



REPUBLIC OF KENYA



KENYA LAW

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**Republic v Murage (Criminal Case 24 of 2019)
[2023] KEHC 18711 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 24 OF 2019**

MW MUIGAI, J

JUNE 15, 2023

BETWEEN

REPUBLIC PROSECUTION

AND

PERIS WANGECI MURAGE ACCUSED

JUDGMENT

Background

1. The information on the Charge Sheet dated 29th July, 2019 that arraigned the accused person before the High Court provides:

murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63, laws of Kenya.

Particulars of the offence:

Peris Wangeci Murage on 17th July, 2019 at Mlolongo Estate, in Athi River Sub- County within Mchakos County murdered Benson Musyoka Kioko.

2. The mental assessment report dated 15/8/2019 confirmed that the accused was fit to plead. The accused person herein took plea on 18/9/2019 in which charges were read out to the accused in a language that she understood in Kiswahili where she pleaded not guilty.
3. The accused person was granted bail/ bond terms and the Office of the Director of Public Prosecution was to provide Witness Statements and Documents to the Defense Counsel and accused person before commencement of the hearing. The defense was supplied with all necessary documents and the matter fixed for hearing on the 28/11/2019.



Prosecution's case This matter/hearing commenced on 18/09/2019 before Hon D. K. Kemei – J

4. PW 1 Nzilani Mutisya Masika gave sworn evidence and testified that on 17/7/2019 she was busy with her work when a young boy called Onyango came to inquire about the mother of the deceased. She testified that she tried to call her but she could not be reached. The boy informed her that the deceased had been stabbed and was unconscious. That she took ten minutes to reach there, and found him outside the gate. She testified that there were many people at the scene. That he was lying on the muddy ground facing upwards; that he had injuries and was bleeding profusely. She called his father who directed her to rush him to hospital and she informed the father that the victim had already passed on; that the police were also there. She testified further that the Father David Kioko came to the scene; that the body was collected by the police and that she joined the deceased father to Shalom Hospital Mortuary and that on 22/7/2019 she joined the deceased's parents to the mortuary and they were able to identify the body during the post mortem. She identified the report and was marked MFI-1.
5. In cross examination by Counsel for the accused, PW1 stated that she was a tenant on the plot just like the deceased's parents and that it is not true that she was paid to testify since she said what she witnessed and that she is a family friend of the deceased's family; she saw the knife at the police station and that she found a crowd at the scene; police officers as well whom she claimed must have arrived earlier; that doctors were not at scene to advice on the use of gloves and that she did not wear gloves during her visit to the scene; that there was large crowd forcing police to shoot in the air so as to pick the accused herein and that the accused was taken first by the police who came for the deceased afterwards.
6. PW2 Daniel Musembi Kioko gave sworn evidence and testified that on 17/7/2019 he was at his parent's house in the company of his mother and brother Mbathi; that the deceased arrived from work and Mbathi requested him to assist fix a certain computer. He testified that the two left, later the deceased came back and quarreled with the accused herein. The deceased asked the accused why she had been insulting their mother; that she assaulted the deceased on the leg and he assisted him into the house; that accused shouted that the deceased was a thief and she later stabbed him with the knife. He saw the blood flowing from the accused's house towards the gate; that he followed the blood trail which led him outside the gate where he found the deceased lying down; he testified that the deceased had been stabbed on the chest; that he rushed to the Mlolongo Police Station to report.
7. The police officers arrived at the scene and the accused had locked herself in her room; she was ordered to open the door, and she handed over the Knife to the police; he saw the knife, it had a black handle and was blood stained; that the knife was a kitchen knife and that the body was collected by the police; that he came to know the accused since November 2018 as a person who was troublesome and harassing people in the plot. The Accused was not on talking terms with the deceased but he had not disagreed with her.
8. In cross examination by counsel for the accused, PW2 stated that he did not see the accused stabbing the deceased but heard her claiming that she had stabbed the deceased; he maintained that he heard accused's voice; that the accused was a troublesome woman at the plot; further that deceased used to quarrel with the accused and they were not in good terms; he stated that blood trail started from accused's house all the way to where the deceased lay.
9. He testified that he was the first person to have checked the deceased as he lay dead outside the gate before the members of the public arrived and that he tried to resuscitate the deceased to no avail; he confirmed he had no gloves or gumboots at the time, stating that the police picked up the accused before turning for the deceased.
10. On re-examination he stated that his parents rented the house within the plot.



11. PW3 David Kioko Musyoka gave sworn evidence and testified that the deceased herein was his son who used to live with him within a rented house and that there are other tenants there. He stated that on 17/7/2019 around 12 noon he was at work when he received a call from one Benson Muema who alerted him that his son had been stabbed with a knife within the Plot. Further to that, he received another call from PW1 who is a family friend urging him to rush home and telling him that the deceased had already died; that he got permission from his employer and on arrival he found a large crowd near the body of the deceased.
12. He testified that the body was soaked in blood. He said that the police collected the body of the deceased and took him to Shalom Hospital Mortuary. On 22/7/2019 he was at the mortuary in company of relatives to witness the post mortem, and the report marked MF1 was identified; that he saw a large stab wound on the left chest of the deceased. The accused herein was their neighbor and a friend of his wife but they later developed some differences.
13. In cross examination by counsel for the accused PW3 stated that he could not tell if there were any differences between the deceased and the accused and that he had not noticed any enmity between the two; he did not witness the incident and that he saw the knife at the police station; he stated that the deceased was an adult at the time he was not employed and he did odd jobs and the deceased was not an angel and could make mistakes; that he had no gumboots when he approached the deceased body and that none of the members of the public wore gloves or gumboots at the scene and that the body was taken by police as the public watched.
14. PW 4 Mary Ndunge Kioko testified on oath and stated that deceased was her son, the accused was a tenant and neighbor. She testified that on 17/7/2019 at 4PM her phone battery went off and later she received a message from one mama Pamela who enquired from her as to what had taken place at their plot. She said that she was not aware of the incident and that she called her son John Kioko who alerted her that the deceased had been killed and she lost consciousness.
15. PW4 was assisted and she got home and found a group of neighbors and learnt that her son had been stabbed with the knife. The following day she visited Shalom Mortuary and identified the body which she saw had a stab wound in the left side of the chest.
16. She testified further that accused was a neighbor at the plot and that they had quarreled in April 2019 when her children informed her that the accused had hurled insults and that she confronted the accused who told her off; that the accused appeared to have blamed the deceased over some rubbish thrown outside the gate which she tried to arbitrate but the accused again told her off; she testified that they agreed to keep it to themselves and realized that the accused had bad motives where the accused used to throw the deceased's clothes from the hanger to the ground for no apparent reason; that she then requested caretaker to call the landlord and elders to solve the matter which meeting was to take place on 17/7/2019 but was overtaken by events of murder.
17. In cross examination by the accused's counsel, she testified that it is normal for people to quarrel with each other and that she was alerted of the incident and had to go to the Mortuary to confirm that indeed her son had died; that she only learnt of the quarrel that day of the incident and that she did not witness the incident; that she saw a photograph of the knife through her son's mobile phone.
18. PW 5 Lucy Warugira Wachira a Government Analyst from the Government Chemist from the Department of Forensic Biology Laboratory testified on oath confirmed the exhibits submitted to The Government Chemist laboratory (a) BMK 1" A knife (b) BMK" Bloodstained Cotton Wool (c) BMK3" Blood in the syringe.



19. PW5 said that they were to ascertain the relationship between the exhibits and that the analysis revealed that the Knife (BMK1) and Cotton Wool (BMK 2) were moderately stained with blood of human origin; that the DNA profile generated from the blood stains on the knife each on the Cotton Wool matched the DNA profile generated from the blood sample on (BMK 3”) which was from the deceased.
20. PW2 Daniel Musembi Kioko was recalled and he identified the exhibit of a knife presented in Court. In cross examination PW2 confirmed the knife was the one recovered from the house of the Accused person.
21. PW 6 NO. SGT Ochieng Ombuor, gave her sworn testimony and stated that she is based at Mlolongo Police Station and was the arresting officer. On 17/7/2019 at around 11:40am she was at the station when Musembi Kioko went to lodge a report that his brother had been injured by the neighbor. She testified that her boss sent her with a colleague to rush to the scene as the members of the public were said to be baying for the blood of the assailant.
22. On arrival at the scene they found a large crowd trying to flush out the accused from a room in which she had locked herself. That the body of the deceased lay nearby and that they managed to secure the safety of the accused from harm. She interrogated her at the scene and the accused showed her the room where she could see blood drops leading to where the deceased lay. She testified further that she also recovered the knife which was the murder weapon with bloodstain on it and that she used some cotton wool to soak the bloodstains in accused’s house and later preserved the cotton wool.
23. On 22/7/2019 she accompanied the deceased’s parents to the hospital for post mortem conducted by Dr Ndegwa and she collected blood samples in a syringe for DNA analysis; that she prepared an exhibit memo form, recorded statements of witnesses and forwarded the exhibits to the Government Chemist for analysis. She identified the knife she recovered from the accused’s house MFI-3. - Exhibit 3.
24. In cross examination by the accused’s counsel, she testified that there was a large crowd at the scene hence the scene was not secured at all; that she collected blood samples from the blood drops on the floor of the accused’s house and handed over the exhibits to the Government Chemist and were returned to them after one year.
25. Hon D. K. Kemei J heard prosecution’s case – PW1, PW2, PW3, PW4, PW5 and PW6. This Court took over the proceedings on 6/10/2021 when the Court sought proceedings to be typed and availed to the parties/Counsel before directions were on how to proceed going forward.
26. On 15/12/2021 the Accused person confirmed receipt of typed proceedings. The provisions of Section 200 – 201 CPC were explained to the Accused Person by the Court Assistant Geoffrey and the Accused stated that the matter proceeds from where it had stopped.
27. On 23/03/2022 the Advocate on record Mr. Ogeto withdrew and the Accused’ Advocate Mr. Langalanga came on record and typed proceedings were to be availed. On 18/05/2022, the proceedings were typed and the defense received copies and further hearing scheduled on 26/07/2022.
28. On 26/07/2022, Dr. Peter Muriuki Ndegwa testified and produced Exhibit 1 – Post Mortem.
29. PW 7 Dr Peter Muriuki Ndegwa testified on oath and stated that he is working with the Ministry of Health as a pathologist and that on 22/7/2019 at Athi River Shalom Community Hospital Mortuary he conducted a post mortem examination of the deceased, the body having been identified by the deceased’s father. He stated that externally, the deceased had sharp penetration stab wound on the left chest wall 4 cm from the midline and length 5cm breadth 2cm and 8cm through the left clerical-collarbhone on the left side; further that internally, he had perforated sack that surrounds the heart and the right ventricle was also perforated and had blood; that the stomach had been stabbed and there



was leakage of stomach contents released to the heart; he testified that the 4th rib on the rib cage was fractured and he formed the opinion that the cause of death was due to exsanguination or haemorrhage due to chest injuries penetrating sharp force trauma consistent with assault.

30. The prosecution closed their case and parties were directed to file in court their written submissions on a case to answer and vide a ruling dated and delivered on 24th October, 2022 the court having considered the prosecution witnesses and submissions by both parties found that the accused be placed on her defense.

Defense Case

31. The Accused person in her defense opted to give sworn evidence.
32. DW 1 Peris Wangechi gave her sworn testimony and stated that on 17/7/2019, she was in the plot near Masai Court standing outside and basking in the sun; that the said Benson Musyoka Kioko (deceased) who she did not know and only saw him come and wash his clothes and ware and did not know him other than that. She further testified that she did not know what happened about the murder of the deceased.
33. On that day she saw the deceased come and he begun hurling insults at the people and she did not know who the deceased was abusing directly and that they were neighbors. Further, she said that she was not involved with him and the deceased begun to hurl insults and then he begun to beat her up. That she woke up and got inside the plot and he went on beating her and she asked the deceased what he was doing to her; testifying that she did not do anything to the deceased.
34. She testified that the deceased's brother came out and asked the deceased why he was being mean to her and the brother tried to separate him and the deceased and followed her to her house continuing beating her; that she screamed for help and that the deceased had a knife and attempted to knife her which she dodged and she pushed him away. That the deceased woke up and walked away threatening to kill her holding the knife.
35. The Accused person stated that she did not stab him and she did not murder him. That the police asked her to pick the knife and take it to police. She stated that she was defending herself from the deceased and had no problem with the deceased or deceased's family. She stated that she and the deceased had another confrontation in April, that year of her children throwing rubbish at her 'Kibanda' stall which she refused and that she did not know it and this created the grudge. She claimed that she did not know why the deceased started a fight with her that it is the deceased who started the fight; she asked the court to forgive her and that she did not intend the knife to stab the deceased. That she was defending herself and had no problem with the deceased at all.
36. In cross examination by Prosecution Counsel, she testified that on 17/7/2019 she was with the deceased that morning and that the deceased parents were her neighbors; she stated that the beginning of the problem is not that she did not respect deceased's mother. She further testified that PW.2 Denis Musembi who said had seen start the fight it is/was not true and that she disagreed; that after the incident she was not angry and that she did not take the knife and stab the deceased; that it is not true that the deceased was outside the plot. That the knife was found her house but she did not stab the deceased; she was alone.
37. On re- examination, she stated that the fight started outside the plot and they went into the plot and the deceased followed her home; that the deceased started the fight.



Submissions

Submissions By The State

38. Counsel for the state vide his submissions dated 14th February, 2023 framed the following issues for determination
- a. Was the accused involved in the murder of the deceased?
 - b. Did the accused have malice?
 - c. Was the accused identified appropriately?
 - d. Was the cause of death as a result of the injuries inflicted?
39. On Was the accused involved in the murder of the deceased, it was submitted that the testimony of PW2 clearly placed the accused person at the crime scene. The fact that PW 2 witnessed the deceased and the accused have a confrontation before the murder clearly showed malice on the part of the accused person. Urging that the blood trails from the accused house to the gate where the deceased body was discovered, clearly shows that she indeed inflicted injury to the deceased by stabbing him on the chest.
40. As to the issue of accused having malice, reliance was placed on Section 206 of the Penal Code which states that Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
27. It is evident that the accused had malice aforethought because she inflicted injury to the deceased by stabbing him with a knife.
28. As to the issue of accused identification, it was submitted that the accused was properly identified by PW 2 who saw her lock herself in her house. Also, PW6 arrested in her house.
29. On the issue of cause of death, it was urged that PW7 Dr Ndegwa formed an opinion that the cause of death was exsanguination due to chest injury due to penetrating sharp force trauma consistent with assault.

Reliance was placed on the case of Ronald Nyaga Kiura v Republic (2018) eKLR wherein paragraph 22 it is stated as follows:

“It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence



tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.”

30. Similarly in the case of *Ramanlal Trambaklal Bhatt v R* (1957) E.A 332 at 334 and 335 relied on by the state, the court stated as follows:

“It is may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

31. Reliance was further placed on the case of *R v Jagjiwan M. Patel and Others* (i) T. L. R (R) 85;

“All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply, its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion.”

32. It was submitted that the accused defense is a mere afterthought which cannot shake the prosecution’s cogent case. Contending that the PW2 clearly places both accused and deceased at the crime scene and that it was the accused who assaulted the deceased after the confrontation. Submitting that the prosecution has proved beyond reasonable doubt and the accused ought to be convicted contrary to Section 203 as read with Section 204 of the [Penal Code](#).

Accused Person’s Submissions

33. The submissions dated on 15th March, 2023 and filed on 16th March, 2023, the accused counsel raised an issue on whether the prosecution proved their case beyond reasonable doubt to warrant this court to convict the accused, it was submitted that prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused person herein murdered the deceased. Reliance was made on the case of *Woolmington v DPP* (1935) AC 462.

34. Averring that the standard of proof required of the prosecution is that of ‘beyond any reasonable doubt’ as it was held in the case of *Miller v Ministry of Pensions* (1947) 2 ALL ER 372.

35. It was the position of the accused that the offense of murder is defined under Section 203 of the [Penal Code](#) in the following terms; -

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

36. It was submitted the definition therefore means that for the prosecution to secure a conviction on a charge of murder, it has to prove beyond reasonable doubt the three ingredients against an accused person which ingredients are as follows

- a. The death of the deceased and the cause of death
- b. That the accused committed the unlawful act which caused the death of the accused



- c. That the accused had malice aforethought was held in the case of Jonson *Njue Peter v Republic* (2015) eKLR.
37. On whether the accused person committed the unlawful acts which caused the death of the deceased, it was contended that no eye witnesses testified to have seen the accused person stab the deceased hence no direct evidence to connect the accused with the commission of the offence. Urging that the only evidence which ought to be relevant is that of the person who witnessed the offence, opining that any evidence to the contrary is said to be hearsay evidence which according to the rule of evidence is inadmissible as evidence of stated fact as it was held in the case of *Kinyatti v Republic* (1984) eKLR.
38. It was submitted that the evidence of PW2 who claimed to have heard the deceased shouting that he had been stabbed by the accused amounted to hearsay and the same be disregarded.
39. On the issue of whether the accused had malice aforethought, it was averred that “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.” As it was held in the case of *Nzuki v Republic* (1993) KLR 171, quoted with approval in the case of *Johnson Njue Peter v Republic* (2015) eKLR.
40. It was contended that the accused having decided to go to her house after she had a quarrel with the deceased demonstrates that she did not have any intention to stab the accused hence prosecution failed to prove malice aforethought.
41. As to whether the accused has plausible defense and tenable, it was the contention that the accused gave a detailed explanation which was truthful submitting that it is in the testimony that the accused decided to enter her house and the deceased followed and started beating her. Urging that the accused went on to defend herself and, in the process, saw the deceased bleeding while the knife he was carrying was on floor.
42. It was submitted that the court acquits the accused under Section 306 (2) of the *Criminal Procedure Code* for having failed to prove their case beyond reasonable doubt as required by law.

Determination

43. The Court considered the Trial Court evidence on record, submissions filed and written submissions by the parties through Respective Counsel.
43. The issue for determination is whether the Accused person committed the offence of murder as prescribed by Section 204 *Penal Code* or not.
44. In *Republic v Mohammed Dadi Kokane & 7 Others* [2014] eKLR the elements of the offence of murder were listed by Hon M. Odero, L.J. as follows:-



- 1) The fact of the death of the deceased.
 - 2) The cause of such death.
 - 3) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly
 - 4) Proof that said unlawful act or omission was committed with malice aforethought.
45. As was stated by Hon. R. Nyakundi J. in *Republic v Ismail Hussein Ibrahim* [2018] eKLR:-
- “...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to prove his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution”
46. According to Lord Denning on what is proof beyond reasonable doubt in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated that:-
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
49. The fact of the death of the deceased was established by PW2 who testified on 17/7/2019 the deceased came from work and one Mbithi requested him to help repair his computer. Later the deceased came and began to quarrel with the Accused person asking her why she insulted his mother. The Accused person assaulted the deceased on the leg and he helped the deceased to the house. The Accused Person shouted that the deceased was a thief and later stabbed the deceased with a knife. He saw blood trail flowing from the Accused’s house towards the gate where on following the blood trail found the deceased lying down. He was stabbed on his chest.

The cause of such death.

50. PW.7 Dr. Peter Ndegwa testified that on 22/07/2019 at Athi River Shalom Community Hospital Mortuary he conducted post mortem examination of Benson Musyoka Kioko. Externally- the deceased had sharp penetration stab wound on the left chest wall 4 cm from the midline and length 5cm breadth 2cm and 8cm through the left clerical – collarbone on the left side. Internally – perforated sack that surrounds the heart and the right ventricle was also perforated and blood. The stomach had been stabbed and there was leakage of stomach contents released to the heart. The 4th rib on the rib cage was fractured. He formed the opinion that the cause of death was due to exsanguination or hemorrhage due to chest injuries due to penetrating sharp force trauma consistent with assault.

Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons.

51. PW2 stated that on 17/7/2019, he was home with the deceased his brother. The Deceased and Accused person quarreled. The Accused Person shouted that the deceased was a thief. PW2 witnessed the



- Accused person assault the deceased on the leg. Later the Accused person stabbed the deceased with a knife. He saw blood trail flowing from the Accused's house towards the gate where on following the blood trail found the deceased lying down. He was stabbed on his chest.
52. When the Police Officers arrived as PW6 testified she found the Accused person locked in a room as the crowd was trying to flush her out. PW6 recovered the knife that was blood stained and saw blood stain trail soaked the blood in a cotton wool. PW6 took the deceased's body to the Mortuary and later compiled the exhibits and took the Exhibit Memo Form.
53. PW.5 Lucy Warugira Wachira Government Analyst confirmed the analysis revealed that the knife (BMK1) and cotton wool (BMK 2) were moderately stained with blood of human origin. That the DNA profile generated from the bloodstains on the knife and on the cotton, wool matched the DNA profile generated from the blood sample on BMK3" which was from the deceased.
54. PW2 saw the Accused person who was not a stranger but a neighbor who quarreled with the deceased his late brother and she assaulted him on the leg and he helped him to the house. Shortly, he came out and found blood trail from Accused person's house to the gate and found the deceased lying down with a stab in the chest and he died. The last person with the deceased was the Accused person.
55. In *R v ECK, Lessit, J.* in analysis of the doctrine of the last seen with deceased alive stated: -
- “Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria: Court case of *Moses Jua v The state* (2007) (PELR – CA/11 42/2006.
- The court while considering the last seen doctrine held: -
- “Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.”
56. Although, there is no direct evidence of any witness who saw the Accused person stab the deceased. The deceased and Accused person lived in the same Plot. On the fateful day, the evidence adduced by PW2 and Accused person in her defense, confirms that the deceased and Accused person quarreled and fought. They were in close proximity and contact and it was in broad daylight. PW2 saw and heard the accused person and the deceased quarrel and saw her assault the deceased on the leg and he carried him to the house. Shortly thereafter, he found blood trail from the accused person's house towards the gate who was lying down with a chest stab wound and he died. The Police PW6 came to the scene and the knife was found /given to the Police from the Accused person's house. The knife was stained and the blood stains were confirmed to be the deceased's blood by PW5, the Government Analyst. The blood stains collected from the Accused person's house and soaked in cotton wool was also confirmed by PW 5 upon analysis to be the deceased's blood. The totality of the evidence above depicts the Accused person's presence and involvement in a tussle with the deceased that resulted with his death. This is sufficient circumstantial evidence to lead to the only reasonable and logical conclusion that the Accused person's unlawful act of stabbing the deceased in the scuffle caused the deceased's death.



57. In *Abanga Alias Onyango v Rep* CR. A No.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.” Proof that said unlawful act or omission was committed with malice aforethought.

Proof that said unlawful act or omission was committed with malice aforethought.

58. Section 206 of the *Penal Code* sets out the circumstances which constitute malice aforethought 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 caused death or to do grievous harm to any person whether such 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 such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.
- (c) An intention to commit a felony.
- (d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

59. The Court of Appeal in *Nzuki v Republic* [1993] KLR 171 held that:

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.



It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman v Director of Public Prosecutions (1975) AC 55". (emphasis added).

60. The circumstances surrounding the death of the deceased indicate that the accused person and deceased were neighbors and there seemed to be a simmering hostility between the 2 families. The evidence by PW2 brother to the deceased and PW4 & PW5 father and mother of the deceased confirmed that as neighbors there was simmering dispute between the neighbors.
61. The evidence by PW2 confirmed that the Accused person quarreled with the deceased on 17/7/2019 and the deceased asked the accused person why she abused his mother. PW2 saw the accused person assault the deceased on his leg. He assisted the deceased to the house. The accused person called him the deceased a thief. PW2 later saw blood trail from the Accused person's house to the gate where PW2 found his brother the deceased lying on the ground and he had a stab wound on the chest. PW6 came in and found the accused person and in her room was the knife with blood stains and PW6 took blood stain soaked in cotton wool.
62. The accused person was the last person with the deceased on the fateful day. The Accused person and the deceased were not strangers but neighbors and had running dispute as stated by the deceased's mother PW4 regarding issues of the Accused person of throwing rubbish thrown outside the gate and the Accused person throwing the deceased's clothes from the hanger. On the fateful day, the circumstances depicted the Accused person and deceased quarrelling as usual but this time when PW2 left them the deceased was stabbed on the chest, the knife was found in the accused's house by PW6 with blood stain and some bloodstain was found in her house and soaked in cotton wool and PW5 confirmed it was deceased's blood.
63. The accused person in her sworn statement in her Defense claimed that she did not know the deceased but the claim was controverted by PW2 PW3 & PW4 that they were neighbours and quarreled often.
64. The Accused person testified that it is the deceased who hurled insults at her abused her and followed her to her house and beat her and she did not do anything but she screamed for help and tried to defend herself as the deceased wanted to kill her and had a knife.
65. If the Accused person was threatened , abused and beaten up by the deceased who threatened to ill her and followed her to her house, she did not report to the Police she was abused harassed threatened and beaten up by the deceased. The accused person who screamed for help as alleged seemingly no one came to her rescue. Already the accused person had assaulted the deceased on the leg earlier and he did not stab the Accused person if he had the knife as alleged he would have stabbed her then.
64. Strangely, there was no sign of commotion in her house, PW6 only noticed bloodstain and the knife no evidence of commotion was shown. The Accused person did not report the alleged assault to the police, seek medical care in any hospital nor have/produce medical report P3 Form filled in. All these circumstances are inconsistent with the Accused person's claim as it is not borne out by any evidence on record. No witness testified to this alleged insults and/or assault by the deceased. The accused person's defense is a denial.
65. However, the events that led up to the death of the deceased, the circumstantial evidence cumulatively place the Accused person at the scene of the crime and the Accused person and deceased were known to each other as neighbors and in close proximity and had a quarrel. The Accused person assaulted



the deceased on the leg and PW2 left him with the deceased shortly thereafter the deceased had a stab wound and did not survive. The totality of the evidence does not depict malice aforethought, intention to kill the deceased. The mens rea has not been proved based on the facts/evidence on record.

66. The Court is not satisfied that malice aforethought has been established in terms of Section 206 of the Penal Code despite the circumstantial evidence that prove the Accused person caused the deceased's death. A life is lost but based on the evidence in totality, I am unable to find that the ingredients of murder have been proved.
67. Section 9(3) of the *Penal Code* stipulates that unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility. Section 179 of the *Criminal Procedure Code* provides-
- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
 - (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Disposition

68. In the premises, I reduce the charge of murder to manslaughter. The accused is 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*.

Judgment accordingly.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 15/6/2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In The Presence/absence Of:

Ms Peris Wangeci Murage – Accused – Absent

Mr.Langalanga for the accused – Absent

Mr. Mwongera for the state

Geoffrey/Patrick – Court Assistant(s)

COURT: The Accused person is in Machakos women Prison.

Further Mention on 20/06/2023.

M.W.MUIGAI

JUDGE

