked him to wait for her to go for a Church service and thereafter to go and confirm if the work was completed before she could pay him. That, the deceased became so angry and turned violent on her. He grabbed her throat and pushed her to the ground. She raised alarm. The deceased hit her on the face and she bled from the mouth.
33. That, some motor cyclists came to her rescue. They separated them and placed her on one of the motor cycles. As they were about to leave, the deceased grabbed her hair. When the motor cycle was engaged into motion, the deceased fell on the tarmac road as she fell on the murram side. The motor cyclist then fled.
34. The accused stated that she was yet again rescued by another motor cyclist and as she was being rushed to hospital, they were stopped by a Village elder who told them to, instead, first go to the Police station. On reaching at the station, the accused was arrested and boked into the cells. The deceased was taken to hospital. She was, however, released on police bond and issued with a P3 Form which was filled. She produced the P3 Form as an exhibit.
35. On learning that the deceased was admitted, she used to visit him in the Wards. Later, the family requested her to assist in clearing the hospital bill as the deceased had been discharged, but they could not raise the money. She obliged and the deceased was eventually discharged. That, on request, she used to take the deceased for review and bought the medication.
36. To her surprise, she was later charged with assault which charge was withdrawn after the deceased died. She was then charged with the instant offence.
37. After the close of the defence case, parties were directed to file their respective rival written submissions. Mr. Kiarie, Learned Counsel for the accused filed submissions dated 13th October, 2023. He contended that the prosecution failed to prove the information against the accused and called for dismissal of the charge and that the accused be set at liberty. Several decisions were referred to.
38. The Prosecution on the other hand presented its written submissions dated 30th October, 2023. It submitted that the State had established a case to the required standard of proof, being beyond reasonable doubt, against the accused. It urged the Court to find the accused guilty as charged. It also relied on several decisions in urging the Court to find in its favour.

Analysis:

39. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person.



40. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR, summed up the elements of the offence of murder as follows: -
- (a) the death of the deceased occurred and its cause;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
41. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased and its cause:

42. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).
43. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased dead. PW1 witnessed a Post Mortem examination conducted on the lifeless body of the deceased. The body was later released to its relatives and was subsequently buried.
44. The second way in which the death of the deceased was proved was through the evidence of PW3, a Medical Doctor who produced a Post Mortem Report prepared by a colleague Doctor who had conducted the autopsy on the body of the deceased.
45. A litany of injuries both externally and internally were observed. It was then concluded that the deceased died as a result of cardio-respiratory arrest secondary to chronic pulmonary Tuberculosis/ COPD secondary to fracture of the right humerus and fracture of the skull following blunt trauma.
46. This Court, therefore, finds and hold that the death of the deceased in this case and its cause were both sufficiently proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

47. There was only one eye-witness in this matter. It was PW4. He narrated how he witnessed the accused assaulting the deceased and how he rescued both the deceased and the accused from angry members of public of public.
48. The investigating officer, who testified as PW5, also stated that the deceased had narrated to her how he was assaulted by the deceased. Surprisingly, there was no attempt to produce the Statement by the deceased in evidence. Since the accused had initially been charged with assault in Kitale Chief Magistrates Criminal Case No. 2143 of 2017, it then meant that the investigations had been completed and reviewed by the Director of Public Prosecution before the consent to charge the accused with the offence of assault was given.
49. Since the deceased had then died, an attempt to produce the statement ought to have been made in accordance with Section 33(a) of the *Evidence Act*, Cap. 80 of the Laws of Kenya. That, did not, however, happen.
50. As such, that leaves the sole evidence of PW4 on the issue of identification of the assailant.
51. In consideration of the evidence of PW4, this Court is called upon to juxtapose it with the defence tendered by the accused. Before this Court ventures into that arena, a look at the law on the evidence of a single identifying witness becomes necessary.



52. The Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the aspect of single identifying witness as follows: -

13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, “No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.” Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in *Mailanyi vs Republic* [1986] KLR 198:

1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In *Mailanyi v Republic* (supra), the Court emphasized that:

What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight.

There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant’s aid or to the police.

53. In *R -vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness



when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

54. In *Wamunga vs Republic* (1989) KLR 426 the Court of Appeal stated as under: -

.... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

55. In *Anil Phukan vs. State of Assam* (1993) AIR 1462 the Court held as follows: -

A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

56. Deriving from the foregoing, it is the legal position that the evidence of a single identifying witness can be sufficient to positively settle the issue within the settled legal parameters.

57. PW4 testified that he was a neighbour to the accused and also knew the deceased well. In fact, he was the one who called and informed the relatives of the deceased after he had taken the deceased to hospital.

58. There was no contestation that PW4 knew the accused and the deceased. What is at stake is the version of evidence to be accepted by this Court on how the deceased sustained the fatal injuries.

59. According to PW4, he saw the accused beating the deceased with a stick and he was the one who restrained her from assaulting the deceased further. That evidence was on oath.

60. On the part of the accused, she alluded that the deceased's injuries were inflicted from a fall from a motor cycle onto the tarmac road. However, that evidence was not on oath.

61. The Court of Appeal in *Jamaal Omar Hussein v Republic* [2019] eKLR had the following to say about unsworn testimony: -

.... There is a presumption that a person who swears to tell the truth will do so and since evidence tendered on oath is subjected to cross-examination to test its credibility and veracity, then the same carries more probative weight. This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter. This Court addressed the evidentiary value of unsworn statements, in *May v Republic* (1981) KLR (Law Miller & Potter, JJA.) as follows;

An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case. In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this Court in *Mwangi v Republic* (2006) 2



KLR 94 held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence.

62. Therefore, the accused's evidence has no probative value. However, it is persuasive and would require corroboration before it can sustain the defence. However, throughout the record, there is no evidence that corroborates what the accused stated in her evidence on how the deceased's injuries were inflicted. As a result, the accused's evidence is for rejection.
63. This Court, hence, finds favour with the evidence of PW4. Further, that evidence was properly corroborated by PW3 who stated that the injuries inflicted on the deceased were by a blunt object. PW4 stated that he saw the accused use a piece of wood to beat the deceased. An ordinary piece of wood is a blunt object.
64. This Court further believes that the injuries sustained by the accused and as proved in the P3 Form filled by the accused, were inflicted by the members of public who descended on her after the accused attacked the deceased with the wooden stick and not otherwise.
65. In the end, this Court finds and hold that the death of deceased was caused by the accused who inflicted the fatal injuries on the deceased using a blunt object. The evidence of the prosecution stands out well corroborated and deliberate as to the truthfulness of those facts.

Whether there was malice aforethought:

66. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
67. Section 206 of the Penal Code defines 'malice aforethought' as follows: -
 206. 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.
68. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
69. In Joseph Kimani Njau vs Republic (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in Nzuki vs Republic (1993) KLR 171, held as follows: -

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 test of which is always subjective to the actual accused; -

 - i. The intention to cause death;



- ii. The intention to cause grievous bodily 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 intention were aimed at a potential victim other than the one 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. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (emphasis added).

70. In the case of *Nzuki vs. Republic (supra)*, the accused had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to there having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed as follows: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

71. This Court will now juxtapose the above with the facts in the case.
72. The accused was the only one who testified on what prompted her to attack the deceased. According to the accused, it was the deceased who attacked her while demanding the payment of his balance of Kshs. 200/=.
73. PW4 only witnessed the accused assaulting the deceased, but did attest to what had prompted the attack.
74. The attack on the deceased by the accused was, hence, spontaneous.
75. By applying the subjective test in *Joseph Kimani Njau vs Republic* case (*supra*), this Court is unable to find malice aforethought in the circumstances of this matter. Whereas the accused caused the fatal injuries, there is no proof of malice to the required standard. The killing only amounted to manslaughter.
76. The foregoing analysis does not, therefore, support a conviction in respect of the information of murder. The accused is, hence, found not guilty of the murder of the deceased.



77. However, it is apparent that the deceased lost his life as a result of the actions of the accused, but of course without any malice aforethought.
78. In view of the provisions of Section 179(2) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and given the state of the evidence on record and as analyzed hereinbefore, this Court finds the accused guilty of the offence of Manslaughter contrary to Section 202 of the Penal Code and he is accordingly convicted accordingly.
79. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS ...25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court in the presence of:

Mr. Kiarie, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

TABLE

Judgment – Kitale High Court Criminal Case No. 2 of 2018 Page 13 of 13

