



**Republic v Jadi & 2 others (Criminal Case 49 of 2018)
[2024] KEHC 12804 (KLR) (Crim) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 49 OF 2018**

**K KIMONDO, J
OCTOBER 24, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

FAITH JADI 1ST ACCUSED

WESLEY SAMUEL 2ND ACCUSED

PETER GICHIMU KIARIE ALIAS MUHIMU 3RD ACCUSED

JUDGMENT

1. Dominic Nambili Isaya (hereafter the deceased) was last seen alive on 2nd September 2018 at a bar styled Texas Club. On 6th September 2018, his lifeless body was found floating in a dam at Dam Village, Mountain View Area, Nairobi not too far from the pub. It was badly decomposed but with a visible injury at the back of the head.
2. The three accused persons were among the prime suspects. The 1st accused was employed at the bar while the 2nd and 3rd accused patronized the establishment on the date the deceased disappeared.
3. The Republic brought information to the High Court charging them jointly with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on the night of 2nd September 2018 at Dam village, Mountain View Area, Dagoretti Sub-County within Nairobi County jointly with others not before the court, they murdered the deceased.
4. They all pleaded not guilty. The prosecution called ten witnesses. The first was the deceased's brother, Ronald Mambili Isaiah (PW1). He testified that on the night of 2nd September 2018 he found the deceased at Texas Bar. PW1 had gone there to watch a football match and was not imbibing alcohol. He said the deceased got into an argument or disagreement with an unidentified woman who was vending



- bedsheets at the bar. The 1st accused hit the deceased with a beer bottle on the head. The other woman also threw a bottle at him and hit him on the head.
5. The witness said that the 2nd and 3rd accused intervened in the struggle and beat up the deceased. The deceased then ran out of the bar with three men chasing him. PW1 did not try to assist his brother or venture outside as he claimed he was down with malaria. The following day and the next one, he looked for the deceased in vain. On 5th September 2018, a formal report of a missing person was recorded at Kabete Police station. On 6th September 2018, the body was discovered in the dam.
 6. PW2 was Brian Irako. His version of events was largely similar to that of PW1. He added that the bar was small; the size of the courtroom 4 at Milimani; and, that there was electric lighting. He was emphatic that he saw the 1st accused emerge from the counter and throw a beer bottle at the deceased which hit him on the back of the head. When the fight ensued, he saw the 2nd accused, the 3rd accused and another man hitting the deceased with fists and kicks. They then chased him outside the bar.
 7. PW3 was Silas Munyao. He was the proprietor of the bar. He confirmed that the 1st accused was employed at the counter. The bar had “three florescent lights and other blinking lights”. There was also a security light outside. On the material night at about at 9:30 p.m., the 1st accused called him to say that the deceased was disturbing customers or pouring beer on them.
 8. PW3 knew the deceased and asked the 1st accused to calm him down or report the matter to the police. She later told him that the deceased left with his brother. when he got to the bar later, everything seemed to be okay. He said that after three days, the 1st accused left employment without demanding her wages.
 9. The next witness was Stephen Shipanzi (PW4). He was the area chairman of Nyumba Kumi. PW1 had informed him of the incident. He was later informed by his assistant that a body was discovered floating in the dam. He informed the OCS Kabete who advised him to wait for the scenes of crime officers.
 10. Corporal Silas Kiprof Tekendai (PW7) was one of the police officers at the dam. Members of public helped the police to retrieve the body out of the water and identified it as that of the deceased.
 11. There is then the evidence of Corporal Jennifer Jepkosgei Sirwa (PW10), a scene of crimes officer and in charge at Dagoretti Office. She produced a series of 15 photographs (exhibits 5 (a) to (o)) taken at the bar and the dam on 6th September 2018 at about 16.00hrs. They were all printed and supervised by her colleague, Gatheca, who also made a certificate (exhibit 6) and a report dated 1st October 2018. The defence had no objection to the production of the photographs or certificate.
 12. The pathologist was Dr. Grace Atieno Midigo (PW5). She testified that the body had been in the water for long and had decomposed: The entire body had skin slippage and the lung and heart were rotting. There was also water in the stomach.
 13. In cross examination, she opined that there was a possibility that the deceased drowned in the dam because to “swallow water one must be conscious...a body thrown in water when dead one cannot swallow water”. The witness said there were internal injuries on the brain. She produced the autopsy report (exhibit 1). Her final opinion was that the deceased died from “head injury due to blunt force trauma”.
 14. Wycliffe Nyaberi (PW6) confirmed that on the material night, he, the 2nd and 3rd accused were at the bar and that the 1st accused was serving customers from the counter. The deceased as well as another man called Patrick were also there. PW6 left at some point to drive a matatu. When he returned at about 10:00 p.m., he found broken glasses and bottles near the counter and some bloodstains. When he enquired, Patrick told him that a customer was beaten by other customers.



15. PW8 was Chief Inspector Anne Kamama. On 25th September 2018, she conducted an identification parade at Dagoretti Police Station. She said the accused persons were in the cells and she explained to them about the parade. Some of the participants were drawn from the cells and “largely looking alike to accused”. On the three separate parades she got 9 persons including the accused – all were male and looking alike to the accused. She filled out the respective ID Parade Forms for all the three accused. The three signed the respective forms and said they were satisfied with the exercise.
16. An objection was raised by the defence. I found that the witness used the same group of participants to identify all the three accused. For reasons on the record and the fact that the 1st accused is a woman; and, that her position in the line-up or the gender of the participants was unclear, I declined to admit the parade forms for the 1st and 2nd accused. I however admitted that of the 3rd accused as exhibit 2. I will return to this issue in the course of this judgment.
17. Chief Inspector Zacharia Yegon (PW9) was the investigating officer. In cross examination, he stated that the deceased was attacked by the 1st, 2nd and 3rd accused. The 1st accused hit him with a beer bottle on the head while the 2nd and 3rd accused used kicks and blows. A lady hawking some clothes also attacked the deceased. The witness could not tell if deceased fought back.
18. When the accused were placed on their defence, they distanced themselves from the murder. The 1st accused (DW1) stated on oath as follows-

[The deceased] came at 5:00 p.m. and asked for take –away drink. He said he would return at 9:00 p.m. to watch a foot-ball match. He returned when he was intoxicated and making noise. Some customers near the door asked him what the matter was but he said he would make as much noise as he wanted. He came to the counter and bought alcohol for 100/=.

As he left, he bumped into (hit) Rebecca (Becky) as they passed each other. Deceased asked why Becky bumped into him. He pushed her to the door, she stumbled onto a table knocking off some glasses and alcohol. The customers were annoyed and started beating deceased. They were 5 men.
19. The 1st accused testified that after the commotion, the deceased left with his brother (PW1). She said the bar had many patrons that night and is lit by coloured lights. She said she was at the counter and did not hit the deceased as alleged by some witnesses. The bar closed for the night at 2:00 a.m., and she spent the night there.
20. The 2nd accused (DW2) on the other hand stated that when he arrived at the bar, he found a fight going on. He bought some alcohol and stepped outside near the shoe shine stand. When the scuffle ended, he went back inside, drunk some alcohol and went home.
21. The 3rd accused (DW3) on the other hand testified in the material part-

I got to mountain view at 10:30 p.m. and entered Texas Bar. I found a small commotion. I asked for Kibao beer and sat down. A fight ensued. A lady selling bed-sheets was having an argument with deceased and other customers. Deceased left with 2 persons. I stayed in the bar until 1:00 a.m. when I went home and slept. The bar had “snake lights” inside, a bulb at the counter and security lights outside. I also went to the bar on 4th & 5th September 2018. I heard the deceased was found in the dam.
22. Learned counsel for the accused lodged final submissions dated 23rd July 2024. It was submitted that the deceased was attacked by unidentified persons in the bar. While all the accused admitted being at the establishment, counsel contended that they were not positively identified as the assailants; and, that



- the identification parade conducted by Chief Inspector Kamama (PW8) was counterfeit. He argued further that the body was recovered in a dam far away from the bar. This, combined with the evidence of the pathologist, meant that there were glaring gaps in the evidence; and, that no one can tell for certain what caused the death.
23. I take the following view of the matter. The burden of proof that the accused murdered the deceased lay squarely with the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.
 24. Section 203 of the Penal Code provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
 25. There are three key ingredients that must be present: first, the prosecution must prove beyond reasonable doubt the death of the deceased and the cause of that death; secondly, that the accused committed the unlawful act that led to the death; and, thirdly, that the accused was of malice aforethought.
 26. There is no doubt about the death of the deceased. His lifeless body was retrieved from the reservoir by the public. This was witnessed by a number of witnesses including PW4, PW7, PW9 and PW10. The brother of the deceased (PW1) also identified the body. Doubt of the death is completely erased by the post mortem report (exhibit 1) produced by Dr. Grace Atieno Midigo (PW5). In the opinion of the pathologist, the death resulted from “head injury due to blunt force trauma”.
 27. From that evidence, I readily find that the death was unlawful. The next question then is whether the Republic proved beyond reasonable doubt that the accused, of malice aforethought, killed the deceased.
 28. All the accused admitted in their defence that they were at Texas Bar on the material night and witnessed a fight in which the deceased was attacked and thrown out of the premises. They however denied assaulting the deceased, chasing him out towards the dam or in any way involved in his murder.
 29. The location of all the accused at the locus in quo was confirmed by PW6 who said that he was with both the 2nd and 3rd accused persons at the bar; and, that the 1st accused was serving customers from the counter. When he returned later to the bar he found it littered with broken glasses and bloodstains near the counter. When he enquired, Patrick told him that a customer was beaten by other customers.
 30. The lines of defence adopted by all the accused are unbelievable in for a number of reasons. Firstly, there was no evidence that any of the accused persons was acting in self-defence. The deceased was obviously drunk, noisy and perhaps a nuisance to other patrons. He pushed a lady who was hawking clothes onto a table spilling some beers. The reaction by the accused and their accomplices was to assault the accused with beer bottles, punches and kicks which left him bloodied.
 31. Secondly, the 1st accused lied to the proprietor of the bar that after the commotion, the deceased left in the company of his brother (PW1). It was a white lie because PW1 remained behind. Thirdly, it is equally telling that three days after the incident, the 1st accused left employment at the pub without even demanding her wages. All those are pointers to a guilty mind.
 32. Fourthly all the defences by the accused must be weighed against the clear evidence of Ronald Mambili (PW1) and Brian Irako (PW2). The two knew all the accused well. The evidence of these two witnesses was consistent that they saw the 1st accused hurl a beer bottle towards the deceased which hit him on the back of the head; and, that the 2nd and 3rd accused joined in the fracas and assaulted the deceased using fists and kicks.



33. From the combined evidence of PW1 and PW2, I also find that there was sufficient lighting in the small bar. It is fortified by the evidence of the proprietor (PW3) that the pub had “three florescent lights and other blinking lights”. There was also a security light outside the building. Furthermore, the 3rd accused in his defence confirmed that “the bar had “snake lights” inside, a bulb at the counter and security lights outside.
34. I thus find that all the three accused persons were positively identified as the persons who jointly assaulted the deceased together with other persons not before the court. See *Wamunga v Republic* [1989] KLR 424.
35. But before leaving the matter of identification, I should comment on the three police identification parades conducted by PW8. They were not scrupulous or in full compliance Chapter 46 of the Force Standing Orders. As detailed earlier in this judgment, PW8 used a common group of participants in the lineup for all the three parades. The 1st accused is a woman, and her position in the line-up or the gender of the participants was unclear. Due to other breaches of the rules, I declined to admit the parade forms for 1st and 2nd accused persons and only allowed that for the 3rd accused.
36. But the point to be made is that the parades were superfluous in light of the clear identification of the accused by PW1 and PW2 and who all knew them well. I think the identification parades were perhaps conducted out of an abundance of caution.
37. I will now return to another important fragment of evidence from PW1. He was not drinking and had gone to the bar to watch a football match. He was the older brother of the deceased. He said that following the attack, the deceased was bleeding and ran away. PW1 did not try to assist his brother or venture outside as he claimed he was down with malaria. I found it a little strange but from the evidence of the 1st accused (DW1), the deceased was drunk, noisy and may have been a nuisance to other patrons.
38. There is then the additional evidence of PW2 in cross-examination where he said-
- Faith hit Dominic with a bottle. Faith came from the counter with a bottle and hit Dominic on the back of the head. She threw the bottle at him. It was a Kenya cane bottle. The bottle broke. The bottle hit Dominic direct. It did not hit a metal first before hitting Dominic. Accused 2 & Accused 3 and another man Patrick followed him and continued hitting him. I followed outside. They were using fists and kicks on the head, ribs. There was light outside, Dominic ran and they followed him.
39. I thus find that the 2nd and 3rd accused pursued the deceased outside the bar and continued assaulting him. The body of the deceased was found floating in the dam on 6th September 2018. The scene was processed and the remains removed to the City Mortuary.
40. I agree with the pathologist that the presence of water in the stomach indicated that he was alive when he fell into the dam. But he was being pursued by the accused persons and other accomplices. From the evidence, the dam was in the vicinity of the bar. But more importantly, the cause of death was not drowning but “head injury due to blunt force trauma”. The pathologist confirmed that the examination revealed internal injuries on the brain. I thus find that the primary cause of death is consistent with the attack by the accused persons.
41. I accordingly find that the conduct of all the accused is inconsistent with their plea of innocence. By hitting the deceased with beer bottles on the head and assaulting him with kicks and fists, they, or their accomplices knew or ought to have known that it was likely to cause grievous harm or death. The deceased may have been drunk, noisy and a nuisance to the customers at the pub, but it did not call for



such a vicious attack. Accordingly, all the accused had malice aforethought as defined in section 206 (b) of the Penal Code. The deceased died as a consequence of their conduct.

42. In the end, I find that the defences set up by all the accused are a sham and completely evasive. The entire corpus of direct and circumstantial evidence points irresistibly to the guilt of all the accused.
43. The upshot is that the prosecution has proved the charge beyond reasonable doubt. The accused, of malice aforethought caused the death of the deceased by an unlawful act. I accordingly enter a finding of guilty. All the three accused are hereby convicted of murder contrary to section 203 as read with section 204 of the Penal Code.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of: -

The accused persons.

Mr. Musa holding brief for Mr. Masara for the accused persons instructed by Masara & Company Advocates.

Ms. Kigira & Ms. Timoi for the Republic instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

