



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Republic v Isare (Criminal Case 19 of 2018)  
[2023] KEHC 18673 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18673 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 19 OF 2018**

**A. ONG'INJO, J  
JUNE 15, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOEL MAROA ISARE ..... ACCUSED**

**JUDGMENT**

**Background**

1. The accused person Joel Maroa Isare faces a charge of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya.
2. The particulars are that Joel Maroa Isare on April 21, 2018 at around 2330 hours at Mnazi Moja Area Kongowea within Mombasa County murdered Geoffrey Mariam.
3. The prosecution called 7 witnesses to support its case that the accused committed the offence herein. The accused person was therefore placed on his defence.

**Prosecution Case**

4. PW1, Benson Masero Ikwabe testified that he was a chairman of the Kuria community in Kongowea and that he had a record of the members of the Kuria community and that both Geoffrey Mariam and Joel Marwa Isare were members of the community. That Joel Marwa Isare used to be a porter at Kongowea Market and carries goods for customers at a fee while the deceased used to hire out swimming costumes at Nyali beach. PW1 stated that on April 22, 2018 at 4.30 am, he was at Prime Bank Nyali when he was called by John Marwa the treasurer of the community and informed that there was a young man who had been stabbed by his housemate and died. That a county government askari by the name Omondi assisted John Marwa in having Joel Marwa arrested. That when PW1 went



- to the office of the county government askari at 6.00 am, he found Joel Marwa who could not explain what happened but was crying.
5. PW1 informed court that Mwita Igai, John Timu, Paul and him went to see the body of Geoffrey Mariam at Coast Provincial General Hospital Mortuary. That Paul identified the deceased as he knew him. That on May 7, 2018, PW1, Mary Kiratu the mother of the deceased and Moses Ngati went to Nyali Police Station and recorded their statements. That on May 16, 2018, Moses Ngati and the deceased's mother went and identified the body of the deceased before the postmortem was done and that at the mortuary, PW1 saw that the deceased had a stab wound on the stomach. That on May 17, 2018, they buried the deceased at Kongowea Makaburini and that as the chairman of the Kuria community, PW1 inquired what happened between the deceased and the accused and Martin told him that when the accused takes alcohol, he likes fighting and that on the night of April 21, 2018, the deceased and the accused fought for a very long time.
  6. PW2, Mwidadi Omar, the Government Analyst based in Mombasa stated that he had a DNA Report dated August 20, 2018 MFI P1 that was written by his colleague George Lawrence Oguda whom he had worked with. That on May 29, 2018, they received 3 exhibits from PC Kipkorir Langat No 85908. That the 1<sup>st</sup> exhibit was a plastic floor mat – A1, the 2<sup>nd</sup> exhibit was a pen knife – A2 and the 3<sup>rd</sup> exhibit was blood sample from the deceased. That through the exhibit memo form, they were required to ascertain whether blood stains in A1 and A2 matched glass test tubes that were in khaki envelope marked B. PW2 testified that after DNA analysis was done, it was found that plastic floor mat and the pen knife A1 and A2 both tested positive for human blood. That the conclusion was that blood from mat and pen knife A1 and A2 generated DNA profile that matched the DNA profile generated from reference blood sample marked B. PW2 produced the report - Exp1(a), floor mat – MFIP1(b), pen knife – MFIP1(c), exhibit memo form – MFI1(d), khaki envelope that contained blood sample – MFIP1(e). The exhibit memo was produced as Exp1(d).
  7. PW3, Martin Chacha Maribe, testified that on April 20, 2018, he left Kongowea market at 2.00 pm and went to visit Joel Marwa whom he identified as the accused in the dock, and Juma before going home. That when he arrived, he found them seated and they told him they had a business. That Juma told PW3 that he had a Nokia phone which he wanted to sell to Joel at Kshs 1200 but Joel only had Kshs 200. That he gave Juma Kshs 200 and they agreed to pay the balance the following day. That the next day when PW1 returned, Joel was complaining that the phone he bought got lost at the market. That at about 7.00 pm, Juma arrived drunk and demanded for his money but Joel told him that the phone and memory card were stolen and that he would pay for the phone and memory card and return Bluetooth. That Juma started beating Joel but PW3 intervened and told them to go sort out the issue. That inside the house, Juma refused to heed and PW3 advised Joel to go look for a place to sleep until Juma got sober and that they left Juma in the house.
  8. PW3 informed court that he went to his house and slept and at 12.30 am, he heard noise coming from Juma and Joel's house and Joel was telling Juma to beat him if he wanted. That PW3 got out of his house where he met Joel running out of their house holding a blood stained knife. That PW3 restrained him at the door and went back with him to the house where they found Juma leaning on the wall. PW3 stated that his house was adjacent to Juma and Joel's room and that lights in his house were on so he could clearly see what was in the house. PW3 testified that the knife he saw Joel carrying was in court MFIP1. That the deceased was holding his chest and bleeding profusely from where he was holding. That Joel wanted to run away but PW3 restrained him and pushed him back to the house where they found Juma crying saying "Ameniuwa!" That PW3 administered first aid to Juma and later with the help of another neighbour took him to Makadara Hospital where he died at 1.30 am. That the doctor advised them to go to Nyali Police Station where they reported what happened and they went back to



hospital with a police officer who confirmed that Juma had died. PW3 stated that he took the police to the scene who took photographs and locked the house, and left contact details in case Joel is seen. That the next day PW3 went to work in Kongowea where he called Joel who was also in Kongowea and at 6.00 am when he showed up, PW3 got the help of a county askari in arresting Joel. That PW3 then contacted the police officer who went and arrested him.

9. PW4, Mary Masigio Kirato, stated that on April 28, 2018, she received a call from her brother Moses who told her that her child in Mombasa had died and that she should go to Mombasa to confirm that her child was dead. She stated that her child was called Juma but the name in the charge sheet was different. That she travelled to Mombasa and someone known as Masero took her to the mortuary at the Coast General where she identified the body of her child. That from the hospital, they were taken to Masero's house where funeral arrangements were made and they raised funds for about one month. That they buried the body of her child in Mombasa after the postmortem. PW4 testified that her brother told her that her son sold the phone to the person who killed him. That PW4 was showed the knife used to stab his son and that it was a pocket knife with a brown handle and the knife was in court MFIP1(c). That it is Masero who pointed to her the person who stabbed her son and that it was the accused in the dock. That Masero was not present when the accused stabbed her son and that there is a neighbour to her son who assisted to take him to hospital and to arrest the assailant.
10. PW5, Dr Gabriel Mungula from Coast General Teaching and Referral Hospital testified that he had a Postmortem Form in respect to the body of Geoffrey Mwita which was performed on May 16, 2018 by Dr Ghanum. PW5 stated that he had worked with Dr Ghanum whose name was on the postmortem report and the same was stamped with the Coast General Hospital stamp. That on general observation, the body was in blue shorts and black shirt soaked in blood. The body was of male African adult, apparent nutrition was good, physique was well built, height of 168 cm, postmortem changes and assessment at time of death the body was embalmed, and externally there was penetrating stab wound. That on internal appearance, the respiratory system was normal, cardiovascular was normal, the digestive system had a stab wound to the abdomen, there was blood in the abdominal cavity, the intestines were perforated but other systems were normal. As a result of examination, Dr. Ghanum was of the opinion that death was caused by hemorrhagic shock secondary to deep penetrating abdominal trauma. PW5 produced the postmortem report as ExP-2.
11. PW6, Moses Gathi Kirako testified that in April 2018, he was in Nairobi when he received a call from a family member at home and was asked if he had any information about Geoffrey Mwita, his sister's son. That he was told Geoffrey had died and that the information had come from Mombasa. That when he called his sister, she confirmed that Geoffrey had died and that she was looking for fare to travel to Mombasa. That he accompanied her to Mombasa where they were received by Benson Masero who also accommodated them. That the next day, they went to where the deceased was living and the neighbours narrated to them how the quarrel ensued between the deceased and the accused leading to the deceased being stabbed in the abdomen. That they found Geoffrey's body had been taken to the mortuary at Coast General Hospital and that when they went to identify the body, they saw stab wounds on the lower abdomen on the umbilical cord. PW6 stated that he was with Benson and his sister when they identified the body and that they went to Kisauni Police Station where a report had been made and they recorded their statements. That a postmortem report was conducted before the body was removed for burial.
12. PW7, No 85908 P C Kipkorir Langat stated that on April 22, 2018, he was at DCI Kisauni when he was summoned by the DCIO together with his colleague Sgt. Lumbasi where he was told that there was a murder case committed at Mnazi Mmoja in Kongowea and the police officers from Nyali were already at the scene. That they went to the scene and were shown the deceased person's house. That there was a



pool of blood on the floor and they collected a mat that had blood stains for analysis. That they left the scene and proceeded to Nyali Police Station where they were told that the accused had been arrested from Kongowea. That they took him to Kisauni DCI office for interrogation where he told them that differences arose between him and the deceased because the deceased had sold him a bluetooth radio and phone and he had not completed paying and the deceased wanted the radio and phone back. That he said the phone was stolen at his place of work and that a fight ensued and he stabbed the deceased in the abdomen. PW7 informed court that the deceased was rushed to Coast General Hospital but he died. That the suspect led them to Kongowea market where he works and they were able to recover the knife he had hidden and that it had blood stains.

13. PW7 stated that on May 16, 2018 he attended the postmortem at Coast General Hospital where relatives of the deceased identified the body. That PW7 was able to see the stab on the deceased's abdomen and the results of the postmortem were that the cause of death was as a result of hemorrhagic secondary to deep penetrating abdominal trauma – ExP-2. PW7 recorded statements of the relatives of the deceased who identified the body and the accused was arraigned in court. PW7 identified the accused in court. That on May 29, 2018, PW7 prepared an Exhibit Memo Form and forwarded the blood stained mat and knife as well as blood sample collected during postmortem to government analyst for analysis. That they received the government analyst report on August 20, 2018. The blood stained mat - MFIP1(b) – ExP1(b), the blood stained knife in court – MFIP1(c) – ExP1(c). That according to the Government Analyst Report, the mat and knife generated DNA profile that matched the DNA profile generated from reference blood sample of Geoffrey Mwita.

#### **Defence Case**

14. The Accused, Joel Marwa Isare gave an unsworn statement and stated that he stayed at Mnazi Mmoja prior to his arrest and worked as a loader and carried goods at Kongowea. He stated that on April 22, 2018 at about 11.00 pm when he went to the house, he found the deceased had slept. That he sat on a seat and took milk when the deceased woke up and asked for money for the phone he had sold him. That they had agreed that he pays in instalments but the deceased started interrogating and beating him demanding that he pays. That in the course of being beaten, the deceased held the accused by the neck and was strangling him. That the accused did not have the money that the deceased was demanding for.
15. The accused informed court that the deceased was holding a knife with the left hand and the accused pushed him and managed to escape and went to call a neighbour by the name Martin Chacha. That when Martin entered the house, they found the deceased had been stabbed on the stomach. That martin asked the accused for money to take the deceased to hospital but he did not have money. That Martin told the accused to leave as neighbours would injure him and that he went and slept at a friend's place and went to work in the morning where he worked up to 7.00 am when he was arrested and learnt that Geoffrey had died. That he was taken to Nyali Police Station and later charged, and that he did not kill Geoffrey.

#### **Analysis and Determination**

16. In consideration of the evidence of 7 prosecution witnesses and in consideration of the accused person's unsworn statement, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the Penal Code Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.



17. Section 203 of the Penal Code Chapter 63 of the Laws of Kenya under which the accused person was charged provides as follows: -

‘Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.’

18. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

### **Death of the deceased**

19. Death of the deceased is not in dispute. PW1, PW3, PW4, PW5, and PW6 confirmed that the deceased died. PW3 took the deceased with the stab wound to Makadara Hospital where he died at 1.30 am. PW4 and PW6 identified the body of the deceased at the Coast General Hospital Mortuary and they were in the company of PW1. PW7, P C Kipkorir Langat attended the post mortem and PW5, Dr Gabriel Mungula from Coast General Teaching and Referral Hospital produced the post mortem report prepared by Dr Ghanum which showed that death was caused by hemorrhagic shock secondary to deep penetrating abdominal trauma.

### **Whether death was caused by an unlawful act or omission**

20. The manner in which death of the deceased was caused shows that the said death was through an unlawful act which was not self-inflicted. According to the post mortem report produced by PW5, Dr. Gabriel Mungula from Coast General Teaching and Referral Hospital, the digestive system had a stab wound to the abdomen, there was blood in the abdominal cavity, the intestines were perforated and death was caused by hemorrhagic shock secondary to deep penetrating abdominal trauma.

### **Participation of the accused persons in the commission of the alleged offence**

21. PW3 informed court that he heard noise coming from Juma and Joel’s house and Joel was telling Juma to beat him if he wanted. That PW3 got out of his house where he met Joel running out of their house holding a blood stained knife. That PW3 restrained him at the door and went back with him to the house where they found Juma leaning on the wall and crying saying “Ameniuwa!”

22. PW7, P C Kipkorir Langat, the investigating officer stated that when the accused was taken for interrogation, he stated that differences arose between him and the deceased because the deceased had sold him a bluetooth radio and phone and he had not completed paying and the deceased wanted the radio and phone back. That he said the phone was stolen at his place of work and that a fight ensued and he stabbed the deceased in the abdomen.

23. When the accused was placed on his defence, he stated that the deceased was holding a knife with the left hand and the accused pushed him and managed to escape and went to call a neighbour by the name



Martin Chacha. That when Martin entered the house, they found the deceased had been stabbed on the stomach.

### **Malice aforethought**

24. From the evidence of the prosecution witnesses and the defence, it is clear that the death of the deceased arose from provocation of the accused by the deceased. The accused in his defence stated that on April 22, 2018 at about 11.00 pm when he went to the house, he found the deceased had slept. That he sat on a seat and took milk when the deceased woke up and asked for money for the phone he had sold him. That they had agreed that he pays in instalments but the deceased started interrogating and beating him demanding that he pays. That in the course of being beaten, the deceased held the accused by the neck and was strangling him. That the accused did not have the money that the deceased was demanding for. This court therefore finds that there was no malice aforethought on the part of the accused.
25. In the case of *Republic v Andrew Mueche Omwenga* [2009] eKLR, Maraga, J. (as he then was) held as follows: -

Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter- Mbugua Kariuki v Republic, [1976-80] 1KLR 1085 and Republic v Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words: -

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

26. In conclusion, this court reduces the charge of murder to manslaughter. The Accused is accordingly acquitted of the charge of murder but convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 15<sup>TH</sup> DAY OF JUNE 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

**Ogwel- Court Assistant**

**Mr Ngiri for the State**

**Ms Nasimiyu Advocate for the Accused**

**HON LADY JUSTICE A ONG'INJO**

**JUDGE**

Mr Ngiri

I don't have records

Order: Mention on 29.6.2023 for mitigation and Victim Impact Statement.

**HON LADY JUSTICE A ONG'INJO**



**JUDGE**

