



**Republic v Nyamawi (Criminal Case 19 of 2016)
[2024] KEHC 11446 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 19 OF 2016**

**MN MWANGI, J
JULY 19, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MUNYIKA MWAKALELA NYAMAWI ACCUSED

JUDGMENT

1. The accused person, Munyika Mwakalela Nyamawi, was arraigned in Court on 27th June, 2016 for the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the charge are that on the 29th day of October, 2015 at Magalani area of Kinango Sub-County within Kwale County he jointly with others not before the Court murdered one Peter Magero.
2. The prosecution called 9 (nine) witnesses in support of its case. The hearing commenced on 12th July, 2017 before Judge A. Ongeri, who heard the evidence of three (3) witnesses.
3. PW1 was Edward Waliauka. He stated that on 30th October, 2015 at 8.00 a.m. as he was preparing to go to work, his nephew Robert called him and told him that his uncle Peter Magero had been killed at Taru. PW1 stated that he tried to place a call to Peter Magero's phone, but his call was not answered.
4. PW1 said that he got the same information from his sister Josephine who went to his place while crying. It was his evidence that they went to Coast Province General Hospital where they found the body of Peter Magero, and saw that he had been slaughtered. PW1 stated that the deceased's hands had several cuts, and he had stab wounds on his stomach. They went to Taru Police Station the following day where they recorded statements.
5. PW2 was Stephen Maina Ndige. He stated that he was working in Naivasha and on 27th October, 2015, he was in the office and they were expecting a lorry to take iron sheets to Naivasha. They gave the registration number of the lorry as KBC 659L a Mercedes Atros. That the Driver of the vehicle was Peter Magero, who was with a Turn-boy called Boniface.



6. PW2 stated that after the Driver and the Turn-boy started the journey, he was called and told that they had been given the iron sheets and they were the way to Naivasha. He stated that he was called later and told that they had been attacked at Taru and the Driver had been killed, and the Turn-boy managed to escape. PW2 stated that the Turn-by told him he had been assisted by the police.
7. It was PW'2s evidence that the following day he went to the Police Station where he found the lorry and the iron sheets intact. He was told that the deceased's body was at the mortuary.
8. Josephine Shikuku Bwire, a resident of Changamwe testified as PW3. She stated that on 30th October, 2015 while at her place of business at Changamwe stage, she was called and told that her brother Peter Magero had died. She then went home and called her brother (PW1) who sent her a message that she should go to the General Hospital to confirm. That she went there and found the body at the mortuary.
9. PW3 testified that the deceased's left hand was on his chest and the thumb had been cut. She also saw a big hole on the left side of the deceased's neck. The following day she went to Taru Police Station and recorded a statement.
10. Dr. Ngali Mbuuko, a Consultant Pathologist at Coast Province General Hospital testified as PW4. It was his evidence that he carried out a post mortem examination on the deceased's body on 1st November, 2015. He observed that the deceased's head was covered in blood as well as his neck, the upper part of his body and his limbs.
11. PW4 testified that the deceased had conjunctiva palour due to loss of blood and there was peripheral cyanosis due to lack of oxygen circulating in the blood. PW4 stated that the deceased had a deep cut wound on the left side of the neck which was 9 cm long and 3 cm deep, which injury extended to the vertebra body. PW4 also noted that the deceased had 4 stab wounds which were 2 cm long, whose depth ranged from 1 cm to 5 cm.
12. PW 4 testified that there were also 2 defensive injuries on the deceased's left thumb and a cut on his left palm. The Doctor testified that there was also evidence of strangulation on the left anterior aspect of the neck, and there were marks left by the object used to cause the strangulation. That there were some bruises wounds on the forehead which were 2 cm long and 2 cm deep. The Doctor established the cause of death as deep cut wound on the left side of the neck which led to excessive bleeding. He produced the post mortem report dated 11th November, 2015.
13. PW5 was Rashid Omar Mvumbo, a Clinical Officer at Samburu Sub-County Hospital. He had with him a medical note for Boniface Gitau who had been examined on 29th October, 2015 by a Nursing Officer for treatment at Mackinon Dispensary.
14. PW5 stated that on 20th April, 2016, Boniface Gitau went to Samburu Sub-County Hospital for the filling of his P3 form with a history of having been assaulted on 29th October, 2015 at 5.00 p.m., at Ngalani area in Taru. PW5 further stated that Boniface Gitau was a Turn-boy of a lorry and in the course of incident, the driver was killed by the alleged thugs.
15. PW5 stated that the complainant (Boniface Gitau) had a deep cut on the forehead and bruises all over his body, and he informed PW5 that he was beaten with crude weapons such as a hammer. PW5 stitched him on the forehead and gave him painkillers. PW5 assessed the degree of injury sustained by Boniface Gitau as bodily harm. PW 5 produced the P3 form dated 20th April, 2016 as an exhibit.
16. PW6 was No. 56261 Sergeant Stephen Nyamai, a Scenes of Crime Officer, duly gazette by the Attorney General vide Gazette Notice No. 4562 of 2003. He stated that on 24th May, 2016 at 1230hrs, he received in a sealed packet No. CR. 326/146/2015 dated 24th May, 2016, signed by PC Ouma, an exposed



- electronic film, under a cover letter of even reference, also signed by PC Ouma. PW 6 testified that the film was processed and enlarged. He produced the photographs produced therefrom in evidence and a certificate for the said photographs.
17. PW7 was No. 233682 Assistant Superintendent of Police, Henry Wesonga. He stated that on 29th April, 2016 at 2.00 p.m., when serving as the OCS Taru Police Station in the rank of a Chief Inspector of Police, PC Ouma, the Investigating Officer in this case requested him to conduct an identification parade of Mwanyika Mwakalela Nyamawi who was a suspect in a murder case.
 18. PW7 stated that the suspect was taken to his office under the escort of the Police Officer who had been at the Report Office, who left him with the accused person. PW7 testified that he informed the suspect Muniyika Mwakalela Nyamawi (accused person) that he would conduct an identification parade as some witnesses in this case would identify him or would be unable to identify him as one of the people involved in the case of murder.
 19. That he informed him that he was under no obligation to participation in the identification parade unless he wanted to. He also told him that he could call a witness either by way of an Advocate, a friend or a family member to attend the identification parade.
 20. PW 7 stated that he accused person agreed to participate in the identification parade and requested for his sister by the name Saumu Mulongo Mwakalela to be allowed to attend the identification parade. It was PW7's evidence that at that time, there were 2 witnesses who had been kept in separate rooms, namely Boniface Gitau and Hamisi Kagunza. That the accused person's sister was called to the Police Station and after she arrived there, PW7 looked for 8 men of similar physique to that of the accused person. He stated that they put the 8 men behind the Police Station where members of the public and the witnesses could not see them. He stated that the accused person and his sister then left for the identification parade.
 21. PW7's evidence was that on reaching there, he asked the accused person to elect where to stand among the men, and he chose to stand between parade members 5 and 6. PW7 stated that he called the witness by the name Boniface Gitau whom he told that he had a group of a men and there is a possibility that he would identify the person involved in the murder of the deceased or he may be unable to do so.
 22. PW7 then told Boniface Gitau not to be afraid and that he could ask the parade members to walk or talk if he wished them to do so, and that he was required to touch the parade member whom he would identify. It was PW7's evidence that the witness looked at the parade members and identified the accused person by touching him on the chest. PW7 then took the said witness to the room he had been before, so that he could not see the other witness.
 23. PW7 testified that he asked the accused person if he was satisfied with the manner in which the identification parade was conducted and he said that he was satisfied with the parade, but he did not know the person who had identified him That the accused person signed the identification parade form on the same day being the 29th April, 2016, and PW7 signed the said form as well. PW7 produced the identification parade form in evidence.
 24. PW8 was Boniface Gitau Wanjiku, a resident of Embakai Nairobi who works was working as a Truck Driver at the time he testified. He stated that he was working with Peter Magero, who was a Driver, and that they had worked together from the year 2014 to 2015. He also stated that Peter Magero was driving motor vehicle Registration No. KBZ 659L, a trailer. That he and Magero were employed by Stephen Maina (PW2). PW8 stated that he knows Muniyika Mwakalela Nyamawi by seeing him, but he did not know him before this case. He identified him at the dock as the accused person.



25. It was the evidence of PW8 that on 29th October, 2015, he and Peter Magero who was driving the truck left Mombasa at 11.00 a.m. PW 8 said that at that time he was the Turn-boy of the vehicle, and on that day, it was carrying iron sheets. He stated that they stopped at Taru at 5.00 p.m., where they went to a restaurant to have late lunch. While there, 4 men approached Peter Magero and started talking to him as if they knew him, as they told him that they had sacks of charcoal which they wanted him to transport to Nairobi. That Peter Magero agreed to transport the charcoal and 2 men left on a black motor cycle, and 2 men were left behind in the restaurant.
26. PW8 testified that the accused person was among the 2 men who remained in the restaurant, and the said men boarded the truck so that they could show him and the driver where the sacks of charcoal were. He stated that they went 4 km to Taru Shopping Centre, where the men directed him and Peter Magero to a murrum road on the left, and Peter Magero drove for a while and found the 2 men who had left earlier.
27. It was PW8's evidence that Peter Magero (Driver) was seated on his seat and he at the Co-Driver's seat and 4 men sat behind the Driver's and Co-Driver's seats. PW8 stated that they drove along the murrum road for about 20 minutes and the Driver told the 4 men that he could not see the charcoal depot and he would not drive any further. PW8 testified that when the driver said that, the 4 men became fierce and ordered him to drive on but the driver turned the vehicle and started driving back to Taru Centre.
28. It was the evidence of PW8 that the man who was seated behind the Driver stood up and pulled out a knife and stabbed the Driver on the left side of his chest. PW8 testified that the person who stabbed the Driver was the accused person, and that he stabbed the Driver several times.
29. PW8 gave evidence that he was hit with a hammer on his forehead by the man seated behind him. He gave the description of the person who hit him as brown and slightly tall. He stated that the driver lost consciousness after being stabbed. PW8 stated that the man who had hit him with a hammer held his hands at the back and the accused person attempted to stab him with a knife. It was his evidence that he struggled hard and freed himself and held the knife with his left hand and he placed his right hand on top of the left hand to gain more strength to hold onto the knife, and he managed to grab the knife from the accused person and held it with his right hand.
30. PW8 stated that by then 2 men had disembarked from the cabin, and since he had the knife in his right hand, he attempted to stab the accused person but he moved backwards. PW8 further stated that he saw that the Driver's window was open and got an opportunity to escape by stepping on the part between the two seats and jumped through the Driver's window to the ground. He added that the vehicle went off after the Driver lost consciousness. He also added that at the time he jumped out, the vehicle was stationary. That he found the other 2 men outside the vehicle and he attempted to stab one of the men, but the man evaded by stepping aside.
31. PW8 testified that he got a chance to run away from the scene, as he bled from his forehead. He ran towards the main road, where he found some men selling charcoal and he explained to them what had happened. One of the men called the OCS Taru Police Station and explained to him about the incident. It was PW8's evidence that he requested the men who were selling charcoal to accompany him to check on the Driver, and on reaching the scene, one of the men opened the cabin door and they found the Driver lying on the seats in the cabin and there was blood everywhere in the cabin. That the OCS Taru Police Station and another Police Officer went to the scene and PW8 explained to him what had happened. He also called PW2 and narrated to him about the incident.



32. PW8 testified that photos were taken at the scene and he was taken to Mackinon Road dispensary where he was treated and stitched on his upper forehead. He then went with the Police and recorded his statement.
33. He testified that he gave a description of the 4 attackers and stated that he described one of them as tall, dark with red eyes, the other one was slightly tall and light skinned and the other one had dreadlocks, and the 4th one was of medium height and had normal hair. He also informed the police that the one with dreadlocks and the one of medium height were speaking in Kikuyu, and they are the ones who had left the restaurant and boarded the motorcycle. He also explained to the police that other two who remained behind in the restaurant were Durumas and they were armed.
34. PW8 stated that the tall dark one with red eyes was the accused person. He described the knife the accused person had as a welded jua kali type which was sharpened on both edges with a handle that had been typed with a back bladder (elastic bladder). He further stated that when he ran away he had the knife in his hand and he stayed with it until the police went to the scene, and he handed it over to them. He identified the knife in Court as an exhibit. He stated that after recording his statement, the police told him that they would call him if they needed him.
35. It was PW 8's evidence that on 18th April, 2016, he was called by the police from Taru who told him that one man had been arrested and he was asked to go to Taru Police Station to see if he could identify him. That on 20th April, 2016, he went to Taru Police Station to the office of the OCS and men from the cells were removed and paraded in a line, and he identified the man who was tall, dark with red eyes. He stated that the man he identified was the accused person. He also stated that the 4 men joined them 20 minutes after he and the Driver reached Taru, and they spoke with the Driver for 15 to 20 minutes.
36. It was PW8's evidence that they took about 20 minutes at the scene where they were attacked in the bush, it. He reiterated that it was the accused person who stabbed the Driver.
37. In cross-examination, PW8 stated that he saw the Driver being stabbed twice and that is when he (PW8) was hit on his upper forehead. He asserted that he was certain that it was the accused person who stabbed the Driver. He stated that he could recall what happened on the day of the attack, and that the Driver was stabbed first, and when he (PW8) was trying to stand up to see what was happening, he was hit with a hammer on his forehead. That one of the men was holding his arms and when the accused person attempted to stab him, he freed himself and grabbed the knife.
38. PW9 was No. 92412 PC Job Ouma of DCI Taru Police Station. He was the Investigating Officer in this case. He testified that on 29th October, 2015 at about 1700 hours, he was at Taru Police Station when he was informed by the then Taru Police Station OCS Chief Inspector Henry Wesonga that someone had been killed at a place called Magalini. That they proceeded to the scene, which was 1½ Km from the Highway, where they found a trailer make Mercedes Benz Actros Registration No. KBZ 659L. He stated that in the cabin of the said trailer, there was a body of a lying dead in a pool of blood. They also found members of the public present at the scene.
39. He further stated that one of the people at the scene was Boniface Gitau (PW 8) who told them that they were lured by 4 men whom he could only identify physically. That PW8 informed them that the 4 men had told him and the Driver of the trailer that they had some bags of charcoal they wanted ferried to Nairobi and that the said bags of charcoal were somewhere in the bush. That on the way to pick the said bags, the 4 men turned out to be robbers and removed crude weapons namely knives and hammers and attacked both the Driver and PW8, and the said men had killed the Driver on the spot. That PW 8 escaped with injuries.



40. PW9 stated that at the scene there was a knife covered with an elastic rubber on the handle. PW9 produced the knife in evidence. It was PW9's evidence that after he photographed the scene, the trailer was towed to Taru Police Station and the deceased's body was taken to Coast Province General Hospital. PW9 stated that on 31st October, 2015, he attended a postmortem examination of the deceased's body at Coast Province General Hospital which was conducted by Dr. Mbuko (PW4).
41. PW9 testified that on 13th April, 2016, he arrested a suspect by the name Munyika Mwakalela Nyamawi and on 20th April, 2016, an identification parade was conducted by Inspector Henry Wesonga and that the accused person was positively identified by PW8. PW9 stated that they charged the accused person with the offence of attempted robbery with violence and also with the offence of murder. He identified the accused person at the dock as the person he arrested.
42. The accused person gave a sworn defence. He denied knowing Peter Magero. He stated that he was a casual worker at construction sites and on 29th October, 2015 he was working at Mackinon Road where they were building a mosque.
43. He stated that he was arrested at a Video shop at night and he told the police that he had forgotten his identity card in the clothes he had worn to work, but they arrested him and told him that the identity card would be taken to him at Taru. The accused person stated that the police asked him for Ksh.2,000/- as they were taking him to the police vehicle and he told them that he did not have money but he could send them the money if they gave him their mobile phone numbers. The accused person claimed that the police told him that he would be in trouble for failing to give them money, and they took him to Taru Police Station where they locked him in the cells.
44. He stated that the following morning he was taken to Mariakani Law Courts where he was informed that the charge of murder had been brought before him for killing Peter Magero. That he was taken to Taru Police Station and after 4 days the OCS ordered for him to be taken to this office. That as he was passing, he saw PW8 sitting with PW9.
45. The accused person stated that the OCS Taru Police Station informed him that an identification parade would be conducted and he was told to call a lawyer but he told the OCS that he did not have one. He stated that he had made arrangements with his sister to take to him his identity card. That on being taken for the identification parade, he saw that some people were short and others were tall and he was the only one wearing a red T-shirt.
46. The accused person contented that PW8 identified him by mistake as he was not involved in the death of the deceased, and he did not know who killed the deceased.
47. Ms Nyawinda, Principal Prosecution Counsel filed written submissions on 20th April, 2023 on behalf of the DPP. She summarized the evidence adduced and stated that the prosecution must prove the following elements in order to prove the offence of murder: -
- i. Proof of death, the cause of death.
 - ii. Proof that death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect;
 - iii. The unlawful act was with malice aforethought.
48. Ms Nyawinda submitted that the death of the deceased was not in dispute as the post-mortem examination confirmed that he died on 29th October, 2015 and the cause of death was a deep cut wound on the left side of the neck which had led to excessive bleeding, which is not a natural cause. Counsel stated that the prosecution had proved that the deceased died, but his death was unlawful.



49. The Prosecution Counsel submitted that PW8 positively identified the accused person and although he was a stranger to him, the attack happened during the day. She stated that the accused person and PW8 spent some time together from the time they met at a hotel, they boarded the same motor vehicle, and drove on a rough road for 1½ km. She stated that PW8 clearly described the physical features of the accused person to the Investigating Officer and also during his testimony in Court.
50. Ms Nyawinda stated that PW8 told the police that one of the attackers was tall, dark and had red eyes, which fit the description of the accused person. She relied on the case of *Mungania & 2 others v Republic & 2 others*, Criminal Appeal No. 21 of 2020 and E003 & E068 of 2021 (Consolidated) (2022) KEHC 167 (KLR), in regard to what the Court should consider in evaluating the accuracy of identification testimony.
51. She submitted that PW8 properly identified the accused person in an identification parade conducted by PW7, and that the accused person signed the identification parade forms, having been satisfied with the manner the identification parade was conducted but he never raised an issue challenging how the identification parade was done. She further submitted that the prosecution had proved beyond reasonable doubt that it was the accused person who stabbed the deceased causing him fatal injuries.
52. Ms Nyawinda cited a decision of the High Court in the case of *Munyika Mwakalela Nyamawi v Republic* [2018] eKLR, where in substituting the offence of Robbery with violence with that of Assault Causing Actual Bodily Harm, this Court held that the accused person herein, who had been charged with the offence of attempted Robbery with Violence, was properly identified by the complainant (PW8).
53. Ms Nyawinda cited the provisions of Section 206 of the Penal Code as to what constitutes malice aforethought and summarized that the elements are the nature of the weapons used, the nature of the injuries sustained, the conduct before, during and after the incident, and the manner the weapon was used.
54. The Prosecution Counsel submitted that the evidence of PW8 was that he saw the accused person stab the deceased several times with the knife. That PW4 in his evidence stated that the deceased's body had several cuts, and he established that the cause of death was a deep cut wound on the deceased's left side of the neck which led to excessive bleeding. She submitted that by inflicting the deep cut wound on the deceased's neck, and by stabbing him several times with a knife, it clearly shows that the accused person had the intent and malice to kill the deceased.
55. She concluded her submissions by stating that the prosecution had proved beyond reasonable doubt that the accused person murdered the deceased with malice aforethought. She prayed for him to be convicted for murder contrary to Section 203 as read with 204 of the Penal Code.
56. The law firm of Mutanu & Company Advocates filed written submissions on 8th May, 2023 on behalf of the accused person. Ms Musyoka, learned Counsel for the accused person stated that in order for an offence of murder to suffice, the prosecution has to prove the death of the deceased, that the accused person committed the unlawful act which caused the death of the deceased, that in causing death of the deceased the accused had malice aforethought, and that it was the accused who killed he deceased.
57. My view of the above elements raised by the defence Counsel, the 2nd and 4th elements are the same as it has to be proved that the accused person is the one who committed the unlawful act which caused the death of the deceased.



58. Ms Musyoki stated that through a post mortem report produced in Court by Dr. Mbuuko from the Coast Province General Hospital, the deceased was confirmed to be dead due to a deep cut wound on the left side of the neck which led to excessive bleeding.
59. She submitted that the prosecution had not proved beyond reasonable doubt before Court that the accused person committed the unlawful act that caused the death of the deceased as 8 of the prosecution witnesses were not eye witnesses and other than the testimony of PW8 stating that he actually saw the accused person stabbing the Driver severally on his left chest, the said evidence cannot be relied on because at the time of the occurrence of the event, PW8 also alleges that he was under attack as he was hit on his forehead with a hammer, and he was bleeding.
60. Ms Musyoki contended that a blunt force to the head can cause a person to suffer from disorientation and as such, anything that is said then cannot be truly relied on. She contended that PW8 could not have the actual picture of the events surrounding the incident.
61. Counsel stated that PW9 testified that no tests were carried out on the knife that was produced before the Court as a murder weapon to prove that it was indeed the weapon the accused person had used to commit the crime.
62. The defence Counsel submitted that according to PW8, he escaped with the knife that was used to stab the deceased but PW9 stated that the knife was handed over to the police by members of the public who claimed to have found it next to the vehicle, which raises suspicion on the truthfulness of the testimony of PW8 as to whether he was in his right senses at that particular time, and whether he did in fact recognize the perpetrator of the offence, as the accused person in his evidence stated that he was wrongly identified by stating that PW8 “alinifananisha” meaning that PW8 mistakenly identified him.
63. Counsel submitted that this is a case of mistaken identity and that the prosecution failed to prove beyond reasonable doubt that it was the accused person who committed the unlawful act which caused the death of the deceased. The defence counsel contended that with the prosecution having failed to prove actus reus, they have failed to prove the element of mens rea, and having failed to do so, the prosecution has not shown beyond reasonable doubt that the accused person is the one who killed the deceased. Counsel relied on the case of Republic v Bernard Obunga Obunga [2015] eKLR, where the Court held that suspicion however strong cannot form the basis of conviction.
64. Ms Musyoki contended that from the evidence adduced by the prosecution, there exists suspicion that the accused person may have been involved in the death of the deceased, but that suspicion alone cannot form the basis of conviction in a murder case.
65. In submitting that the prosecution had failed to prove beyond reasonable doubt the ingredients of murder, Ms Musyoki relied on the case of Republic v James Ogwany Alichu & another [2018] eKLR. She urged this Court to dismiss the charges against the accused person.

DETERMINATION

66. In order for the charge of murder to be proved beyond reasonable doubt as against an accused person herein, the provisions of Section 206 of the Penal Code must be established to show that the accused person had malice aforethought.
67. Section 206 of the Penal Code states as follows –

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –



- a. An intention to cause 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. In order to determine if the accused person is guilty of the offence by murder as charged, the issues for determination are-
- i. That the accused died;
 - ii. If the accused person committed the unlawful act which caused the death of the deceased; and
 - iii. That the accused person had malice aforethought when she caused the unlawful death of the deceased.
69. On the 1st issue, the deceased’s death was confirmed vide a postmortem report that was produced by PW4, Dr. Ngali Mbuuko, a Consultant Pathologist at Coast Province General Hospital. He did a post mortem examination on the deceased Peter Odour Magero on 1st November, 2015. On observation of the deceased’s body, the Doctor observe that it had a deep cut wound on the left side of his neck which was 9 cm long and 8 cm deep, which injury extended to the vertebra body. The Doctor stated that it was a very deep cut wound. The Doctor also saw 4 stab wounds on the deceased’s body which were 2 cm long and ranging in depth from 1 cm to 5 cm. the Doctor also saw defensive injuries on the deceased’s thumb and a cut wound on his left palm. He also noted that the deceased had been strangled on the left anterior aspect of the neck and there were marks running backwards left by the object that had been used to cause strangulation.
70. Additionally, the Doctor saw bruises on the deceased’s forehead which were 2 cm long by 2 cm dep. The Doctor established the cause of the deceased’s death as the deep cut wound on the left side of the neck which had led to excessive bleeding.
71. PW2, Edward Waliaula, a nephew of the deceased was called by one Robert on 30th October, 2015 who informed him that Peter Magero had died. PW2 called his sister Josephine (PW3) and they went to Coast Province General Hospital Mortuary where they confirmed that Peter Magero was dead. According to PW2 the deceased had been slaughtered and his hands had several cuts and the stomach had been stabbed.
72. PW3, Josephine Sikuku Bwire who accompanied her brother PW2 to the mortuary on viewing the deceased’s body saw that his thumb had a cut. She also saw a big hole on the left side of the deceased’s neck.
73. PW8 gave evidence that after he and the deceased were attacked, he managed to escape and found some men who were burning charcoal and he asked them to accompany them back to the scene to check on the Driver and on reaching there, one of the men opened the cabin door of the truck and they found the Driver lying on the seat in the cabin and that there was blood everywhere.



74. PW9 who was the Investigating Officer on going to the scene found in the cabin of the truck the body of a man lying dead in a pool of blood.
75. From the foregoing evidence, there is no doubt that Peter Odour Magero was confirmed dead by the witnesses who testified as having seen him in that condition and from the postmortem report produced by PW4.
76. As to whether the accused person committed the unlawful act which caused the death of the deceased, on 29th October, 2015, PW8 was in the company of Peter Odour Magero who was the Driver of motor vehicle Reg. No. KBZ 659 a Mercedes Benz Atros trailer. PW8 and the driver were both employed by PW2. The two had loaded a cargo of iron sheets in Mombasa for delivery to Naivasha. Their trip was uneventful up to Taru where they stopped to have late lunch in a restaurant at 5.00 p.m. From the evidence of PW8, when they were having their meals, 4 men approached Peter Magero (the Driver) as started talking to him as if they knew him. They told him that they had sacks of charcoal which they wanted him to transport to Nairobi, and the Driver agreed to transport the said charcoal. Then 2 of the 4 men left aboard a black motorcycle and 2 men were left behind in the restaurant. The evidence adduced by PW8 was that the 2 men who were left behind boarded the truck so that they could show the Driver where the sacks of charcoal were and after reaching Taru Shopping Centre the 2 men directed the Driver to a murram road. After driving for a while, they found the 2 men who had left ahead of them.
77. PW8's evidence was that the Driver was seated at his seat while he was seated at the Co-Driver's seat, whereas the 4 men sat on the bed behind the Drivers and Co-Drivers seats. After driving along the murram road for 20 minutes the Driver told the 4 men that he could not see any charcoal depot and said that he would not drive any further. When he said that the 4 men became fierce and ordered him to drive on. It was the evidence of PW8 that when the Driver turned the vehicle and started driving towards Taru Centre, the man who was seated behind the Driver pulled out a knife and stabbed the Driver on the left side of his chest. According to PW8, the said man stood up and stabbed the Driver. PW8 stated that the person who stabbed the Driver was the accused person and that he stabbed the Driver several times. PW8 stated that he was hit on his forehead with a hammer.
78. He stated that the man who hit him was seated behind him and he was brown and slightly tall. PW8 gave a graphic account of how the man who had hit him with a hammer held his hands at the back, as the accused person attempted to stab him with a knife, but he struggled hard and freed himself and held the knife with his left hand and placed his right hand on the top of his left hand to gain more strength to hold on to the knife. PW8 managed to grab the knife from the accuse person and held it with his right hand.
79. PW8 showed this Court healed scars on his left hand. He said he attempted to stab the accused person but he moved backwards. PW8 then got an opportunity to escape by jumping through the Driver's window. He explained that 2 men had by then disembarked from the cabin and when he landed on the ground, he attempted to stab one but the man evaded by stepping aside. PW8 then ran away towards the main road to seek help, which he got from a group of more than 5 men whom he found selling charcoal. He stated that one of the men he sought assistance from called the OCS Taru Police Station and PW8 explained to him what had happened, and after that he and the men went to the scene. The OCS and the investigating officer found them there. After PW8 was treated he accompanied the police to the Police Station and recorded his statement. He gave a description of the 4 attackers and told the police that he would be able to identify them if he saw them. He gave a description of the 4 men as that one was tall, dark and had red eyes, the other one was slightly tall and dark skinned, the other one had dreadlocks and the 4th one was of medium height and had normal hair. He further informed the police



that the man with dreadlocks and the man of medium height were speaking in Kikuyu and they were the ones who left the restaurant and boarded a motor cycle.

80. It was PW8's evidence that the other 2 men who remained in the restaurant were Durumas and they were armed. He explained that the tall dark one with red eyes was the accused person. From the description given by PW8, PW9 on 13th April, 2016, arrested a suspect by the name Munyika Mwakalela Nyamawi (accused person) and on 20th April, 2016, an identification made was conducted where the suspect was identified by PW8.
81. PW7 conducted an identification parade wherein he informed the accused person of his rights to either participate in the identification parade or not, to have an Advocate of his choice, a friend or relative present, and the accused person opted to participate in the identification parade and have his sister Saumu Mulongo present. His sister was called and she was present when the said parade was conducted. After the accused person was identified by PW8 who touched his chest, he said that he was satisfied with the manner the identification parade was conducted. He signed the identification parade forms and so did PW7.
82. Ms Musyoki submitted that since PW8 was injured and he was bleeding from his forehead, he could not have identified his attackers. I hold a different view. Counsel cross-examined PW8, who said that he was sure that it was the accused person who stabbed the Driver. PW8 explained that when they were about to finish eating, 4 men joined them, and he saw the accused person walking from the restaurant to the place where they boarded the truck to go to the bush. PW8 saw that the accused person was tall, and he was the only one who had red eyes amongst the attackers. PW8 also stated in cross examination that he could remember what happened on the day of the attack.
83. In the case of *Terekali & another v Republic* [1952] EA 259, the Court held as follows on the importance of a first report –
- “Evidence of a first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come up in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others”.
84. On the issue of identification, in the Court of Appeal decision in *Maitanyi v Republic* [1986] KLR 198 the Court stated as follows –
- “There is a second line of inquiry which ought to be made and that is whether the complainant was able to give a description or identification of his or her assailants, to those who came to the complainant's aid or to the police ... If a witness receives a strong impression of the features of the assailant, the witness will usually be able to give some description.”
85. As earlier noted in this judgement, PW8 gave a description of his attackers in the first report and said that one of the attackers, was tall, dark and with red eyes. He explained in his evidence that the said person was the accused person herein, and he and another man who were left behind in the restaurant with them were Durumas. PW8 identified the accused person herein in a property conducted identification parade.



86. In the case of Cleophas Otieno Wamunga v Republic 1989 KLR 424, the Court of Appeal held as follows –

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.”

87. In his defence the accused person denied having committed the offence and stated that PW8 was mistaken about his identity and that he was at the scene of crime when he and the deceased were attacked. It must be noted that at the time the 4 men who would later on turn out to be attackers joined PW8 and the deceased, the two were having late lunch at a restaurant at about 5.00 p.m. It was during daytime and circumstances were favourable for positive identification.

88. After engaging in a conversation with the deceased and convincing him to ferry charcoal for them to Nairobi, 2 men of the 4 men were left behind in the restaurant with PW8 and the deceased. PW8's evidence was that one of the 2 men was the accused person herein. PW8 further stated that the 2 men who were left in the restaurant were Durmas, which means that the 2 men spoke between themselves in Duruma language. Since information for murder charges unlike charge sheets do not show the ethnicity of an accused person, and although the accused person's name bears resemblance to Duruma names, I cannot conclude that the accused person is a Duruma and that is why he was speaking Duruma to the other man he was with in the restaurant.

89. In examination-in-chief, PW8 testified that the 4 men joined him and the Driver after about 20 minutes of their arrival at Taru and spoke with the Driver for 15 to 20 minutes. It is my finding that being daytime, PW8 had adequate time to look at the 4 men who were talking to the Driver and after reaching an agreement for the carriage of the charcoal, PW8 still had more time to observe and note the physical features of the accused person whom he was later able to identify at an identification parade.

90. PW8 further testified that at the scene where they were attacked in the bush, the ordeal took about 20 minutes and he was able to see that the accused person was the one who stabbed the Driver twice and he lost consciousness. From the evidence adduced by PW8, at the time of the attack, the 4 men were in close proximity with the deceased and PW8 as they were in cabin of a truck. When PW8 managed to wrestle the knife from the accused person, he attempted to stab the accused person but he moved backwards. It is apparent that when this was happening the two were facing each other and that also gave PW8 another opportunity to see the accused person.

91. In cross examination, PW8 explained that the Driver was stabbed first and when PW8 was trying to stand up to see what was happening, he was hit with a hammer on his forehead.

92. From the evidence adduced by PW8 and his positive identification of the accused person in a properly conducted identification parade, which was preceded by the description of the attackers, and the length of time that attackers took with the deceased and PW8 at the restaurant and during the attack in the cabin of the truck, it is my finding that the accused person was positively identified by PW8. The accused person was lucky to have escaped with his life to tell of the horrid death of the Driver, although PW8 sustained permanent scars on his forehead and on his right palm.

93. On the issue of whether the accused person had malice aforethought when he killed the deceased, PW8 saw the accused person inflicting 2 stab wounds on the deceased's chest. It appears that after PW8



escaped from the scene, there was a frenzied attack on the deceased as when PW4 conducted the post mortem examination on his body, he found numerous external injuries on external examination which are listed below –

- i. Cut wound 9 cm long, with irregular margins extending from the mid left side of the neck to the sternal notch. The cut has severed the muscles on the left side of the neck, the jugular vessels, the carotid, the vagus nerve, the first rib to terminate below body of T1;
 - ii. 2 x 1 cm (deep) sternal stab wound;
 - iii. 2 x 1 cm (deep) right medial supraclavicular stab;
 - iv. 2 x 5 cm deep stab wound behind (iii)
 - v. 2 x 3 cm deep stab wound above lateral third of right clavicle;
 - vi. Defence cut injuries (2) each about 2cm on the palmar aspect of the left thumb;
 - vii. Two strangulation marks
 - a. On the anterior neck at the level of the larynx;
 - b. Lower neck running from the anterior to either side of the neck upwards and backwards, impression is 12cm x 3 mm widest.
 - viii. On the spinal column small stab on the left side of the spine between T1 and T2 caused by injury, described in external examination.
 - ix. Bruises on the frontal scalp about 2 cm by 2 cm.
94. From the above injuries, the Doctor (PW4) formed the opinion that the cause of death was hemorrhagic shock due to exsanguination following deep (cut) wound to the left side of the neck.
95. From the extent of the injuries sustained by the deceased, and noting that PW8 saw the accused person stabbing the deceased two (2) times with a knife, it is apparent that the men who attacked the deceased continued to inflict more injuries on him using a knife or knives or other sharp objects and strangled him using an object that left strangulation marks on his neck. It is apparent from the deep wound inflicted on the left side of the deceased's neck which severed the muscles on his left side of the neck and also severed the deceased's jugular vessels, the carotid, which injury was 9 cm long and 8 cm deep, that the deceased stood no chance of survival. As PW1 put it when he saw the deceased's body at the mortuary, the deceased had been slaughtered. PW3 on looking at the deceased's body saw a big hole on the left side of his neck. The extent of that injury on the deceased's neck is well captured in one of the photographs that was produced in Court by PW7, which shows a big gaping hole on left side of the deceased's neck.
96. As per the provisions of Section 206 of the Penal Code, malice aforethought can be established by the extent of injuries inflicted on a victim and the type of weapon used. The Doctor's evidence leaves no room for doubt that the deceased's attackers had malice aforethought when they inflicted multiple stab wounds on his body. The deep cut wound on his neck severed the muscles on the left side of his neck, the jugular vessels and carotid, led him to bleed to death. As if the injuries caused by the sharp object/objects were not enough, the attackers went ahead to strangle the deceased. That kind of conduct can only have been committed by persons who had malice aforethought. The accused person herein was one of the 4 men who viciously attacked the deceased leading to his death.



97. In such circumstances it does not matter which of the 4 men inflicted the fatal cut wound on the deceased's neck, as the 4 men are deemed to have acted in concert to cause the deceased's death. That is how the doctrine of common intention comes to play. Section 21 of the Penal Code defines common intention as -
- “When 2 more or more persons form a common intention, to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”
98. When addressing the doctrine of common intention in the case of *Njoroge v Republic (1983) KLR 197*, the Court held that –
- “if several people combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.”
99. Bearing in mind the evidence adduced by the prosecution, it is my finding that the accused person had common intention with the other 3 men when they attacked the deceased and ensured that he was dead.
100. Ms Musyoki raised the issue of whether the knife that was produced in Court was handed over to PW9 by PW8 or by a member of the public. PW8 was categorical in his evidence that after he grabbed the knife from the accused person, he went with it up to the place where he found a group of men who were selling charcoal and he explained to them what had happened. That one of the said men called the OCS Taru Police Station and PW8 explained to him about the incident. PW8 asked the men who were selling charcoal to accompany him to the scene so that he could check on the Driver. PW8 stated that he had the knife with him all the time and he was the one who handed it over to PW9.
101. PW9 on his part said that at the scene there was a blood stained knife. On being cross examined, PW9 stated that the blood stained knife was handed over to them by members of the public who were there. He could not recall the specific person who handed it over to him or if it was Boniface Gitau (PW8). PW9 went on to say that the person told them that he collected it near the truck. It is apparent that there is a discrepancy in regard to the evidence of PW9 as to whether the knife was collected near the scene of crime or if it was handed over to him by PW8 as per his evidence.
102. Having listened to the evidence of PW8 and PW9, and having watched them as they testified, it is clear to me that PW8 had a very clear recollection of the events of the fateful day. In addition, he was consistent and was steadfast in his evidence even during cross-examination. PW8 struck me as truthful witness and there is no reason to doubt that he handed over the knife to PW9. It was however apparent to this Court that PW9 did not have a clear recollection of who handed over the knife to him. I therefore believe the evidence of PW8 that he handed over the blood stained knife to PW9.
103. In her written submissions, Ms Nyawinda referred to this Court's decision in the case of *Munyika Mwakalela Nyamawi v Republic [2018] eKLR*, wherein this Court heard an appeal filed by the accused person in a case where he was convicted for the offence of attempted robbery with violence arising from the same transaction as in this case of murder. In the course of the trial herein when it emerged that I had had heard the appeal filed by the accused in the other case, I asked him if he wished to be heard by another Judge, but he said that he was comfortable with me hearing this murder case against him.



104. In the appeal by the accused person, I substituted the charge of attempted robbery with violence with the offence of assault causing actual bodily harm. Although Ms Nyawinda submitted that in the said appeal I held that the accused person was properly identified, I have looked at this case independently without going back to look at my finding in the appeal. I have therefore evaluated this case based on the evidence adduced before me by prosecution witnesses and the defence made by the accused person.
105. Having found that the accused person was positively identified by PW8 in this case, it is my finding that his defence of mistaken identity has been displaced by the overwhelming evidence against the accused person.
106. Although Ms Musyoki contended that the recovered knife was not analyzed to establish that the blood stains were from the deceased person, this Court's view is even if the blood stained knife was examined and found to be stained with the deceased's blood, it would not strengthen the prosecution's evidence in any way, since the accused person was arrested in April 2016, whereas the offence herein was committed on 29th October, 2015. The accused person was not found with any blood stained clothing that could be analyzed for DNA.
107. In conclusion, it is my finding that the accused person was positively identified as one of the 4 men who killed the deceased on the evening of 29th October, 2015. Although the offence occurred during daytime between 5.00p.m., to 6.00 p.m., which was during daytime, I caution myself of the dangers of convicting on the evidence of a single identification witness.
108. Having done so, it is my finding that the prosecution proved its case beyond reasonable doubt as against the accused person for the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. I hereby convict the accused person for the charge of murder under the said provisions of the law.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

The accused person

Ms Musyoki for the accused person

Ms Nyawinda, Principal Prosecution Counsel for the DPP

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

