



**Republic v Kanana (Criminal Case E013 of 2022)
[2024] KEHC 14548 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E013 OF 2022
JN ONYIEGO, J
NOVEMBER 14, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

BRIGIT KANANA ACCUSED

JUDGMENT

1. The accused person herein Brigit Kanana is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on 08.07.2022 at about 2130hrs at Bulla Central area in Jamhuri Location within Mandera County, she murdered Felix Kinyua.
2. The accused person pleaded not guilty to the charge. Seven (7) witnesses were called by the prosecution in support of its case.
3. PW1, Dony Chokera stated that on 08.07.2022 at 2.00pm, he left his place of work and went for lunch in a certain hotel where he met the deceased. That the two ordered for some food and thereafter, the deceased requested him to escort him as they were to meet someone who later turned out to be the accused person herein.
4. They thus entered Kanana’s hotel where they met Judy Kadogo (PW2) who served them food. The deceased on the other hand chose to sit at the rear end of the hotel together with Kanana (accused) but later, joined him at his table. At that point, the accused person offered to buy the deceased chrome beer and so, they stayed in the hotel till 6.30 p.m. when the deceased told them to clear their bills. At that point, together with the deceased, they cleared their bills. However, the accused insisted that the deceased had not paid for one beer. The deceased on the other hand insisted that the accused was to cater for the said unpaid beer.



5. That a scuffle over the unpaid beer ensued for some time leading to the accused person pick up a knife and stabbed the deceased on the neck. The accused thereafter locked the bar and disappeared as he chose to report to the police station and record his statement. On cross examination, he stated that Kanana and Kinyua differed over payment of the bill.
6. PW2, Judy Kadogo testified that she worked as a casual worker for the accused person and on the material day, she was at the hotel when PW1 arrived with the deceased. That they took beer worth Kes. 700 which PW1 paid for. She went further to state that the accused demanded from the deceased an amount of Kes. 350/- which the deceased had declined to pay.
7. That she left for the toilet only to come back and find the door locked. It was her testimony that she later heard noise from outside as if people were quarrelling and at that point, the police opened the door. She was subsequently escorted to the police van where she also met PW1. At that point, PW1 told her that the accused person had stabbed the deceased. They were taken to the police station where they recorded their statements. On cross examination, she stated that when Kinyua refused to pay the bill, a scuffle between him and Kanana ensued.
8. PW3, Patrick Muturi Kaburu, brother to the deceased testified that he identified the body of the deceased to the Doctor who conducted the post mortem.
9. PW4, No. 247756 APC Paul Kiboi stated that on the material day, he had left his house to go buy drinking water when he saw a crowd approaching him. They told him that a man, a police officer had been stabbed by a lady who had since ran away. He rushed to the scene where he saw a man lying on the ground with a stab wound on the neck. He rushed home and via his radio set alerted the station. Together with other officers, they were given a police vehicle to pick the deceased.
10. While at the scene, he was also informed of a lady who had locked herself in the hotel and so he broke open the door and upon entry, he found PW2 who told them that she had left for the toilet when the incident happened. While there, he also spotted the lady he previously saw running away and so they arrested her. The victim was taken to the hospital as PW1 and PW2 were taken to the police station to help with the investigations. Upon the hotel being searched, a blood stained knife was recovered.
11. PW5, No. 237982 PC Sichale of DCI Mandera East, the investigating officer in this case recalled that upon receiving information of the incident from PW4, a team of officers led by the County Police Commander and the DCIO Mandera East booked and proceeded to the scene of crime. That they immediately left the station in company of PC Kiboi, the County Police Commander Mr. Ngetich, IP Jackson, DCIO and PC Eric Mwangi. That they apprehended the suspect who led them to the scene where they found PW2.
12. That upon searching the house, they found a blood stained kitchen knife. He further reiterated the evidence of PW1, PW2 and PW3. It was his evidence that he forwarded to the government chemist blood sample of the deceased, finger nails samples of the deceased, a black t-shirt and a kitchen knife (Pex B) for analysis. That the report from the government analyst confirmed that the DNA profile generated from the knife item marked exh.3 matched the DNA profile generated from the blood sample of the deceased. The body was thus airlifted to Nairobi where postmortem was done by Dr. Johanes Odour.
13. On cross examination, he stated that upon arresting the accused person, she stated that PW2 was responsible for the injuries suffered by the deceased. That at the time of stabbing, she had left the hotel to take some food left overs to her neighbour for safe keeping.



14. He stated that initially they had five suspects, among them: the accused, PW1, PW2, Danson Njebu and Purity Karambu. The main reason why the charge was preferred against the accused was for the reason that they had no role. On re-exam, he stated that Purity Karambu was a sister to the deceased while Duncan was a boyfriend to the accused. He stated that he did prepare the inventory which was signed by those present when they recovered the same. That there was no malice against the accused.
15. PW6, Dr. Johanness Oduor chief government pathologist stated that he conducted post mortem examination on the body of the deceased. That the body was pale, an indication of loss of blood. Additionally, the body had a stab wound on the left chest at the left collar bone 4cm by 8cm deep. The left lung had collapsed and there was a laceration on the aorta while the other systems were normal. According to him, the cause of death was chest injuries caused by a stab wound.
16. PW5, was recalled for further cross examination. He stated that he recorded the statement of Dancun Nkubu and the same could be marked as (DMFI 1).
17. PW7, P/No. 2012024647, Mr. Kipngetich Bernard a government chemist working at Government chemist office Nairobi testified that on 15.07.2022, he received the following items from No. 69691 PC Mauline Mwanzia of DCIO Kilimani police station; Item 1- was a knife with silver metallic handle, item 2- black T-shirt in a brown khaki envelope, item 3- blood sample in small blood container (for PC Felix Kinyua deceased), item no. 4 finger nail chippings in an envelope (PC Felix Kinyua deceased), black T-shirt (P. exhibit 4) and a knife with sticker (P. exhibit 2). Accompanying the items was police exhibit memo form (P. exhibit No 5).
18. He was tasked to determine the origin of blood stains in the items and biological source. He stated that the findings of the examination were; both the knife and T-shirt were lightly stained with human blood; the blood stains on the T-shirt (P. exhibit 4) did not generate any DNA profile; finger nail chippings did not generate any DNA profile; DNA profile generated from the knife and the blood sample belonged to the deceased.
19. The prosecution proceeded to close its case and the court ruled that a prima facie case had been established against the accused person thereby putting him on her defence.
20. DW1, Brigid Kanana stated that on 08.07.2022 while in her hotel known as central, she received the deceased and PW1 who thereafter ordered food. That she sold them beer. The deceased, who was sitting at the front part of the hotel with Donny ordered two bottles of beer and later, Donny joined Judy in another table.
21. According to her, in the hotel there was Duncan Ikubi, Kitonga, Kasimbi, Donny Chokera, Felix, Kadogo and herself. At 6.00 pm, she told them to pay their bills as she prepared to close. That pw1 proceeded to the table where there was a pay-bill number ready to pay. Felix also had a bill of Kes. 350/- which he paid. At that time, the deceased told PW1 to be careful so that PW2 does not steal his money. The statement annoyed PW2 who picked a quarrel with the deceased.
22. That at the same time, she left for the kitchen to pack food remains for a neighbour for safe keeping in a fridge. Upon going back, she found the deceased lying on the floor at the door step. At that time, PW1 told her that PW2 had stabbed the deceased using a kitchen knife and had left the hotel in a hurry. She proceeded to lock the hotel to go look for a taxi and on the way, she met the police.
23. It was her testimony that she was thus ordered to go back to the hotel where the officers carried out a search. According to her, PW2 was responsible for the deceased's death. On cross examination, she reiterated that PW1 was unknown to her.



24. DW2, No. 237982 PC Jared Omondi stated that, he was the, investigating officer and in the process of his investigations, he recorded a statement from Dan Chokera (DMFI 1), Daniel Ikubi (DMFI 2) and also the accused (DMFI 3) which he proceeded to produce. The same were marked as Dex 1-3. On cross examination by the court, the witness stated that he did not call Duncan Ikubi as he was in custody in relation to another case.
25. The defence closed its case and the court directed that parties file their written submissions.
26. The prosecution filed submissions dated 09.07.2024 urging that the evidence tendered was sufficient to sustain a charge of murder. To that end, reliance was placed on the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR where the elements of the offence of murder were listed as: occurrence of death, that the accused person committed the offence and that there was malice aforethought. It was urged that the evidence clearly pointed at the accused person as being responsible for causing the death of the deceased.
27. Counsel contended that the manner in which the act of murder was committed clearly showed that the accused person had malice aforethought. To that end, reliance was placed on the case of Republic vs Tubere 1945 EACA 63, where it was held that malice aforethought in murder maybe established by ascertaining the nature of the weapon used. The court was therefore urged to convict the accused person for the offence herein.
28. The defence on the other hand filed submissions dated 17.07.2024 wherein it was argued that the prosecution did not shift the burden for the reason that the prosecution's star witness, PW1 was not a credible witness. It was contended that apart from the credibility of the witnesses, the said evidence was marred with contradictions which the court cannot forgo. To that end, support was drawn from the case of Twehangane Alfred vs Uganda, Criminal Appeal No. 139 of 2001 [2003] UGCA,6 where the court stated that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of the witness being rejected. Therefore, noting that the evidence of PW1, PW2, PW4 and PW6 having been contradictory and that no sufficient explanation was given, the same ought to be disregarded.
29. Counsel stated that PW1 covered for PW2, the real killer as she was his lover. That in relation to the evidence of PW2 and that of PW4, it was clear that the two were arrested and placed in the police motor vehicle together for a period of forty minutes. On the other hand, PW1 created a false picture that there was no room for himself and PW2 to conjure up a deceitful tale painting the accused person as the killer.
30. Equally, counsel urged that the deceased provoked his attacker for the reason that the deceased was active and acted in a provocative manner through insult and actual physical violence. To that end, reliance was placed on the Court of Appeal decision in the case of V.M.K. vs Republic [2015] eKLR where provocation was defined as an act by the deceased that causes a sudden and temporary loss of self-control. In the end, this court was urged to acquit the accused person as her defence for alibi was reasonable.
31. I have considered the evidence adduced herein by both the prosecution witnesses and the defence. The main issue for determination is whether the prosecution has proved its case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.



32. 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.”
33. For the prosecution to secure a conviction on the charge of murder, it has to prove four main elements against an accused person. In *Anthony Ndegwa Ngari vs Republic* [2014] eKLR, the elements of the offence of murder were listed as follows:
- i. That the death of the deceased occurred;
 - ii. That the death was due to an unlawful act or omission;
 - iii. That it was the accused who committed the unlawful act or omission which caused the death of the deceased; and
 - iv. That the accused had malice aforethought.
34. On whether there was proof of death and the cause of the said death, the death of the deceased was proved by the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, DW1 and DW2 all who testified that indeed the deceased was dead. PW6 testified that he conducted post mortem on the body of the deceased and it was his view that the cause of death was chest injury caused by a stab wound.
35. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from time immemorial. Article 26 of *the Constitution* is clear that every person has the right to life and that a person shall not be deprived of life intentionally except to the extent authorized by *the constitution* or other written law. [See the case of *Gusambizi Wesanga vs Republic* [1948] 15 EACA 65].
36. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained causing the body to be pale, an indication of loss of blood. Additionally, the body had a stab wound on the left chest at the left collar bone 4cm by 8cm deep. The left lung had collapsed and there was a laceration on the aorta while the other systems were normal. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before court irresistibly points to an unlawful act that led to the death of the deceased. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.
37. On whether the prosecution have proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased, the accused has denied committing the unlawful act leading to the deceased’s death. The question is, who caused the unlawful act that led to the demise of the deceased?
38. What does the evidence adduced by the prosecution reveal? From the onset, the burden of proof lies on the prosecution throughout the trial and that burden does not shift to the accused person even if the accused chose to remain silent as that is his constitutionally guaranteed right. [See Article 50(2)(i) of *the Constitution*]. In addition, the accused has the right not to give any self-incriminating evidence. [See Article 50(k) of *the Constitution*].
39. From the evidence on record, PW1 testified that it is the accused person who stabbed the deceased on the neck hence causing the death herein. On cross examination, he stated that Kanana and Kinyua differed over payment of the bill.



40. The question is whether this evidence by PW1, being a single witness alleging to have identified the perpetrator at night was sufficient to find the accused guilty of the offence of murder. That being the issue here, I must examine the law on reliance on such evidence. In *Wamunga vs Republic* (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:
- “It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
41. Similarly, the Court further cited its own decision in *Abdala bin Wendo & Another vs Republic* (1953), 20 EACA 166 where it held:
- “Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”
42. The necessity for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness was also dealt with by the Court of Appeal in *Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga vs Republic* where the Court observed that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. The court stated that whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused based on the evidence of such identification.
43. Having considered the evidence of PW1 the single identifying witness who testified that he knew the accused and that the scuffle over the unpaid beer led to the accused person picking up a knife thus stabbing the deceased on the neck, it begs for an answer whether there was malice a forethought.
44. PW4, stated that on the material day, he had left his house to go buy drinking water when he saw a crowd approaching him. They told him that a man, a police officer had been stabbed by a lady who had since ran away. He rushed to the scene where he saw a man lying on the ground with a stab wound on the neck. While there, he spotted the lady he previously saw running away and so they arrested her. PW1’s evidence in my humble view was corroborated by that of PW2 and that of PW4.
45. The question is, why did the accused person who was so innocent flee the scene and only returned upon being arrested by the police? The evidence of the accused person was not supported when she stated that when she left to pack food remains for a neighbour for safe keeping in a fridge, and upon going back, PW1 told her that PW2 had stabbed the deceased using a kitchen knife and thereafter escaped. Similarly, the alleged grudge between her and the said officer Omondi was also not supported as alleged by the accused.



46. I have carefully assessed the evidence adduced by the prosecution witnesses' vis a vis that of the accused person wherein she points the finger at PW1, PW2 and officer Omondi as the people who are set on fixing her.
47. I am also alive to the fact that the accused person has no duty to adduce evidence in reference to the alleged alibi. However, I am convinced that the evidence of pw1, pw2 and pw4 is credible. Pw2 was accused's employee and the two were on duty the very day the incident took place. Pw2 had no reason to fix her boss in my view.
48. Equally, the offence took place around 6.30pm. The deceased and pw1 had gone to the accused's hotel cum bar much earlier and took time drinking. Pw1 and pw2 knew the accused very well and the time the offence took place was day time thus the conditions for identification were favourable hence no mistaken identity.
49. Clearly, there was nothing suggestive of them framing the accused with such a heinous offence. In my view, the defence presented by the accused was not credible. Furthermore, no question was ever put on the prosecution witnesses over the alleged conspiracy of PW1, PW2 and/or officer Omondi that could have influenced the witnesses to frame the accused with the offence herein. I find the defence devoid of any credibility and or substance hence dismiss it.
50. The prosecution evidence and specially that of PW1 which was corroborated with that of PW2 and PW5, which evidence this court finds credible and uncontroverted places the accused centrally as the perpetrator of the offence leading to the deceased's death. From the chain of events, and given the evidence of pw1 who to me appeared honest, consistent and credible from his testimony and general demeanour, and further considering the available circumstantial evidence and the general conduct of the accused in fleeing the scene of murder, one is left with no conclusion other than that of a guilty person being the accused.
51. It is my view and in the circumstances, the prosecution has proved that it was the accused who committed the unlawful act which caused the deceased's death.
52. On whether the accused had malice aforethought when he unlawfully killed the deceased, under section 206 of the Penal Code, 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
 - (c) an intention 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.”
53. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e), malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. Various courts in interpreting the provisions of section 206 have stated as such in several authorities.



In the classic case of Republic vs Tubere S/O Ochen [supra] the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

54. In the instant case, could it be equally said that the same was done with malice aforethought? As already stated, the accused person had a fight with the deceased wherein the deceased got injured and thereafter succumbed to his injuries. It was urged that the fight between the accused person and the deceased was as a result of unpaid beer. As such, the accused person's reaction was spontaneous. Taking into account the circumstances under which the offence was committed, it would be difficult to find malice aforethought.

55. Sections 179 of the Criminal Procedure Code stipulates:

(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.”

[See Republic v Irene Kageni [2022] eKLR].

56. From the circumstances of this case, the element of malice aforethought has not been fully discharged. To my mind the evidence tendered herein clearly points at proof of a lesser charge of manslaughter and not murder. Accordingly, am persuaded to substitute the charge against the accused from that of murder contrary to Section 203 as read with Section 204 of the Penal Code with manslaughter contrary to Section 202 of the Penal Code.

57. In view of the above holding, I am inclined to find the accused guilty of the substituted charge of manslaughter and therefore convict her accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE

