



**Republic v MMK (Criminal Case 44 of 2017)
[2024] KEHC 11475 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 44 OF 2017**

**MN MWANGI, J
JULY 24, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MMK ACCUSED

JUDGMENT

1. The accused person was on 1st November, 2017 arraigned in Court charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 19th day of October, 2017 at Malandi in Changamwe Sub-County within Mombasa in the Republic of Kenya, she murdered Raymond Mwakoi.
2. The accused person pleaded not guilty to the charge and the hearing of the murder case against her commenced after pre-trial proceedings. The first witness (PW1) was Rahab Njoki Kigo, a Housewife and a resident of Malandi, Changamwe. It was her evidence that on 19th October, 2017 at 8.00 p.m., she was in Changamwe and as she was coming from the Shopping Centre to buy airtime, MM (the accused person) asked her for a knife to cut vegetables with. PW1 told the accused person to send her child for the knife, and she sent her son H [name withheld] for the said knife. PW1 stated that after sometime, about half an hour later, she heard screams. It was her evidence that when the screams continued, she and her neighbours took about 5 minutes to go to Changamwe Secondary School where the screams were coming from. PW1 testified that she found her male neighbour known as Raymond alias “Ndogo Ndogo” crying as he lay on the ground, and as he held the left side of his stomach, and writhed in pain.
3. PW1 stated that members of the public who were present were saying that he had been stabbed by the accused person as he had raped her child. PW1 further stated that Gilbert and Esther Akinyi informed her that it was the knife which she had given the accused person that had been used to stab “Ndogo Ndogo”. The police then went to the scene and collected “Ndogo Ndogo”. PW1 stated that they were



- informed the following morning that he had passed away. She stated that she had not seen her knife since the day she gave it to the accused person.
4. It was her evidence that on the day she heard the screams and went outside towards the direction of the screams, she saw “Ndogo Ndogo” (deceased) and the accused person holding each other struggling, as they headed to the direction of Changamwe Secondary School. She stated that she could not see if any of them was holding anything in their hands and she did not see the accused person stab the deceased.
 5. In cross-examination, PW1 stated that when PW1 asked her for a knife, she was not angry and that she used to ask for a knife from PW1 from time to time, to cut her vegetables with it.
 6. PW2, Livingston Mwakaba Mwabusa testified that he was informed on 20th October, 2017 at 9.15 a.m., by a woman known as Chanya that his cousin Raymond Mwakibola Mwakoi had been stabbed with a knife. On going to Malandi in Changamwe, where his cousin used to live, PW2 was informed that his body had been collected by police from Changamwe Police Station.
 7. PW2 went to Coast Province General Hospital where he found his cousin’s body at the mortuary with bandages tied around his abdomen. PW2 stated that he attended the deceased’s postmortem examination on 20th October, 2017 and the Doctor said that the deceased died because of blood clot in his abdomen. PW2 further stated that the deceased had an injury in his abdomen. He also stated that he knew the accused person as the deceased’s neighbour as he used to see her there, but he did not know that she had a problem with the deceased.
 8. PW3 was a protected witness, whose identity was concealed. It was her evidence that on 19th October, 2017 at 7.30 p.m., she was outside her house where she was staying at Malandi, in Changamwe. She stated that when she was with her neighbour, a woman by the name Mary (accused person) went to where they were and she called her neighbour, and spoke to her in Kikuyu.
 9. PW3 then saw the accused person send her son H [name withheld] to the neighbour’s house. PW3 gave the name of the neighbour she was with as Rahab. PW3 stated that she saw Rahab (PW1) go into her house with H [name withheld] and then saw him coming out of the said house with a knife which he gave to Mary, who entered into her house and came out of it after 10 minutes.
 10. PW3 stated that the accused person then called “Marko” (the deceased), whom they also used to call “Ndogo Ndogo”. PW3 stated that Marko’s real name was Raymond. That “Marko” was not in his house and that when she found him, she asked him to open the door to his house. That the accused person’s daughter called A [name withheld], who was 10 years old, jumped through the window of Marko’s house. PW3 testified that the accused person started pulling “Marko” out of his house and stabbed him with a knife beneath his stomach. PW3 stated that she saw the accused person stabbing him three (3) times, that she would stab him and pull out the knife and stab him again.
 11. That when “Marko” was being stabbed, he was saying “You are hurting me”, “You are hurting me”.
 12. PW3 testified that the accused person was holding “Marko” on his neck, but he managed to escape. She stated that after the incident, she continued sitting where she had been sitting before.
 13. On being cross-examined, PW3 stated that the accused person was not angry when she spoke to PW1 in Kikuyu and PW3 did not think that anything untoward was happening. PW3 stated that the deceased was outside the house he used to live in with his cousin, but he had locked the accused person’s daughter inside the said house.
 14. PW3 asserted in cross-examination that she saw the accused person’s daughter jump through the window of the deceased’s house. PW3 stated that PW1 remained at the veranda with her before she



- went to the house to give H [name withheld] the knife. PW3 stated that it was not true that after PW1 gave the knife to H [name withheld], she (PW1) stayed in her house, as she remained at the verandah with her. PW3 also stated in cross-examination that PW1 did not go to the place where the deceased ran to.
15. In re-examination, PW3 stated that when people went to the scene where the deceased was, she did not know where PW1 went to.
 16. PW4 was also a protected witness, whose identity was not disclosed. She stated that on 19th October, 2017 at 8.00 p.m., she was at her home in Malandi, Changamwe. That as she was having dinner with her family, she heard noises from her neighbour who was saying “Mama A usifanye hivyo”, “Mama A usifanye hivyo”. PW4 identified the accused person as the one who was being referred to as “Mama A”.
 17. PW4’s testimony was that she went outside her house and found the accused person holding a neighbour by the name Raymond. That the accused person was holding a knife in her hand and the two were struggling.
 18. PW4’s evidence was that the accused person stabbed Raymond on his stomach. That he screamed and ran away while holding his stomach. PW4 explained that the incident happened near an electricity post outside their compound. She further testified that she ran after Raymond who fell down writhing in pain as he said “nisaidieni, nisaidieni”. PW4 stated that after he was stabbed, she saw Raymond’s intestines protruding. She asserted that the fight was between Raymond and “Mama A” (accused person). PW4 testified that the police were called to the scene and they collected Raymond and took him to Hospital.
 19. On being cross-examined, PW4 stated that the accused person was saying that her daughter had been locked inside Raymond’s house and she had been raped. PW4 also stated in cross-examination that after the accused person stabbed Raymond she said in Kiswahili as interpreted in English “ I have stabbed, let him go and die”. PW4 said that she saw PW1 at the scene where people were gathered.
 20. In re-examination, PW4 clarified that “A” is also known as A [name withheld], and is the first born child of the accused person.
 21. Dr. Mohammed Ali Mohammed testified as PW5. He gave evidence on behalf of Dr. Said Salim who conducted the postmortem examination on the deceased’s body, but the latter Doctor was in Egypt at the time this case was being heard. In making reference to the Postmortem Report prepared on 27th October, 2017, PW5 stated that the body examined was that of Raymond Mwakoi, and on external examination of the body, Dr. Salim found that the small bowel was protruding from the left anterior wall, and there was a perforation of about 4cm on the extruded gut.
 22. PW5 stated that internal appearance of the digestive system revealed massive haematoma with a portion of the small bowel protruding from the anterior abdominal wall with perforation of about 4cm. He stated that the Postmortem Report showed that the cause of death was haemorrhagic shock secondary to penetrating abdominal injury secondary to assault. PW5 produced the Postmortem Report.
 23. James Simpiri testified as PW6. He stated that on 19th October, 2017, he was at Changamwe Police Station as the Duty Officer. That he got a call at 6.30 p.m, from PC Kaikai who informed him that there was a man who had been stabbed and he was lying on the ground near Changamwe Secondary School.
 24. PW6, another Police Officer, accompanied by a Police Driver went to the scene. PW6’s evidence was that on reaching there, they found a man lying on the ground. He saw that the man had been tied with a lesa on his lower abdomen and part of his intestines was protruding. PW6 stated that the man was



- crying in pain and bystanders at the scene informed him (PW6) that the man had been stabbed by a woman by the name Mary Muthoni (accused person).
25. PW6's evidence was that the first objective of the police was to save the man's life and they rushed him to the emergency department at Coast Province General Hospital where he was attended to immediately. PW6 stated that the man was in a bad condition when they went to Hospital and he was holding his intestines as he cried in pain, and they learnt that he had been stabbed with a knife. After the Doctor informed them that the injured man needed to be taken to theatre, PW6 went back to Changamwe Police Station. At the said Station, the OCS Chief Inspector Busienei informed them that the person who had stabbed the man who was injured, had surrendered herself to the Police Station. PW6 indicated that they arrested the woman and placed her in custody pending a formal charge for the offence of causing grievous harm. He identified the woman as the accused person. PW6 stated that on 20th October, 2017, they were informed that the man who was injured had succumbed to the injuries.
 26. PC Stephen Kaikai was the Investigating Officer in this case. He testified as PW7. He was at Changamwe Police Station on 19th October, 2017 in the evening. At around 7 p.m. or 8 p.m., he received a call from a member of the public who requested to be assisted with the police vehicle so as to save the life of a member of the public who had been injured in Malandi. PW7 spoke to Cpl Sampiri and gave him directions to the scene where they found the victim who had an injury in the stomach, whom they escorted to the Coast Province General Hospital.
 27. PW7 stated that he received another call from a member of the public who told him that the person who had inflicted the injuries on the victim was on her way to Changamwe Police Station accompanied by her daughter with the aim of filing a report that her daughter had been defiled. That after about 15 minutes, they reached the Police Station and he heard her explaining about what had happened to Police Officers at the Report Office. PW7 stated that he called her aside and interviewed her, and she said that she was from Malandi and had gone to report a case of attempted defilement.
 28. PW7 testified that he separated the woman from her daughter so that he could interrogate the woman's daughter. That the said girl was unable to express herself. That he asked her if it was true that she had been locked in the deceased's house in an attempt by the deceased to defile her, but she told him that it was not true that there was attempted defilement, and she could not remember what made her run out of the deceased's house through the window. That she told PW7 that her mother wanted to beat her and she went to the deceased's house and her mother (accused person) confronted the deceased.
 29. PW7 stated that he spoke with the OCS who called the Duty Officer (PW6) who was at the Coast Province General Hospital to confirm the state of the injured man, and PW6 informed the OCS that the man had serious injuries in the lower abdomen and that the Doctors were apprehensive about his survival chances, which were low. PW7 stated that they detained the woman and her daughter. He identified the woman as the accused person.
 30. PW7 testified that when PW6 returned to the Police Station, he booked the accused person for inflicting injuries on the victim, and her daughter was booked in as a child in need of care and protection. PW7 further testified that in the early morning of 20th October, 2017 at around 9.00 a.m or 11.00 a.m., he received a call from the Coast Province General Hospital informing him that Raymond Mwakoi had died. PW7 stated that he and his colleagues went to the Coast Province General Hospital to ascertain the fact of death and on reaching there, they established that Raymond Mwakoi was dead. PW7 went back to the Police Station and informed the OCS who directed him to write a report in the OB about the death of Raymond Mwakoi.



31. PW7 recorded statements and took the accused person's daughter to the Gender Office at Coast Province General Hospital for her to be examined if she had been defiled, and the Doctor filled a Post Rape Care Form showing that the vaginal orifice of the accused person's daughter was open and there were abrasions and her vagina was hyperemic. That the Doctor's opinion was that there was attempted defilement. PW7 produced the Post Rape Care Form dated 25th October, 2017 as an exhibit. He also recorded a statement from the daughter of the accused person.
32. On 20th October, 2017, PW7 drew a sketch plan of the scene of crime which he produced as an exhibit. He also took a postmortem form to Coast Province General Hospital after filling in the 1st page. After the postmortem examination was done, they went to collect the Postmortem Report. They then charged the accused person.
33. The accused person gave a sworn defence. She stated that the deceased was her neighbour and that on 19th October, 2017 accompanied by her daughter she went to Changamwe Police Station in the evening to report that her neighbour wanted to rape her child AA [name withheld]. That the police told her to take her child to Hospital first for examination and then go back to the Police Station. That as she was going out of the gate, she asked someone what the time was and on being told that it was 9.00 p.m., she went back to the Police Station and asked a Police Officer if she could take her child to a private clinic as it was late, but she was told to take her to a Government Hospital.
34. The accused person stated that while still there, a Police Officer called her and asked her if she was the one who had killed her neighbour and she told him that she had not. That he told her to enter a certain office and then he told her to enter the cells, where she went to, with her daughter. That the following morning, she asked the Police Officer if her child could be left to go home as she was feeling cold, but he told her that she should stop being problematic as she had killed her neighbour. That on Monday 23rd October, 2017 her child was released after she was interrogated. The accused person said that her daughter was 10 years old at that time.
35. The accused person recounted that on 19th October, 2017 at 6.30 p.m., she sent her daughter to the ground floor of the house they were living in, to fill some containers with water but she took too long and she started looking for her by calling out her name in their kitchen but she did not respond. She stated that from their house on 1st floor, it was possible for someone fetching water on the ground floor to have heard her calling out the name A [name withheld].
36. The accused person stated that she looked for her daughter where she used to play but did not find her. She then went back to where they used to stay and opened the gate and called out A [name withheld] but her daughter did not respond. She testified that as she was standing outside their gate, she heard a sound but could not tell where it was coming. She then heard the sound again and discerned that it was coming out of the deceased's house. She said that she heard the sound again and made out that the sound was being made by her daughter A [name withheld].
37. The accused person stated that she went to the deceased's house and called him by saying "Ndogo Ndogo" but he did not respond. She testified that she opened the 1st door to his house which leads to the kitchen which was latched with a nail. She stated that she opened the 2nd door which was unlocked and pushed it open, but before doing so, she called "Ndogo Ndogo" but he did not respond.
38. That after pushing the door open, she saw "Ndogo Ndogo" lying on her daughter on the seat with one of his legs on the floor. She asked him why he had not responded all that time she had been calling him. The accused person's evidence was that after she asked him what he was doing, he stood up, and her daughter also stood up and held her skirt on the lower part with her hand, and the accused person saw that her zip was open.



39. The accused person testified that when “Ndogo Ndogo” turned to face her, she saw that the zip of his trouser was open and his penis was erect. She stated that as they were leaving the house, “Ndogo Ndogo” wanted to prevent her daughter from going out by holding her hand and he pushed the accused person. That she gestured to her daughter to pass through the window, which was open, and “Ndogo Ndogo” hit the accused person on the head.
40. That at that time she could hear people saying that “Ndogo Ndogo” had been with her daughter all that time. That he tried to prevent the accused person from leaving the building but she struggled and went outside the gate, and he also went outside the gate. The accused person stated that by then, members of the public were saying that he (deceased) should be taught manners (discipline), and he ran away. The accused person denied having asked for a knife from Rahab Wanja (PW1). She denied having murdered “Ndogo Ndogo”.
41. In the final submissions filed by the DPP on 3rd April, 2023, Ms Nyawinda, Principal Prosecution Counsel summarized the evidence adduced by prosecution witnesses and by the accused person. She stated that the critical elements to a charge of murder are proof of death, and the cause of that death, proof that the death was due to an unlawful act or omission and that the said unlawful act or omission was on the part of the suspect, and that the unlawful act was done with malice aforethought.
42. On the issue of proof of death, Ms Nyawinda submitted that the death of the deceased was not disputed as the Postmortem Report confirmed that he died on 10th October, 2017 at the Coast Province General Hospital and the cause of death was haemorrhagic shock secondary to penetrating abdominal injury secondary to assault, which is not a natural cause. She stated that as such, the prosecution had established that the deceased died and his death was unlawful.
43. In regard to whether the deceased’s death was due to an unlawful act or omission by the accused person, Ms Nyawinda submitted that there were two eyewitnesses, PW3 and PW4 who testified that they saw the accused person stab the deceased with a knife. Ms Nyawinda stated that the injuries sustained by the deceased as per the Postmortem Report were consistent with stab wounds hence corroborating PW3’s and PW4’s evidence. She contended that the accused person’s defence is a mere denial and she alluded to members of the public having lynched the deceased, yet there were no other injuries on the deceased’s body other than the stab wound in his stomach.
44. She stated that PW7’s evidence was that members of the public who called the police requested for a motor vehicle in a quest to save that deceased’s life after he was stabbed by the accused person in his stomach with a knife.
45. Ms Nyawinda cited the provisions of Section 206 of the Penal Code which outlines the elements that constitute malice aforethought as being the nature of the weapons used, the nature of the injuries sustained, and the conduct of the accused before, during and after the incident.
46. Ms Nyawinda submitted that in this case, PW1 stated that the accused person borrowed a knife from her and after 30 minutes she heard screams. She ran towards the direction of where the screams were coming from and found the deceased crying in pain.
47. Ms Nyawinda stated that PW3’s evidence was that she saw the accused person stab the deceased with a knife three times, whereby she would stab him, pull out the knife and stab him again. That after being stabbed, the deceased ran away as he held his stomach and also saw his small intestines protruding.
48. Ms Nyawinda contended that the accused person’s defence was not corroborated by any other witness, even her daughter, who was 16 years old at the time when the accused person was giving her defence. Counsel further contended that the allegations of attempted defilement were unsubstantiated and that



- the accused person denied the police a chance to investigate the same, and instead she took the law in her own hands.
49. Ms Nyawinda submitted that the accused person equipped herself with a knife before the deceased opened his door, and that she pre-meditated murdering the deceased irrespective of what was happening inside the deceased's house and in the circumstances, she cannot plead provocation or self defence.
 50. The Prosecution Counsel concluded by stating that the prosecution had established that the accused person had malice aforethought to kill the deceased, due to the nature of the weapon used, the time she took asking for the knife and the nature of the injuries sustained. She submitted that the prosecution had proved all the elements of the offence of murder against the accused person beyond reasonable doubt. She prayed for the accused person to be convicted for the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.
 51. Mr. Tindi, learned Counsel for the accused person filed written submissions on 25th April, 2023. He summarized the prosecution evidence and the defence by the accused person. He submitted that they were not admitting that this Court should find the accused person guilty of manslaughter but wanted to emphasize the circumstances of provocation to demonstrate that there was no malice aforethought.
 52. He submitted that it was confirmed by medical evidence that the deceased had defiled the minor girl of the accused person. Counsel stated that the deceased had even locked the said girl in his house and at the insistence of the accused person, and by peeping through the window, she saw her minor girl lying on her back on the sofa set and the accused person removing his private parts from the girl's vagina and pulling up his trouser, and that allowed the minor girl to escape through the window.
 53. Mr. Tindi submitted that there was indeed a struggle between the accused person and the deceased but a crowd had formed and there was an attempt to pull them apart.
 54. He contended that the time from which the accused person saw her daughter escaping from the house and the scuffle did not allow malice aforethought to be formed, and what happened during the scuffle was spontaneous. He also contended that a mother who sees her baby girl being defiled is entitled to protect her child against beastly acts of the rapist.
 55. He stated that although the deceased was injured by a knife, the accused person was not carrying it. He contended that there is a shadow of a doubt as to who stabbed the deceased since there was no direct evidence linking the accused person with the knife. He stated that the knife should have been produced in Court with fingerprint markings of the accused person but that was not done. He stated that the description of the knife would have corroborated the evidence of the prosecution witnesses. He submitted that the foregoing casts doubt as to whether there was a knife. He expressed the view that the prosecution would like the Court to speculate that the accused person had the knife when there was no basic link between her and the non-existent knife.
 56. Mr. Tindi submitted that even if the accused person was at the scene of the incident, she left the deceased with a group of people and she never had blood on herself if at all she had used the knife, and she never carried the knife from the scene of the incident hence a high possibility that during the scuffle, there was no knife at play, and the possibility which is not even remote is that someone stabbed the deceased but it was not the accused person. He stated that there was no blood spatter on her clothes or stains from the deceased person linking her to the stabbing.
 57. Mr. Tindi relied on the case of Jonathan Kiplimi v Republic [2018] eKLR, where the Court of Appeal held that even though the appellant therein was at the scene and that may have provided an opportunity to him to stab the deceased, there were several other people at the scene who also had



similar opportunity. The said Court then found that the evidence relied on by the Trial Judge did not point irresistibly to the appellant nor did it rule out the deceased having been injured by some other person.

58. Mr. Tindi also relied on the case of Republic v Kevin Aboxi Onsom [2021] eKLR, where Judge E. N. Maina held that the accused person therein fell within the defence of provocation and found the accused person guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
59. In relying on the above case, Mr. Tindi aimed to support the suggestion that the accused person was provoked by the deceased whom she found defiling her daughter. He was however assertive that the accused person was not to blame for the death of the deceased. On the said issue, he stated that the prosecution in the face of defilement of a minor child of the accused person cannot deny that such an offensive sexual act is provocative in the eyes of the society, and reiterated that the deceased might have been stabbed by a third party.
60. The defence Counsel stated that the Investigating Officer was called by telephone whilst at the Police Station but he never bothered to go to the crime scene to collect evidence or investigate further, but confined himself within the Police Station.
61. Counsel stated that when the accused person went to the Police Station, she did not have any blood stains on herself and how she became an immediate suspect demonstrates a scheme of bias and being framed, hatched out by PW1, PW2, PW3 and PW7.
62. Mr. Tindi concluded his submissions by stating that the prosecution had failed to establish that the accused person had malice aforethought to kill the deceased. He also stated that there was no direct link of the knife that stabbed the deceased, and since there were no blood stains on the accused person linking her to the stabbing, there was not even a remote chance that the accused person committed the crime and the prosecution's case failed completely. He prayed for the accused person to be acquitted.

DETERMINATION

63. A charge of murder presupposes that an accused person had malice aforethought when he committed the offence. Malice aforethought is therefore the chief catalyst in the commission of such an offence. In the case of Republic v Juma Mwarabu Chai alias Juma Kazungu & another [2022] eKLR, the Court stated as follows:-

“The test of malice aforethought is to be properly understood in so far as the evidence of the prosecution presents and manifests the following circumstances –

- a. The weapon used;
 - b. How it was used;
 - c. The part of the body injured;
 - d. Conduct of the assailants before, during and immediately after the injuries were inflicted”
64. When considering the above tests, it is also necessary to consider-
 - i. The cause of the deceased's death;
 - ii. Proof that death was due to an unlawful act or omission;



- iii. That the unlawful death was occasioned by the accused person; and
 - iv. If it was done with malice aforethought.
65. On the issue of the cause of the deceased's death, Rahab Njoki Kigo who testified as PW1 was on the night of 19th October, 2017 at 8.00 p.m., coming from the Shopping Centre heading to the place where she used to reside, when accused person, who was her neighbour asked her for a knife to cut vegetables with. Before PW1 went to her house, she told the accused person to send her child for the knife, and the accused person sent her son H [name withheld]. As PW1 was having a meal, she heard screams. She left her house and headed to Changamwe Secondary School being the direction where the screams were coming from. On reaching there, she found her male neighbour "Ndogo Ndogo" crying as he lay on the ground. He was holding his left side of his stomach as he writhed in pain. He was saying that he was in pain as members of the public said that he had been stabbed by the accused person. They were also saying that "Ndogo Ndogo" had raped the accused person's child.
66. PW1 stated that she was informed by Gilbert and Akinyi that it was the knife that she had given the accused person that had been used to stab "Ndogo Ndogo". PW1 also stated that she has never seen her knife since that day. It was PW1's evidence that when she went outside towards the screams, she saw the accused person and the deceased holding each other as they struggled, heading to the direction of Changamwe Secondary School.
67. On being cross-examined by Mr. Tindi, PW1 stated that one of her neighbours saw the accused person's child carrying the knife from her house, and the people at the scene were asking her what the accused person had told her, and she told them that she had asked for a knife. PW1's evidence was that the accused person was not angry when she asked for the knife and that she used to ask for one from time to time to cut her vegetables with it.
68. Livingstone Mwakaba Mwabusa, a cousin to the deceased was informed of the deceased's death. He traveled from Voi to Changamwe, where he was told that his cousin had been collected by the police from Changamwe Police Station. He proceeded to the Coast Province General Hospital where he found his cousin's body at the mortuary with bandages tied around his abdomen. He attended the postmortem examination on 23rd October, 2017, where the Doctor said that the deceased died due to a blood clot in his abdomen. PW2 stated that the deceased had an injury in his abdomen. He stated that he used to know the accused person as a neighbour to the deceased.
69. PW3 who was a protected witness testified that on 19th October, 2017 at 7.30 p.m., she was outside her house, where she was staying, when the accused person called their neighbour PW1, and they spoke in Kikuyu. She then saw the accused person send her son H [name withheld] to PW1's house and he came out with a knife which he gave to the accused person.
70. PW3 stated that the accused person stayed in her home for 10 minutes, then she called "Marko", whom they also used to call "Ndogo Ndogo" but his real name was Raymond. That the accused person found "Marko", whom she told to open the door of his house, and when "Marko" opened the door, Mary's daughter A [name withheld] who was 10 years old, jumped through the window. PW3 stated that she saw A [name withheld] jumping through the window of Marko's house.
71. PW3 stated that she saw the accused person pulling "Marko" out of his house and she stabbed him with a knife beneath his stomach. PW3 explained that she saw the accused person stabbing the deceased three times. She explained that the accused person would stab him, pull out the knife, and stab him again, which she did three (3) times, and at that time Marko was saying "You are hurting me", "You are hurting me", as the accused person held him on his neck, but he managed to escape.



72. On being cross-examined, PW3 stated that the accused person was not angry when she called PW1. She also said that there was light outside the compound.
73. PW4 was also a protected witness. Her evidence was that on 19th October, 2017 she was in her house having dinner when she heard noises from her neighbour saying “Mama A usifanye hivyo”, “Mama A usifanye hivyo”. PW4 identified the person who was being called “Mama A” as the accused person. PW4 testified that on going outside her house, she found the accused person holding a neighbour by the name Raymond and that she was holding a knife in her hand, and that she stabbed Raymond in the stomach. That Raymond screamed and ran away as he held his stomach. She stated that there was an electricity post where the incident happened. PW4 stated that she ran after Raymond, who fell down writhing in pain as he said “nisaidieni”, nisaidieni”. PW4 saw that Raymond’s intestines were protruding. The police were called and they collected him and took him to Hospital.
74. On being cross-examined, PW4 stated that she heard the accused person saying that her daughter had been locked inside Raymond’s house and that he had raped her. She stated that the accused person was holding a knife which she used to stab Raymond, and after she stabbed him, she said “ I have stabbed, let him go and die”, which she said in Kiswahili language.
75. PW4 said that she saw PW1 at the scene where people were gathered, but she did not hear people asking her why she had given the knife to the accused person.
76. In re-examination, PW4 stated that “A” is also known as A [name withheld] and is the accused person’s first born.
77. Dr. Mohammed Ali Mohammed testified in place of Dr. Salim Said, as PW5. He produced the Postmortem Report of the deceased which showed that the cause of his death was haemorrhagic shock secondary to penetrating abdominal injury secondary to assault. He produced the said Postmortem Report.
78. Corporal James Simpiri, PW6, stated that on 19th October, 2017, he was the Duty Officer at Changamwe Police Station, and he received a call at 6.30, p.m. from PC Kaikai who told him that a man had been stabbed and was lying on the ground near Changamwe Primary School, which is adjacent to Changamwe Secondary School.
79. PW6 further stated that he, accompanied by a Police Driver and another Police Officer went to scene, where they found a man lying on the ground with a leso tied on his lower abdomen. That the said man was crying in pain and a part of his intestines was protruding.
80. PW6 stated that they rushed him to the Coast Province General Hospital where they took him to the Emergency Department and he was attended to immediately. PW6’s evidence was that the man was in a bad condition as he held his intestines and cried in pain. PW6 stated that they got to learn that the man had been stabbed with a knife, and the Doctor informed them that the man had to be taken to theatre. They then went back to the Police Station. On arrival, the OCS told them that the woman who had stabbed the deceased had surrendered to the Police Station.
81. The Investigating Officer was PW7, PC Stephen Kaikai. He was working at Changamwe Police Station when sometime between 7 p.m to 8 p.m., on 19th October, 2017, he received a call from a member of the public who was asking to be assisted with a police vehicle so as to save the life of a member of the public who had been injured at Malandi. PW7 directed PW6 to the scene of crime.



82. According to PW7, PW6 escorted the person who was injured in the stomach to the Coast Province General Hospital, and on reaching there, the Doctor told them that the injuries were serious and the chances of survival for the victim were low.
83. PW7's evidence was that he received another call from a member of the public who informed him that the person who had inflicted injuries on the victim was on her way to the Changamwe Police Station accompanied by her daughter with the aim of filing a report that the daughter had been defiled, and within 15 minutes of the said call, the woman and her daughter reached the Police Station and she reported a case of attempted defilement. The following morning on 20th October, 2017, PW7 received a call around 9.00 a.m. or 10.00 a.m. that Raymond had died. PW7 went to the Hospital to establish the cause of death.
84. As to the cause of the deceased's death, the Postmortem Report produced by PW5 shows that on external appearance the deceased had a decomposing small bowel protruding from the left anterior abdominal wall and a perforation of 4 cm was noted on extruded gut. On internal appearance of the body, the Doctor who did the postmortem noted massive haemoperitoneum and a portion of the small bowel was protruding through the anterior abdomen at the level of the penetration with a 4 cm perforation. The Doctor concluded that the cause of death was haemorrhagic shock secondary to penetrating abdominal injury secondary to assault. The postmortem examination was done on 27th October, 2017.
85. From the Postmortem Report and the nature of injuries outlined above, it is apparent that the deceased's death was unlawful as there is no evidence on record to show that the deceased inflicted the penetrating abdominal injury on himself when he was alive. It is also clear that the deceased died as a result of heavy bleeding due to the penetrating abdominal injury.
86. As to the identity of the person who inflicted the injuries on the deceased, there were eyewitnesses who witnessed the incident. PW3 gave evidence that she saw the accused person stabbing the deceased three (3) times. She asserted that the accused person would stab the deceased, pull out the knife and then stab him again, which she did three (3) times. In juxtaposing the evidence of PW3 to the findings contained in the postmortem report, there is no doubt whatsoever in mind that my mind that PW3 was not a witness of truth.
87. In my view, even if PW3 saw the accused person stab the deceased, she exaggerated her evidence in so far as the number of stab wounds are concerned by stating that she saw the accused person stab the deceased three (3) times, and that she would stab him, pull out the knife and then stab him again. That evidence cannot be true as the Postmortem Report shows that on external examination, Dr. Salim Ahmed saw one perforation on the extruded gut of the deceased. The Doctor went on to indicate on the said Report that there were no other visible external injuries noted. Upon examining the deceased, the Doctor observed that there was a 4 cm perforation on the deceased's abdomen at the level of penetration from which a portion of his small bowel was protruding.
88. I therefore discredit the evidence of PW3 as to the number of stab wounds that she saw the accused person inflict on the deceased. If indeed the accused person had stabbed the deceased three (3) times, the Doctor would have seen three stab wounds. He however reported of having seen a single stab wound on the deceased's body. I therefore disregard the evidence of PW3 for being an untruthful witness.
89. The other witness who testified as to the identity of person who stabbed the deceased was PW4. She was having dinner when she was drawn to some noise outside their compound of someone saying "Mama A usifanye hivyo", which statement she heard being uttered twice in Kiswahili language. On going outside her house, she saw the accused person holding their neighbour by the name Raymond. She



- also saw the accused person holding a knife in her hand as the two struggled. She also saw the accused person stab the deceased on the stomach and Raymond screamed and ran away as he held his stomach.
90. PW4's evidence was that the incident took place at 8.00 p.m., at night. She also stated that there was an electricity post outside their compound. PW4 testified that she ran after Raymond who fell down writhing in pain as he said "nisaidieni", "nisaidieni", which means 'help me', 'help me'. PW4 stated that Raymond's intestines were protruding and the police were called and they took him to Hospital.
 91. The evidence adduced reveals that PW1 gave a knife to the accused person on the fateful day at around 8.00 p.m., for the latter to cut her vegetables with it. PW1's evidence was that the accused person sent her son H [name withheld] to pick the knife from her. Her evidence was that half an hour later, she heard screams, and she went out of her house to the place where the screams were coming from. On reaching there, she found her neighbour Raymond alias "Ndogo Ndogo" crying, as he lay on the ground holding the left side of his stomach as he writhed in pain, as he said that he was in pain.
 92. PW1 heard members of the public saying that he had been stabbed by MMK (accused person) as he had raped her daughter. PW1 stated that Gilbert and Esther Akinyi told her that it was the knife that she had given to the accused person that had been used to stab "Ndogo Ndogo" and she told them to check and see the cabbage that the accused person had been cutting as it was in an open place.
 93. PW1 stated that the police collected "Ndogo Ndogo" from the scene, and on the following day, they were told that he had died. PW1 stated that she has not seen her knife since that day.
 94. It was her evidence that on the material day, she saw "Ndogo Ndogo" and the accused person holding each other struggling, as they headed to the direction of Changamwe Secondary School, but she could not see if any of them was holding anything in their hands.
 95. From the evidence adduced by PW1 and PW4, it is evident that the accused person's intention when she asked PW1 for the knife was solely for the purpose of cutting vegetables with it, as she even sent her son H [name withheld] to collect the knife from PW1's house. If her intention was to use the knife to stab the deceased, she could not have waited for 30 minutes to do so, as that is the duration of time that PW1 stayed in her house before she started hearing screams. Further, on being cross-examined, PW1 stated that the accused person was not angry when she asked for a knife. The same line of evidence was adduced by PW4 upon cross-examination, to the effect that the accused person was not angry when she asked PW1 for a knife. It is therefore clear that the accused person had no bad intention as at the time she borrowed a knife from PW1.
 96. Although the accused person denied having committed the offence and Mr. Tindi submitted that any other member of the public could have stabbed him, as they had the opportunity to do so as they had gathered at the scene where the accused person was alleging that the deceased had defiled her daughter, I am of the view that a third party could not have inflicted a stab wound in the deceased's abdomen for no reason at all. From the evidence adduced, I am satisfied that it was the accused person who unlawfully inflicted the stab wound in the deceased's abdomen leading to perforation of his small bowel, after she found him defiling his daughter. The said injury resulted in haemorrhagic shock and the eventual death of the deceased.
 97. The other issue for determination is if the accused person had malice aforethought when she stabbed the deceased. In order to determine the said issue, it is important to go back to the defence by the accused person. She stated that on 19th October, 2017, her child A [name withheld] went home from school at 6.30 p.m., and the accused person told her to fill some water containers with water. According to the accused person, after her daughter went downstairs, she took too long before going back to their house which was on the 1st floor, yet her daughter had gone to the ground floor.



98. The accused person stated that she went to the kitchen of her house, and called out A [name withheld], but her child did not respond. According to her, it was possible for someone who was fetching water to hear her calling out A [name withheld]. The accused person explained that she went to the stairs and called out A [name withheld] but there was no response. She stated that she went outside the gate and saw a neighbour by the name Njoki or Mama Wanja (PW1) and asked her where Wanja was, and she told her that she was in the house. The accused person stated that she went to the place where A [name withheld] used to play with her friends but she did not find her. She went back to the place where they were staying opened the gate and called out A [name withheld] but she did not respond. She then went to Malandi Mapya in Changamwe to look for A [name withheld] and asked some woman whether they had seen her but they told her they had not.
99. The accused person said that she went back to their gate and opened the compound and started calling out A [name withheld] but she did not respond, and as she was standing outside the said gate, she heard a sound but could not tell where it was coming from.
100. That she heard the sound again and could tell that it was coming from their neighbour's house (the deceased's). That she heard the sound again and she was able to make out that the sound was being made by her daughter A [name withheld]. The accused person stated that she went to her neighbour's house and said "Ndogo Ndogo fungua mlango", but he did not respond or open the door to the house he was in.
101. The accused person stated that she gained entry into the said house by opening the door to the kitchen after unlatching a nail which was latching it, and then she pushed open the 2nd door and found "Ndogo Ndogo" lying on her daughter on a seat and she asked him what he was doing. That he stood up and so did the accused person's daughter. The accused person stated that she saw that the zip of her daughter's skirt was open and when "Ndogo Ndogo" turned to face her, she saw that the zip of his trouser was open and his penis was erect. She stated that as they were leaving the house, "Ndogo Ndogo" wanted to prevent A [name withheld] from leaving the house by holding her hand and that he pushed the accused person, but she gestured to A [name withheld], to pass through the window which was open. The accused person stated that "Ndogo Ndogo" hit her on her head. She stated that as she was walking away from Ndogo Ndogo's house she could hear people saying that "Ndogo Ndogo" had been with A [name withheld] all that time. She further stated that "Ndogo Ndogo" was at that time still trying to prevent her from leaving the building, but she struggled and went outside the gate and they stood outside. That members of the public started saying that "Ndogo Ndogo" should be taught manners and he ran away. She then went to the Police Station.
102. The accused person denied having asked PW1 for a knife. She denied having gone back to her house or to having killed "Ndogo Ndogo". She confirmed what PW4 had said that there was an electricity post near the gate to the house she used to live in, which had a bulb that used to give light to the shed where she used to sell vegetables from 7.00 p.m. to 8.00 p.m at night.
103. The Investigating Officer, PW7 produced a Post Rape Care Form (PRC) for the accused person's daughter by the name A [name withheld] dated 23rd October, 2017. The said report shows that the Examining Officer, found AA's vaginal orifice open and noted that it was hyperemic and it had abrasions. The hymen was intact. The conclusion was that there had been attempted defilement.
104. It is my finding that the fact that the accused person caught the deceased red handed trying to defile her daughter begs the question of whether the said act provoked her to such an extent that she stabbed the deceased in the heat of the moment.



105. Although Mr. Tindi submitted on the defence of provocation, he however stated that the accused person did not kill the deceased out of provocation. In the case of *R v Davis Muriuki* [2021] eKLR, the Court stated as follows on the issue of provocation –

“The essentials of provocation as provided in Section 207 and 208 of the Penal Code entail the following requirements;

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

Two fundamental conditions must be fulfilled in order for the accused to take refuge in that defence that may reduce to manslaughter which would otherwise be murder. First, the provocation must be gross and must be such as might cause a reasonable man to lose his self-control and use violence with fatal results. Secondly, the accused must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime whilst still so deprived.”

106. The application of this doctrine applies in the following circumstances as stated in the case of *R v Hussein s/o Mohammed* [1942] EACA -

“When once legal provocation as defined in our Court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether that weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. This defence by the accused leads to the question of guidelines propounded under Section 17 self defence before an accused is entitled to a defence of self the following circumstances must be seen to exist:

1. That he was repelling an unlawful attack that posed danger of serious assault or grievous harm to him.
2. That the force he employed was commensurate to the danger he was repelling.
3. That the means he employed were the only reasonable available means in the circumstances”

107. I have considered the evidence adduced by prosecution witnesses and the defence by the accused person, who found the deceased attempting to defile her daughter. It is apparent to this Court that the accused armed herself with a knife and then went outside the gate of their compound where she found the deceased and stabbed him with the said knife, a fact which was witnessed by PW4 as per her evidence in this Court. Although the accused person denied stabbing the deceased, I have no reason to doubt the evidence of PW1 whom I find to be a truthful witness, and whose evidence has not been discredited.

108. Although there had been an act of attempted defilement on the accused person’s daughter, the act of the accused person arming herself with a knife and stabbing the deceased cannot be said to be commensurate with what had been done to her daughter.



109. As a mother, the accused person must have been infuriated to find the accused in the said act but, she should have asked for assistance from her neighbours to apprehend the deceased and take him to Changamwe Police Station for him to be charged with the offence of attempted defilement, instead of taking the law into her hands.
110. The evidence of PW1 from whom the accused person borrowed a knife is that she was not angry at the time she asked for the knife. The said evidence was also echoed by PW4. Moreover, she had asked for the knife about 30 minutes before she stabbed the deceased. It cannot therefore be said that she borrowed the knife from PW1 for the sole purpose of stabbing the deceased. In the said circumstances, it is my finding that the accused person did not have malice aforethought when she committed the unlawful act of inflicting fatal injuries on the deceased. I do not find her guilty of the offence of murder. I however find her guilty of the lesser charge of manslaughter. I hereby convict her for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY, 2024.
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

The accused person

Mr. Tindi for the accused person

Mr. Nyawinda, Principal Prosecution Counsel for the DPP

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

