



**Republic v Odhiambo (Criminal Case 53 of 2017)
[2024] KEHC 11411 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL CASE 53 OF 2017
MN MWANGI, J
SEPTEMBER 24, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

PAMELA ACHIENG ODHIAMBO ACCUSED

JUDGMENT

1. On 18th December, 2017 the accused person Pamela Achieng Odhiambo, was arraigned in Court for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that between the 14th and 15th December, 2017 at Mathare area in Likoni Sub-County of Mombasa County, she murdered Wilson Kiziri Jumba. The accused person pleaded not guilty to the charge.
2. The prosecution called 7 witnesses in support of its case. PW1 was Abdillah Salim Malalo, a person involved in community policing at Mrima in Mathare at Likoni Sub-County. He had worked as the Chairman of the community policing for 7 to 8 years as at the time he testified in Court.
3. His evidence was that at 9.30 p.m., on the night of 14th and 15th December, 2017 as he was going to the Trading Centre, he came across Pamela Achieng (the accused person) who informed him that she had been beaten by Sharubaro, which was a nickname for the deceased Wilson Kiziri.
4. PW1 stated that he told her that she should report to the Police Station. He added that it was customary for them (Pamela and Kiziri) to fight and that was the fourth time he heard about them fighting. He stated that on 3 other occasions, he had picked them from their house and taken them to Likoni Police Station after their domestic disputes.
5. PW1's evidence was that after he told the accused person to go to the Police Station, she followed him asking him to assist her by saying "Babu nisaide".



- PW1 stated that he continued walking to Mama Fatuma's house and after getting some loose change in coins, he left the said house and the accused person was left there.
6. PW1 testified that as he was walking towards his house, on reaching a certain junction he saw some people running towards the direction of the house the accused person was living in. PW1 stated that on reaching there, he saw the accused person's husband, Wilson Kiziri, lying outside their house in a pool of blood. He also saw a knife beside the body. With the aid of electric light from the accused person's house that reflected on the deceased's body, he saw that the knife had been used for a long time and had thinned out due to sharpening and the said knife was blood stained. PW1 identified the knife in Court.
 7. PW1 testified that he went back to Mama Fatuma's house and asked Mama Fatuma why she was talking to a murderer. He told the accused person to accompany him to her house, and held her hand to restrain her. On reaching the scene, he ordered her to sit down. PW1 stated that Wilson was still lying on the ground. He then called the OCS Likoni Police Station Inspector Libole who went to the scene and PW1 handed over to him the accused person. PW1 stated that at that time, Wilson Kiziri was breathing with difficulty. PW1 also stated that the scenes of crime personnel took photographs of the scene and took away Wilson Kiziri and the blood stained knife.
 8. PW1 stated that he had known Wilson Kiziri (deceased) and the accused person for over 5 years and that on the three occasions he had taken them to the Police Station as they had fought when drunk.
 9. PW2 was PC Titus Musembi attached to Likoni Police Station in general duties. His evidence was that on the night of 14th December, 2017 he was on crime stand by with the Duty Officer Sgt Kienyere when at 10.00 p.m., while on Patrol, he received a call from Chief Inspector Libole, the OCS Likoni Police Station. That the said OCS informed them that he had received a call from PW1. They proceeded to the scene on being given directions by the OCS.
 10. PW2 testified that the scene was outside the accused person's house where they found a man lying outside the door of the said house. PW2 observed that the man was bleeding from his chest and there was a knife underneath his chest which was blood stained.
 11. PW2 stated that he checked the said man's pulse to ascertain if he was alive but found that he had no pulse and he was not breathing. PW2 indicated that electric light from the accused person's neighbour's house was reflecting at the scene. That he saw the accused person sitting outside the door to her house and members of the public wanted to beat her. He saw that she had no injuries and asked her to stand up and inquired from her if she had any problem, and she said she had none.
 12. PW2 then called the OCS (Likoni Police Station) who in turn called the scenes of crime personnel who went to the scene and took photographs and took away the knife. PW2 took the deceased's body to Coast Province General Hospital.
 13. PW2 stated that they informed the accused person that she was under arrest on suspicion of murder and they booked her in the Occurrence Book (OB) of Likoni Police Station pending investigations.
 14. On being referred to the initial OB/2/15/12/2017 of 0014 hours, PW2 informed the Court that it states that the deceased picked a fight with his wife at around 2300 hours and after a while, the wife stabbed the deceased in the chest and he collapsed.
 15. Senior Sergeant Kennedy Kienyere testified as PW3. He stated that he was working at Likoni Police Station and was in charge of the police lines and discipline as at the time he testified in Court. He also stated that on 14th December, 2017 around 2200 hours he was the Duty Officer, and when on patrol, he was called by the OCS Likoni Police Station, Chief Inspector Patrick Libole, who requested him to go to Mathare area as he had received a report of a woman who had stabbed her husband.



16. PW3 was given directions to the scene by the Village Elder, Mr. Malalo. PW3 testified that on arrival, PW3 found a young man lying in a pool of blood outside the door to a house and they were informed that the occupant of the said house was a woman called Pamela (accused person) who was inside the house. PW3 stated that they found Mr. Malalo protecting the woman because the crowd wanted to remove her from the said house.
17. PW3 testified there was a kitchen knife with a shiny handle beside the body of the dead man. He identified it in Court. PW3 called the OCS who went to the scene of crime accompanied by CID Officers from Likoni Division and the Scenes of Crime Officer, who conducted their investigations at the scene. PW3 was then instructed to remove the body from the scene.
18. PW4 was Amos Jumba Mudanyi, the deceased's father. He stated that the deceased, Wilson Kiziri Jumba, was his 3rd born, who had gone to Mombasa after Standard 8 to join college where he was studying mechanics. He further stated that his son befriended a woman by the name Achieng Odhiambo (accused person) and the two used to live together as husband and wife, respectively.
19. PW4's evidence was that he tried to warn his son not to live with the accused person but he did not heed his words. He stated that the two used to fight a lot and he was informed by Mama Fatuma (now deceased) of how the police had arrested the two of them after a fight in a previous occasion.
20. PW4 testified that it was the said Mama Fatuma who called him on 16th December, 2017, and told him that the accused person and the deceased had fought and that the accused person had stabbed the deceased with a knife. On 18th December, 2017, PW4 went to Likoni and he was informed that his son's body had been collected from the scene and taken to Coast Province General Hospital. He then went to the said Hospital where he found his son in the mortuary. He identified his son's body during the postmortem examination, and he was present during the said examination. PW4's evidence was that the Doctor explained him that the knife had penetrated the deceased's ribs and stabbed the heart. That the Doctor also told him that his son could not have survived that injury.
21. PW5 Inspector Yusuf Ibrahim was assigned this case by the OCS Likoni Police Station on 15th December, 2017 as the Investigating Officer. He visited the scene at Mrima area in the morning of the said day. He stated that since the murder had happened at night, he found that the deceased's body had been removed from the scene. He looked for the Village Elder Abdalla Malalo (PW1) and spoke with him and other members of the public.
22. PW5 drew a sketch plan showing where the deceased's body had laid near the door of their house. He also stated that there was blood at the scene where the body had laid. He stated that there was a kitchen knife which he recovered next to the area where there was blood.
23. PW5 testified that he prepared an exhibit memo and forwarded the knife to the Government Chemist to establish if it was stained with the deceased's blood. PW5 stated that his investigations revealed that the accused person and the deceased used to live together as wife and husband, respectively. He indicated that the accused person was arrested for the deceased's murder and charged for the said offence. He also stated that it was Chief Inspector Libole, the OCS Likoni Police Station who entered the report of the incident in the Occurrence Book (O.B) as per OB No. 2 of 15/12/2017 at 0014 hrs. PW5 produced a copy of the OB extract. He also produced the sketch plan and the knife with a metallic handle.
24. PW6, Omar Mwidadi a Government Analyst attached to the Government Chemist Mombasa stated that on 18th December, 2017, they received a kitchen knife as an exhibit from PC Musembi with a request to find out if the knife had been used in the incident in issue. He testified that on examination



- of the said knife by Mr. George Ogunde, a fellow Government Analyst, the knife did not generate any DNA. PW6 produced the exhibit memo form and the Government Analyst's report on behalf of Lawrence Ogunde, who had been transferred to Kisumu.
25. PW7 was Dr. Bikuu Salma Mohammed. She testified on behalf of Dr. Umu who was not readily available to testify as she was pursuing a Masters degree programme outside the country. PW7 made reference to the postmortem report of Wilson Kiziri Jumba, for the postmortem examination that was done on 12th January, 2018 at Coast Province General Hospital Mortuary.
 26. PW7 stated that as per the said Report, on external examination, the body had blood on the feet and palms and also had blood from the nose and the mouth. PW7 stated that deceased also had bruises on the chest with a cut wound of approximately 2cm on the left side of the chest near the nipple.
 27. PW7 testified that the on internal appearance of the respiratory system, the deceased had a penetrating cut wound between the 5th and 6th ribs, and he had left haemothorax on the left lung. He also had a cut wound on the left diaphragm. PW7 stated that the cardio-vascular system had a cut on the pericardium, which is the lining of the heart.
 28. She also stated that the apex of the heart had a cut wound penetrating to the opposite side, with haemopericardium. That the digestive system, liver and stomach had a penetrating cut wound.
 29. PW7 stated that Dr. Umu formed the opinion that the cause of death was haemorrhagic shock secondary to penetrating chest injury secondary to stab wound. PW7 produced the postmortem report as an exhibit.
 30. The accused person was put on her defence. She gave an unsworn defence. She denied the charge. She stated that on 14th December, 2017, the deceased knocked at the door of their house at 9.00 p.m., and after she opened the said the door, he started quarrelling her asking her why she had taken long to open the door for him, and she told him that she had opened the door at the first knock. She stated that she asked him for money to buy food but he told her that he had no money and she went to the bed. She stated that she saw him remove a bottle of beer and he started drinking it and he then went to the bed and started pulling her and beating her up to the basin where they used to keep utensils.
 31. The accused person claimed that the deceased removed a knife from the utensils and when she saw that, she ran to the Village Chairman's house to look for help, but she did not find him but she came across a former Village Chairman by the name Mzee Malalo who was passing by and she explained to him about the quarrels and beatings by her husband but he told her that he had told them several times to stop fighting all the time. That he told her to go to the Police Station and report, but she had no money (fare) for going there.
 32. The accused person stated that she decided to go to Mama Fatuma's house and told her that her husband was being troublesome. That Mama Fatuma told her that she had told them several times to stop fighting and informed the accused person that she would accompany her to their house but before they could leave, Mr. Malalo, the former Village Elder went to where they were and said that Willy had died. The accused person said that she got confused and she, Mzee Malalo (PW1) and Mama Fatuma went to her (accused person's) house and on reaching there, they found Willy (deceased) lying outside the house bleeding. That although he was talking, the accused person could not understand what he was saying. That the deceased's family members were called by PW1. She stated that by then the deceased was breathing faintly. That the police then went to the scene and she was taken to Likoni Police Station, and she learnt that the deceased had been taken to the mortuary.



33. Ms Nyawinda, Principal Prosecution Counsel filed written submissions for the office of the Director of Public Prosecutions. She submitted that the death of the deceased was undisputed as the said death was proved by the evidence of PW1, PW2, PW3 and PW5 who saw the deceased's body lying dead on the ground with blood flowing from his chest. Counsel stated that the Postmortem Report confirmed that the deceased died as a result of haemorrhagic shock resulting from a penetrating chest injury inflicted by a stab wound.
34. On the issue of whether the death of the deceased was caused by an unlawful act or omission, Ms Nyawinda stated that the Postmortem Report prepared by PW7 revealed that the deceased's cause of death was haemorrhagic shock resulting from a penetrating chest injury inflicted by a stab wound. She submitted that the death of the deceased was the consequence of an unlawful act.
35. Ms Nyawinda stated that the other issue to be considered is whether the accused person herein was responsible for the unlawful death of the deceased. On the said issue, Counsel submitted that whereas none of the prosecution witnesses directly witnessed the accused person committing the act of murder, the evidence presented by the prosecution provides circumstantial evidence pertaining to the death of the deceased.
36. On circumstantial evidence, Ms Nyawinda relied on the decisions in *Ahamad Abolfathi Mohammed & another V Republic* [2018] eKLR and *R v Taylor, Weaver & Donovan* [1928] Cr Amp. R 21. She also relied on the case of *Abanga alias Onyango v R*, Cr. Case No.32 of 1990, where the Court of Appeal set out the test to be applied in determining if the circumstantial evidence adduced in Court can support a conviction.
37. Ms Nyawinda contended that the following facts point out to the unlawful acts or omissions of the accused person in this case –
 - i. That it was PW1's testimony that he met the accused person who informed him that she had got into a fight with the deceased.
 - ii. That the accused person in her defence stated that on the night of 14th December, 2017 there occurred an altercation between her and the accused person. That in the midst of the altercation, the deceased forcibly dragged her towards the area where the utensils were kept and retrieved a knife. That sensing imminent danger, she managed to break free from the deceased's grasp and quickly fled to seek assistance from the Village Elder.
38. She cited the Nigerian case of *Stephen Haruna v The Attorney General of the Federation* [2010] 11law/ca/a/86/c/2009 and the Indian case of *Ramreddy Rajeshkhanna Reddy & another v State of Andhra Pradesh* JT 2006 (4) SC 16.
39. Ms Nyawinda submitted that from PW1's evidence and the accused person's own admission, it is clear that the accused person was the last person to be seen with the deceased prior to his death. She further submitted that as per the "Last seen" doctrine, the accused person herein is presumed to be the one responsible for the deceased's death unless she gives a satisfactory explanation that would exonerate her from blame. She urged this Court to invoke the "Last Seen" doctrine.
40. Ms Nyawinda pointed out that in her defence, the accused person mentioned a knife but she did not explain how the deceased sustained the fatal injuries described in the Postmortem Report, being a penetrating chest injury inflicted by a stab wound. Ms Nyawinda contended that failure by the accused person to satisfactorily explain how the deceased sustained the fatal stab wound makes her guilty of the offence. That having admitted that there was a fight between her and the deceased prior to his death, it



is not enough to allege that she escaped for her dear life, when she did not even have a “scratch” injury on her body, whereas the deceased sustained a stab wound on his chest.

41. On the issue of whether the accused person had malice aforethought when she committed the offence, Ms Nyawinda stated that the Postmortem Report shows that the deceased sustained a penetrating chest injury inflicted by a kitchen knife that was recovered next to the deceased’s body and the cause of death was established as haemorrhagic shock.
42. The Prosecution Counsel contended that from the nature of the weapon used by the accused person, which was a sharp kitchen knife, to her conduct after inflicting the grievous injuries on the deceased, whereby she left him to bleed to his death, in addition to covering up her heinous acts, shows that she had malice aforethought to murder the deceased, which she did.
43. Ms Nyawinda relied on the definition of malice aforethought under Section 206 of the Penal Code. She also relied on decisions in *Res v Tubere s/o Ochen* [1945] 12 EACA 63 *Hyam v DMP* [194] AC and *Ernest Asame Bwire Abango alias Onyango v R* [CARA No. 32 of 1990].
44. She submitted that the prosecution had proved beyond reasonable doubt that the accused person murdered the deceased with malice aforethought. She prayed for this Court to convict her of the offence of murder contrary to Section 203 as read with 204 of the Penal Code.
45. Mr. Ngaine, learned Counsel for the accused person filed written submissions on behalf of his client. From the outset, he explained that the two elements that constitute murder are *actus reus* and *mens rea*, which means that the prosecution must prove beyond reasonable doubt that the unlawful death of the victim was caused by an act or omission of the accused person, and that the accused person did that act or omission with express or implied malice aforethought. Mr. Ngaine relied on the case of *R v P.C Robert Chaka* [2010] eKLR on the elements that the prosecution is obliged to prove in a case of murder.
46. He summarized the evidence by the prosecution and the defence made by the accused person and proposed 3 issues for determination, being –
 - i. Whether the death of the deceased was unlawful;
 - ii. Whether the accused person caused the deceased’s death; and
 - iii. Whether the accused person’s act or omission was with malice aforethought.
47. The defence Counsel stated that the deceased Wilson Kiziri died due to a cut wound on the left side of his chest near the nipple which was 2 cm as testified by the pathologist (PW7). Counsel stated that no evidence was called to explain the circumstances under which the said cut wound, suspected to have caused the deceased’s demise occurred. It was submitted that it was not clear from the evidence how the deceased died, save that it was testified that he was found lying motionless outside his house, next to a kitchen knife, but there were no eye witnesses to the incident that led to the deceased’s death.
48. Mr. Ngaine contended that the Investigating Officer (PW5) did not testify as to what led him to conclude and recommend that the deceased’s death was as a result of murder. Counsel contended that the fact that foul play was not ruled out as the deceased’s cause of death does not in itself mean that the deceased died of foul play and/or of an unlawful death.
49. He further contended that investigations did not reveal the motive of the deceased’s death so as to establish with certainty that it was an unlawful death. He submitted that no evidence or facts were placed before this Court to lead to a reasonable presumption that the deceased’s death was an unlawful



- death. He prayed for the accused person to be acquitted as the prosecution failed to demonstrate and/or prove the deceased's death was unlawful.
50. As to whether the accused person caused the death of the deceased, Mr. Ngaine stated that no prosecution witnesses testified and/or adduced evidence to place the accused person at the scene of the alleged murder before, during or after the alleged murder.
 51. He contended that the decision by PW5 to recommend that the accused person be charged was not informed by any cogent evidence, but rather conjecture and/or suspicion.
 52. Counsel cited the case of *Republic v Frankton Naburera* [1998] eKLR, where the Court acquitted the accused person of two counts of murder as after having analyzed the evidence on record, the Court found that there was no witness who saw the accused shoot in the direction of the house.
 53. The defence Counsel submitted that the testimony by PW1 that the accused person and the deceased always fought when drunk is inadmissible because it is "similar facts" evidence of prior discreditable conduct or prior bad acts, which is generally inadmissible. He further submitted that the test for "similar facts" evidence is that it must be logically probative, not oppressive or unfair to the accused person, but PW1's testimony is neither.
 54. Counsel contended that the investigations were conducted with the aim of a particular outcome, to pin the alleged murder on the accused person. He further contended that on the morning of 15th December, 2017, when the OCS Likoni Police Station, Chief Inspector Libole instructed PW5 to take up the case and open investigations, he had already made up his mind that what he intended to investigate was murder, and nothing less or nothing more.
 55. Counsel invited this Court to note that by the time the investigations were being commenced by PW5 on the morning of 15th December, 2017, a day after the "alleged murder", by that time the accused person had already been arrested for murder as testified by PW3 and a report filed in the Occurrence Book (OB) of such "murder incident".
 56. Mr. Ngaine stated that the bias in the reporting of the incident and the investigations is very obvious, which started with PW1, an admitted non-eye witness, who started the narrative by reporting that "a woman had killed her husband", a narrative that the police took up hook, line and sinker with OCS Libole, instructing his officers among them PW5, that a murder had occurred. Counsel contended that it is difficult to see how PW5 could have carried out open minded, objective and independent investigations to rule out other possible causes of death other than murder.
 57. Mr. Ngaine stated that PW5's testimony was that he spoke to members of the public but he did not disclose who they were. He further stated that PW5 said during cross-examination that the neighbours at the scene of crime were not willing to give evidence.
 58. As to whether the accused person committed the offence she was charged with, with malice aforethought, Mr. Ngaine submitted that malice aforethought which is the intention, cannot stand if an unlawful death has not been proved and/or commission/omission of an act of unlawful death, has not been proved. He submitted that it is evident from the record that the prosecution did not adduce any evidence as to the intention and/or motive of the accused person in committing the alleged murder. He relied on the case of *Patel v Republic* [1969] 1EA 545 to support his submissions.
 59. Mr. Ngaine submitted that the prosecution relied on circumstantial evidence for the reason that there was no eye witness for the alleged murder. In that aspect, Counsel relied on several authorities namely, *Makau v Republic (Criminal Appeal No. 055 of 2021)* 2022 KEHC (9798) [KLR] cited with approval in the case of *Moses Kabue Karuoya v Republic* [2016] eKLR. He also cited the decisions in



Abanga alias Onyango v Republic Cr. A. No. 32 of 1990 and Joan Chebichii Sawe v Republic [2003] eKLR, and the case of Philip Muiruri Ndaruga v Republic [2016] eKLR still on circumstances to be considered in giving an accused person the benefit of the doubt. He prayed for the accused person to be acquitted.

Determination

60. In order to determine if the accused person committed the offence of murder whose prerequisite is malice aforethought, this Court has to establish –
 - i. The cause of the deceased's death;
 - ii. Proof that the deceased's death was due to an unlawful act or omission; and
 - iii. That the death was caused by the accused person and that she had malice aforethought.
61. As to the cause of the deceased's death, PW1, Abdala Salim Malalo joined some people whom he saw running to the direction of the deceased's house. On reaching there, he saw the accused person's husband Wilson Kiziri (deceased), lying outside their house in a pool of blood. PW1 also saw a blood stained knife beside the body.
62. PW1 called the OCS Likoni Police Station, Chief Inspector Libole who went to the scene. PW1's evidence was that by the time the police reached there, Wilson Kiziri was breathing with difficulty and after the Scenes of Crime Personnel had taken photographs of the scene, the police took Wilson Kiziri and the blood stained knife.
63. PW2's evidence was that on the night of 14th December, 2017. He was on crime standby at 10.00 p.m., and when on patrol, he and the Duty Officer sergeant Kienyere received a call from Chief Inspector Libole the OCS of Likoni Police Station, who directed them to a scene outside the accused person's house where he found a man lying outside the door of a house bleeding from his chest. He saw a blood stained knife underneath the mans's chest. On checking the man's pulse, he found none. He also noted that the man was not breathing.
64. The OCS called the Scenes of Crime Personnel who went to the scene and took photos and took away the knife. PW2 and others took the deceased's body from the scene to Coast Province General Hospital. PW2 stated that one had to turn the deceased's body around in order to see the injury on his chest.
65. PW3 corroborated the evidence of PW2 that the OCS Likoni Police Station called them when they were on patrol and they were directed to a scene where they found a man lying in a pool of blood outside the door of a house. He was instructed to take the body to Coast Province General Hospital after the CID had done their work of investigating.
66. PW4 was the deceased's father. When he was at Vihiga, he was called by one Mama Fatuma (now deceased) who informed him that the accused person had stabbed the deceased with a knife. On reaching Mombasa on 18th December, 2017, he was informed that the body was at the Coast Province General Hospital.
67. The evidence of PW4 was that he was present when the postmortem examination was done and the Doctor explained to him that the knife used had penetrated the deceased's ribs and stabbed his heart. The Doctor also told him that his son could not have survived that injury.
68. Dr. Bikuu Salma Mohammed (PW7) produced the Postmortem Report of the deceased Wilson Kiziri Jumba on behalf of Dr. Umu. PW7 stated that on external appearance, the body had blood on the feet and palms. That the deceased also had blood from the nose and mouth, and bruises on the chest with a



cut wound of approximately 2 cm on the left side of the chest near the nipple. On internal appearance, the Doctor stated that in the respiratory system, the deceased had a penetrating cut wound between the 5th and 6th ribs. The deceased also had left haemothorax on the left lung and a cut wound on the diaphragm.

69. The Postmortem Report further showed that the cardio vascular system had a cut to the pericardium, which is the lining of the heart. The report should that the apex of the heart had a cut wound penetrating to the opposite side, with haemopericardium. The digestive system, liver and stomach had a penetrating cut wound. PW7 stated that Dr. Umu formed the opinion that the cause of death was haemorrhagic shock secondary to penetrating chest injury secondary to the stab wound.
70. From the evidence that I have summarized herein before, there is no doubt that the deceased died at the scene of the incident as by the time PW2 reached the said scene, the deceased was lying on the ground in a pool of blood. The deceased had no pulse and he was not breathing. The postmortem conducted on the deceased's body on 12th January, 2018 confirmed that he died of haemorrhagic shock secondary to penetrating chest injury secondary to stab wound. The father of the deceased (PW3) attended the postmortem examination, the Doctor informed him that the deceased died from the stab wound to his heart.
71. From the evidence adduced in that regard, there is no doubt that the deceased died on the night of 14th December, 2017 as a result of a stab wound. It is therefore evident that the deceased's death was unlawful as there is no evidence that he inflicted the said stab wound on himself.
72. As to whether the accused person caused the deceased's death, there were no eye witnesses who saw the person who stabbed the deceased. This Court therefore has to rely on circumstantial evidence in order to determine if it was the accused person who caused the death of the deceased. Before doing so, it is important to consider what circumstantial evidence is. In the case of *Makau v Republic (Supra)*, the Court distinguished between direct and circumstantial evidence as follows-

“The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. Thus circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw or heard.”

73. From the evidence adduced by PW1, the accused person and the deceased used to live together as wife and husband, respectively. Their marriage was not a bed of roses as they would fight from time and time, and on three occasions, PW1 had escorted them to the Police Station after the two had fought.
74. According to PW1, the accused person and the deceased would normally fight when drunk. The deceased's father (PW4) was against the relationship between his son and the accused person, and he had dissuaded his son from living with the accused person, but he never heeded his advise.
75. According to PW4, he had been informed of an incident where the deceased and the accused person had fought and they were taken to the Police Station, he had been given that information by Mama Fatuma (now deceased).



76. From the evidence adduced by PW1, on the night of 14th and 15th December, 2017 at 9.30 p.m, as he was going to the Trading Centre, he came across the accused person who informed him that she had been beaten by Sharubaroo (the deceased). He advised her to go and report at the Police Station, but she followed him, as she told him “Babu nisaidie”, and she followed him up Mama Fatuma’s house where he left her.
77. As PW1 was walking back to his house, after reaching a certain junction, he saw some people running towards the direction of the house the accused person was living in. On PW1 going that place, he saw the accused person’s husband Wilson Kiziri lying in a pool of blood, and beside the body there was a blood stained knife. The time span between the time the accused person met PW1 and informed him that she had been beaten by the accused person, and the time the deceased was found lying on the ground outside his house was short.
78. The evidence of PW1 must be weighed against what the accused person said in her unsworn defence. She denied having killed the deceased on 14th December, 2017. She stated that at 9.00 p.m., the deceased knocked at the door to their house and when she opened the door, he started quarrelling her asking her why she had taken long to open for him and she told him that she had opened at the first knock. That the accused person asked him to give her money to buy food but he told her that he had no money and so she went to lie on the bed. That she saw him remove a bottle of beer and he started drinking from it. He then went to the bed and started pulling her and beating her up to an area where there was a basin for keeping utensils. The accused person stated that the deceased removed a knife from the utensils and when she saw that, she ran to the Village Elder’s house to look for help, but he was not at home. That a former Village Chairman by the name Malalo was passing by and he told her that the Village Elder was not at home and he started walking away as she started calling out “Babu”, “Babu”, and she explained to him about the quarrels and beatings by her husband and he told her that he had told them several times to stop fighting all the time.
79. He told her to go to the Police Station but since she did not have enough money for going there, she decided to go to Mama Fatuma’s house and she told her that her husband Willy had become troublesome. That Mama Fatuma informed the accused person that she had told them several times to stop fighting. She also told the accused person that she would accompany her to their house but before they could leave, PW1 went to where Mama Fatuma and the accused person were, and told them that Willy had died. The accused person stated that she got confused, and they all went to the house she used to live in.
80. That on reaching there, they found Willy (deceased) outside their house while bleeding. That he was talking but she could not understand what he was saying and by then, he was breathing faintly. That the police went to the scene and said they would wait for the Scenes of Crime Officers, who went to the scene at 12.20 a.m. She was then taken to Likoni Police Station. She asked them where they had taken Willy, and they said they had taken him to the mortuary.
81. From the defence put forth by the accused person, it is evident that what PW1 said about the accused person and the deceased is true that they used to fight and quarrel often, as according to the accused person, when she reported to PW1 about the quarrels and beatings by her husband, he informed her that he had told her several times to stop fighting all the time. The submissions by Mr. Ngaine about the events that had happened prior to the night of 14th December, 2017 as relates to the fights between the accused and the deceased being irrelevant does not hold water. Such events are relevant to the present case as they depict the tumultuous relationship between the deceased and the accused person. Due to the troubled relationship that they had, PW1 had taken them to Likoni Police Station on three occasions after the two had fought.



82. Putting together the links in the chain of circumstantial evidence, it is evident that the deceased and the accused person quarreled on the night of 14th December, 2017 and in the cause of the quarrel a fight ensued that led the accused person to arm herself with a knife and stab the deceased on the chest.
83. From the circumstantial evidence on record, the time span between the quarrel and the time when the accused person asked for assistance from PW1 was short, because when the PW1 went to the scene where the deceased lay, he was still breathing although he was lying in a pool of blood. On PW1 going to Mama Fatuma's house where he had left the accused person, and on taking her back to the scene, they still found him alive, as according to the accused person, the deceased was talking but she could not understand what he was saying and he was breathing faintly. It is thus apparent that he had not been stabbed such a long time before the accused person went to look for the Village Elder whom she did not find, but she came across PW1 to whom she reported that she had been beaten by the deceased.
84. On further consideration of the defence by the accused person, she would like this Court to believe that either the accused person stabbed himself with the knife that was recovered at the scene, or that he was stabbed by someone else.
- There is however not even a dim possibility that was the case, as there is no evidence of the deceased having quarreled or having fought with anyone else on the material night, save for the accused person.
85. It is evident that the accused person also engaged in the fighting the deceased, as per the Postmortem Report, as the deceased's body had bruises on the chest in addition to the other injuries that are captured on the Postmortem Report.
86. In this Court's considered view, the deceased could not have inflicted the bruises on his chest, but they must have been inflicted by the accused person. It is therefore my finding that the accused person not only inflicted the said bruises on the accused person, but also stabbed him.
87. As to whether the accused person had malice aforethought when she caused the death of the deceased, as earlier stated in this judgment, the relationship between the accused person the deceased was not a rosy one as the two would quarrel and fight from time to time, a fact which was well known by PW1. The accused person admitted in her defence that she and the deceased quarreled, and she was beaten by the deceased on the night of 14th December, 2017.
88. This Court has found that the accused person is the one who inflicted the fatal injuries on the deceased with the knife that was recovered at the scene. Although no DNA was found on the knife that was examined by the Government Analyst, the knife that was recovered at the scene where the deceased's body lay was blood stained. Even if no DNA was lifted from it, it was definitely the weapon used to kill the deceased. The Postmortem Report shows that the deceased died due to haemorrhagic shock secondary to penetrating chest injury secondary to stab wound.
89. Having analyzed the circumstances leading to the deceased's death, this Court's finding is that the accused person had no malice aforethought when she caused the death of the deceased. Her stabbing of the deceased with a knife was as a result of the quarrel and fight that ensued on the night of 14th December, 2017.
90. I therefore find the accused person not guilty of the charge of murder. I however find her guilty of the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I hereby convict her for the offence of manslaughter under the said provisions of the law.

It is so ordered



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

NJOKI MWANGI

JUDGE

In the presence of:

The accused person

Mr. Nyamache h/b for Mr. Ngaine for the accused person

Ms Nyawinda - Principal Prosecution Counsel for the DPP

Ms B. Wokabi - Court Assistant.

