



**Republic v Njambi (Criminal Case 1 of 2019)  
[2024] KEHC 13258 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL CASE 1 OF 2019  
MW MUIGAI, J  
OCTOBER 25, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BARBRA NJAMBI ..... ACCUSED**

**JUDGMENT**

**Background**

- The information on the Charge Sheet dated 4<sup>th</sup> January,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:  
Barbra Njambi on 24<sup>th</sup> December,2018 at Mlolongo Estate, in Athi River Sub- County within Machakos County murdered Rosebella Nasimiyu.
- The mental assessment report dated 11/2/2019 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.
- The hearing took off and the Prosecution called a total of Six (6) witnesses .  
This matter/hearing commenced before Hon D. K. Kemei – J  
Vide Ruling of 16/10/2019 the Accused person was denied bond/bail with the right to renew application for bond/bail. Bond of Ksh 500,000/with 1 surety was granted on 14/5/2020.



## Prosecution's Case

4. PW1 Martin Malaka Wamalwa testified that on 19<sup>th</sup> December 2018 he was informed by Veronicah Kere who was the deceased sister that the deceased was admitted at Kenyatta Hospital following a stabbing incident by unknown person. He stated that on 23<sup>rd</sup> December 2018 at 6pm, he received a call that the deceased had succumbed to her injuries. He then stated that he was present during the post-mortem exercise which was conducted on the 31<sup>st</sup> December 2018 and he was able to positively identify the body.

5. On cross examination he said that he identified the body of the deceased on 6<sup>th</sup> and was present when post mortem was conducted but did not have chance to speak to the deceased before her death.

This Court took over the matter applied Section 200-201 CPC and the Accused person decided to proceed from where the matter stopped after 1 witness testified.

6. PW.2 Caroline Lemba Matende testified that on 14<sup>th</sup> December 2019, she was at the 1<sup>st</sup> floor of High Class Bar/Guest House and the Accused person and deceased were her friends and they worked at the said establishment.

7. On 14/12/2018 during midday they were drinking downstairs when the accused and the deceased ordered for some food and an argument ensued out of the said food. PW2 stated that the accused, deceased and Shiro (PW4) had argued and fighting ensued, the accused then went up to her room on 3<sup>rd</sup> floor, Shiro and the deceased beat up the Accused person. They followed the Accused to her room while telling her to pay for the food. PW2 stated that the accused refused to pay for the food and Shiro pushed the accused as she wanted them to fight. The Accused person refused to pay for the food and she wanted money for her room.

8. PW2 testified that the Accused person came downstairs and Shiroh and the deceased met the Accused person on 1<sup>st</sup> Floor and Shiroh pushed 'Maggie' the Accused person and the Accused was dressed in a 'dera' long wide dress and she did not seem as if she had anything but had a knife hidden in the 'dera.'

9. PW2 testified that the deceased insisted on payment for the food. The accused took a knife and stabbed the deceased in the hands removing it from deceased's ribs and wanted to stab her again but Shiroh bent down and held the knife and snatched the knife.

Victoria Ndunge came to the scene and helped take the knife

and she saw the Accused person with the knife in her however she managed to disarm her. The deceased was then rushed to hospital as she was bleeding profusely. PW2 took a leso wrapped the deceased and took her to hospital and she was accepted at Shalom hospital. PW2 identified the knife that was used during the incident.

10. On Cross Examination by Mr. Langalanga for the Accused person, she stated that the deceased and the accused were drinking downstairs and that the accused and the deceased were friends. The accused was the one who had paid for the deceased's room. She further confirmed that it was the deceased and Shiro who followed the accused and that she did not see the knife.

11. PW3 Victoria Ndunge testified that on the 14<sup>th</sup> December, 2018 at around 2pm she was seated in her room on the 1st floor when she heard noise coming from the stairs in the guest house. She came out and found Shiroh and told her of the fight downstairs. She locked herself in her room. Later she heard noises and on coming out she found the deceased Nasimiyu, Shiroh and the Accused Maggie/Barbara. She asked what was the problem, they said the Accused Maggie refused to pay money and she told them she was drunk to let her sleep then ask her later. They refused. She did not know who had the



- knife but heard that the deceased had been stabbed and was bleeding. She suddenly saw the accused holding a knife and witnessed her try to stab Shiru while she was able to disarm her, her fingers were injured. The deceased was bleeding around her ribs. She saw the knife on Rossie (deceased) who was stabbed by Maggie, the Accused person. PW3 identified the knife as exhibit in Court.
12. On Cross Examination by Mr. Langalanga for the Accused person, she told the Court that the accused and the deceased were friends and the accused had stayed at the High Class Bar & Restaurant for six months. The deceased Rossie came from home and the Accused Maggie paid for her house that morning. Earlier, the Accused person, Shiru and deceased were drinking together downstairs. She stated that she did not witness who stabbed the deceased.
  13. PW4 Priscilla Wanjiru Mwangi testified that on the 14<sup>th</sup> December 2018 at around 2pm she was at the High Class Club in the company of the deceased waiting for food which they had ordered as they were taking photographs on the Ground Floor. She stated that Barbara Njambi, the accused came and started disrupting them while they were taking photographs by abusing them. She told the accused to stop abusing her and decided to give her space by leaving, but the accused insisted on following her. The accused pointed her finger on her neck telling her she will cut her on her head. She stated that she got furious and pushed the Accused person away from her and the deceased Nasimiyu came between them so as not fight.
  14. The deceased separated them. The food which they had ordered was brought to the table, the deceased Nasimiyu said the food was not properly cooked and Maggie, the accused pushed the plates which food scattered on the floor and she then left and went upstairs. She stated that they then followed her to demand for the payment of the spilled food.
  15. They met at the staircase and upon confrontation, a fight broke out. She said the Accused person refused to pay for the food and she (the Accused) then removed a knife and stabbed the deceased on her left rib which prompted PW2 to intervene to prevent the accused from stabbing her too in which event PW2 was injured on her right hand fingers. She rushed the deceased to Shalom Hospital while bleeding profusely from her left rib. PW4 saw the Accused person stab the Deceased and identified the knife in Court as exhibit. She said they all worked together at the Guest house for 8 months.
  16. On cross examination she stated that on 24/10/2018 they went to High Class Bar and were drinking. It was the accused person who went to where they were sitting and they left. They went to the Accused person not to fight but to ask her to pay for the food she poured.
  17. PW5 PC Josephine Njoki testified that on 15<sup>th</sup> December, 2018 at around 10 am while on duty at Mlolongo Police Station, the deceased came in the company of PW4 who reported that she had been stabbed at the left rib by the accused. She stated that the deceased narrated to her what transpired on the 14<sup>th</sup> December, 2018 and she booked the report in the occurrence book and recorded the statement of the deceased and PW4 and later arrested the accused person and released her pending investigation.
  18. On 26<sup>th</sup> December 2018, she received a report that the deceased had succumbed to the injuries in Kenyatta Hospital. On 26<sup>th</sup> December 2018, she escorted the accused to Mavoko Law Courts where she had filed a miscellaneous application to detain her for 7 days. On 2<sup>nd</sup> January 2019, postmortem examination was conducted at Kenyatta Hospital, she later escorted the accused to Machakos High Court to be charged for the offence of Murder.
  19. On cross examination she stated that she found the accused person and the deceased who were sex workers. She came to learn that they were fighting for a man. She did not know if it was true as she did not see the man. At the time they went to the police station Priscilla and Rosebella were not drunk it was during the day. She could not tell if they were drunk or not. The guest house was upstairs and each



one of them had their room upstairs. Barbra was at the corner and she was informed that the accused person returned to her room upstairs. Priscilla and Rosebella were going to their rooms upstairs. She did not find out how the accused person assisted the deceased. They went as sex workers and left. There was no relationship

20. PW6 Dr. Obiero Okoth testified that he was a pathologist and had the post-mortem report of Rosebella Nasimiyu. The Post Mortem was conducted in Kenyatta National Hospital and the body was identified by Amos Nyongesa and Isaac Nyongesa. The circumstances of death are as per the report by the police the deceased was stabbed by known lady and she was taken to Shalom hospital and later to KNH where she died being treated. On 31/12/2018, 4 pm the Post Mortem was conducted; the body was of a female African in good physique and nutrition. The body was refrigerated and the deceased had been treated there was a test tube on the left side/stab wound/incision which was stitched.
21. The main incision of the stomach and it was septic and infected and pus was from the abdominal tube with faecal matter and pus. The right side were pieces of intestines. The left lung collapsed with peral infusion. A gastronomic tube was used to drain the stomach content/bile and there was obstruction in the infected areas. Urinary system was swollen and she was bleeding but was intact. She was pregnant at the time of death. Head brain spinal cord was intact. There was an infection at the stab wound. Stab wound from chest to stomach and abdomen causing bleeding and blood clots. He formed the opinion that the Stab wound from the chest to the stomach abdomen causing bleeding and blood clots. He signed the report and produced the Post mortem Report.
22. On cross examination he stated that the cause of death was stab wound and he reiterated that the cause of death.
23. The prosecution closed their case and parties were directed to file in court their written submissions on a case to answer and vide Ruling dated and delivered on 24<sup>th</sup> October, 2022 the court having considered the prosecution witnesses and submissions by both parties found that the accused was placed on her defense.

### **Defense Case**

24. The Accused person in her defense opted to give sworn evidence.
25. DW 1 Barbra Njambi gave her sworn testimony and stated that she was a casual laborer working at Mlolongo and that she knew Rosebella the deceased as her friend. On 15/12/2018, she was at the High Class Club Mlolongo drinking with the deceased and others and spent the night there. The next day at 2pm Rosebella was sick. She wanted to eat food and refused to share and that everyone was to buy their own food. Rosebella, the deceased & Shiro started to fight her. She went upstairs to sleep in Room 34 while Rosebella and Shiro were in room 32. As she was heading upstairs she felt she had been pulled back. She found Rosebella, Shiro and others and they fought again. She heard/saw that Rosebella was bleeding profusely that she had been stabbed by a knife.
26. All of them took Rosebella to the hospital at Athi River she was to be admitted but she refused and they all went back. She did not work she rested in her room. On 19/12/2018 she went to her room. She was now in Thika and on 24/12/2018 she had been called that Rosebella was very sick and had been taken to Athi River hospital and they refused to admit her and referred her to Kenyatta National hospital and underwent surgery but died after the surgery. Rosebella and her were friends and had never had a problem. She heard the evidence in court and the evidence was not true that she stabbed the deceased. They only quarreled and fought but she did not have a knife. She was drunk and they all drunk alcohol. She asked that the court acquit her as she did not commit the offence.



27. On cross examination she told the court that they all fought about food. They exchanged words and physically fought. She denied having a knife. They were all drunk.

## **Submissions**

### **Submissions By The State**

28. Counsel for the state vide his submissions dated 16<sup>th</sup> July,2024 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?
29. On Was the accused involved in the murder of the deceased, it was submitted that the testimony of PW1, PW2 and PW4 clearly placed the accused person at the crime scene. They all worked at High Class Lodging in Mlolongo. They had a first account when the accused removed the Knife to stab the deceased on the chest and was disarmed. They adduced direct evidence as they witnessed the altercation that led to the stab of the deceased by the Accused person. The knife was recovered at the scene and was produced in Court as exhibit.
30. As to the issue of accused having malice afore thought Section 206 of the Penal Code which provides 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.
23. In the present case it is evident that the accused person had malice aforethought because she inflicted injury on the deceased by stabbing the deceased with a knife.
24. As to the issue of accused identification, it was submitted that the accused was properly identified by PW1, PW2 and PW4 vide direct evidence. The evidence on record confirmed that the deceased and Accused person and the witnesses were known to each other, they worked and lived together in the High Class Bar/Guesthouse. They knew each other well enough. On the fateful day, they were at the Guest house, they witnessed the altercation between the deceased and Accused person and one Shiroh stated that a scuffle ensued they parted ways. Shortly thereafter, the Accused person went downstairs, the deceased and Shiroh came upstairs and the Accused person stabbed the deceased. The deceased was rushed to hospital and she succumbed to her death.



25. On the issue of cause of death the PW.6 Dr. Obiero Okoth the Pathologist testified that he conducted the Post mortem and filled the Post Mortem report produced as Exhibit 2. The deceased was identified by PW1 The Post Mortem Report contains findings of the said Post mortem examination. He was the one who conducted it and concluded that the cause of death was peritonitis secondary to penetrating abdominal and chest injury consistent with stab wound.
26. It was submitted that the evidence tendered by the prosecution witnesses and the postmortem form produced as exhibits sustains the charge of murder and the case had been proved beyond reasonable doubt thus the prosecution had discharge their burden of proof and prayed that the court finds the accused guilty of the offence of murder.

### **Accused Person's Submissions**

27. The submissions dated on 16<sup>th</sup> July, 2024, 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 vs DPP (1935) AC 462*.
28. 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 vs Ministry of Pensions (1947) 2 ALL ER 372*.
29. 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.”
30. 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 Vs Republic (2015) e KLR*.
31. On whether the accused person committed the unlawful acts which caused the death of the deceased, reliance was placed of *Republic vs Stanley Muthike Tiire(2018) eKLR* to buttress the point that it was the duty of the prosecution to prove their case beyond reasonable doubt.
32. It was submitted that the evidence of the entire prosecution's case was based on pure circumstantial evidence without any direct evidence linking the accused to the death of the accused. Reliance was made to the case of *Abanga alias Onyango v Rep CR A No 32 of 1990* on circumstantial evidence. Reliance was also made to the case of *Republic vs Danson Mgunya[2016] eKLR*
33. it was submitted that in this case there is no eye witness who saw the accused stabbing the deceased and that both mens rea and actus rea essential elements of a murder conviction had not been proved beyond reasonable doubt. Reliance was made to the case of *Republic vs Stanley Muthike Tiire (2018) eKLR*



34. 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.
35. As to whether the accused has plausible defense and tenable, it was the contention that the accused gave a detailed explanation which was truthful and corroborated by prosecution witnesses.
36. 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**

37. The Court considered the Trial Court evidence on record, submissions filed and written submissions by the parties through Respective Counsel.
38. The issue for determination is whether the Accused person committed the offence of murder as prescribed by Section 204 Penal Code or not.
39. In Republic vs. 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.
40. As was stated by Hon. R. Nyakundi J. in Republic vs. 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”
41. According to Lord Denning on what is proof beyond reasonable doubt in Miller vs. 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.”

The fact of the death of the deceased was established by PW.2 Caroline Lemba Matende. On 14/12/2018, PW2 testified that the deceased insisted on payment for the food. The accused took a



knife and stabbed the deceased in the hands removing it from deceased's ribs and wanted to stab her again but Shiroh bent down and held the knife and snatched the knife.

PW3 suddenly saw the accused holding a knife and witnessed her try to stab Shiru while she was able to disarm her, her fingers were injured. The deceased was bleeding around her ribs. She saw the knife on Rossie (deceased) who was stabbed by Maggie, the Accused person.

& PW4 stated that they met at the staircase and upon confrontation, a fight broke out. She said the Accused person refused to pay for the food and she (the Accused) then removed a knife and stabbed the deceased on her left rib which prompted PW2 to intervene to prevent the accused from stabbing her too in which event PW2 was injured on her right hand fingers.

#### **The cause of such death.**

43. Pw6 Dr. Obiero Okoth testified that he was Pathologist and conducted post mortem on the deceased on 31/12/2018. The deceased was identified by relatives, sister, father/uncle and Cousin. He filled the Post-mortem report of Rosebella Nasimiyu. The cause and the circumstances of death are as per the report by the police the deceased was stabbed by known lady and she was taken to Shalom hospital and later to KNH where she died being treated/undergoing surgery. The stab wound from chest to stomach and abdomen was causing bleeding and blood clots. He signed the report and produced the Post mortem Report. He formed the opinion that the cause of death was due to Peritonitis secondary to penetrating abdominal and chest injury consistent with the stab wound.

#### **Proof that the deceased met her death as a result of an unlawful act or omission on the part of the accused person.**

44. PW2 stated that on 14<sup>th</sup> December 2019, she was at the 1<sup>st</sup> floor when the accused and the deceased ordered for some food and an argument ensued out of the said food. She stated that the accused, deceased and Shiru (PW4) had argued to the point of fighting, the accused then went up to her room on 2<sup>nd</sup> floor, Shiro and the deceased followed the accused to her room while telling her to pay for the food. She stated that the accused refused to pay for the food and Shiro pushed the accused as she wanted them to fight. She testified that the deceased was not holding anything however came to realize later that she had hidden it in her dress. She testified that the accused took a knife and stabbed the deceased however she managed to disarm her. The deceased was then rushed to hospital as she was bleeding profusely .
45. Pw3 Victoria Ndunge testified that on the 14<sup>th</sup> December, 2018 at around 2pm she was seated in her room No.8 on the second floor when she heard noise coming from the stairs in the guest house. She went there and found the deceased, accused and Shiru arguing and that from the argument, a fight ensued. She tried to separate them. She suddenly saw the accused holding a knife and witnessed her try to stab Shiru while she was able to disarm her, her fingers were injured. The deceased was bleeding around her ribs.
46. Pw4 Priscilla Wanjiru Mwangi testified that on the 14<sup>th</sup> December 2018 at around 2pm she was at the High Class Club in the company of the deceased waiting for food which they had ordered. She stated that the accused came and started disrupting them while they were taking photographs by abusing them. She told the accused to stop abusing her and decided to give her space by leaving but the accused insisted on following her. The accused pointed her finger on her neck telling her she will fuck her on her head. She stated that she got furious by the accused pushing her and she pushed her back. The deceased separated them. The food which they had ordered was brought to the table and the accused pushed the plates which scattered on the floor and she then left. She stated that they then followed her to demand for the payment of the spilled food. They met at the staircase and upon confrontation, a fight broke out. She alleged that the accused then removed a knife and stabbed the deceased on her left



rib which prompted PW2 to intervene to prevent the accused from stabbing her too in which event PW2 was injured on her right hand fingers. She rushed the deceased to Shalom Hospital while bleeding profusely from her left rib

47. It is not in dispute that the accused person and her friends including the deceased had a fight over food. And the accused was the last person to be seen with the deceased.
48. In R vs. 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 vs. 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.”

49. Therefore, evidence of the deceased’s stabbing by the accused person was/is confirmed by 3 witnesses above mentioned. They all lived worked together at High Class Guest House Mlolongo and on the day of the incident PW2 PW3 & PW4 and the Accused person were together. These facts confirm recognition of the Accused person as one who stabbed the deceased and she later succumbed to her death. The knife was recovered and produced as exhibit in Court and was identified by PW3 &4 as the knife used by the Accused person on the fateful day.

The deceased and Accused person were in the same bar. 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 later witnessed the fight and stab by Accused person on deceased.

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

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.

52. The Court of Appeal in *Nzuki vs. 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;
- ii. 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 vs. Director of Public Prosecutions (1975) AC 55*”. (emphasis added)

53. *Anthony Ndegwa Ngari Vs Republic / Respondent*

Court of Appeal 352 of 2012 *Visram Koome Odek JJA* observed;

Based on the foregoing, there has to be intent to cause harm or death or knowledge that an act can cause death or injury on the part of the accused person. Did the evidence establish the requisite mens rea on the part of the appellant? We have perused the judgment of the lower court and note that despite the learned Judge mentioning the issue of the appellant being drunk, there was no finding on the same; also on whether the appellant was in a position to form a specific intention to kill (mens rea).

Section 13(4) of the Penal Code provides:-

“Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”

54. In *Said Karisa Kimunzu –vs- Republic- Criminal Appeal No. 266 of 2006*, this Court held,

“But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial



Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son."

55. See also Julius Obare Angasa-vs- Republic – Criminal Appeal No. 271 of 2008 David Munga Maina –vs- Republic [2007] eKLR,
56. The circumstances surrounding the death of the deceased indicate that the accused person and deceased were friends and were drinking together and had in fact quarreled over food. The accused in her testimony also admitted that they had indeed quarreled and even fought over food.
57. The accused person in her sworn statement in her Defense claimed that they were drinking alcohol and that indeed they had an argument over food and ended up fighting.
58. The accused person's defense is denial of the offence that she was not the one who stabbed the deceased with a knife which caused the stab wound that would lead to the death of the deceased.
59. The Prosecution remains with the onus of proof beyond reasonable doubt of the commission of the offence of murder. This Court is satisfied from the evidence on record adduced by PW2 PW3 & PW4 which was direct evidence that on the fateful day, they quarreled and were involved in a fight that later escalated with the Accused person stabbing the deceased and in her Defense stated that they fought her. It was also conceded that all the girls/ladies had spent time together drinking and as the Accused person ordered food the other girls including deceased wanted to partake and she refused that each was to buy own food. The accused hit the plate and food poured. The deceased was asked to pay and she refused. A quarrel started that ended up in a fight and culminated with the stabbing of the deceased by the accused person.
60. 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. The Girls were drinking and could contribute to the capacity to have an intention malice aforethought by the Accused towards the deceased, there was a fight and the Accused acted in defence and events thereafter, the deceased died while undergoing treatment. The mens rea is difficult to discern in the circumstances.
61. 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.
62. 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**

63. 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.

**JUDGMENT DELIVERED SIGNED & DATED ON 25/10/2024 IN OPEN COURT AT MACHAKOS HIGH COURT. (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

