



**State v Owuor & another (Criminal Case E008 of 2023)
[2024] KEHC 14886 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E008 OF 2023
RE ABURILI, J
NOVEMBER 20, 2024**

BETWEEN

STATE PROSECUTION

AND

MAGDALENE ATIENO OWUOR 1ST ACCUSED

MATHA AWINO OTIENO 2ND ACCUSED

JUDGMENT

Introduction

1. The accused persons herein Magdalene Atieno Owuor and Matha Awino Otieno are charged with the of the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 15th day of March 2023 at around 2030hrs at Nyamasaria village, Kisumu East sub-county within Kisumu County jointly murdered one Alga Akinyi. The accused persons pleaded not guilty to the charge against them and the matter proceeded to trial. The prosecution called ten (10) witnesses in support of its case which is summarised herein below.

The Prosecution’s Case

2. PW1 Kennedy Onyango Otieno, took oath and testified on how he was called by an unknown mobile number to go to the scene near Nyamasaria School where he found the deceased, his fiancé lying injured and dead and the two accused persons, who are his wife and her cousin respectively were at the scene. (The evidence of PW1 was expunged from the record after PW4 testified that the deceased was a widow to his brother and that PW1 was only her boyfriend. This was in line with section 127 (3) and (4) of the Evidence Act).



3. PW2 Kevin Otieno Omollo testified that he knew the two accused persons whom he saw on a date he could not recall at about 8.30pm at Nyamasaria School assaulting one lady. It was his testimony that he stopped his motorcycle and went near them where there was a culvert.
4. PW2 testified that one of the ladies then emerged saying ‘amenidunga kisu’, then fell down. It was his testimony that he called nyumba kumi and informed him of what he had witnessed and further that he called 2 police officers who could not respond. He testified that the 2 ladies who were fighting with the fallen lady tried to escape but he held them and told them to sit. PW2 further testified that the 1st accused gave him her phone which she had called speaking to her husband and he spoke to him and informed him of the injured lady and subsequently called him a second and third time.
5. It was his testimony that he asked the 1st accused why he had stabbed the victim to which the 1st accused responded by stating that the victim had bitten her breast. PW2 testified that the 2nd accused queried the 1st accused as to why she had stabbed the victim and why she had placed her in trouble and why she did not tell her that she (the 1st accused) had a knife.
6. PW2 testified that though it was at night, he had his phone torch and further other people had torches so he was able to see the 2 accused persons. He further testified that they looked for the knife but never recovered it.
7. In cross-examination PW2 testified that he could not tell who between the 2 ladies stabbed the deceased but that he heard the 2nd accused say ‘kama unajua umabeba kisu, mbona hukuniambia. Sasa ni shida umeniwekea.’ In re-examination PW2 stated that there were security lights from the nearby homes.
8. PW3 Elizabeth Akinyi testified that he knew the 1st accused who sold food in town. She testified that she saw Martha on the 15th March 2023 at around 8.15pm as she left town and at Nyamasaria School she saw one Kevin who had stopped and parked his motorcycle on the side of the road. PW3 further testified that she saw a lady, who was her neighbour, lying beside the road and asked her what the problem was and the lady answered ‘Wamenidunga na kisu’. She testified that she told Kevin that if the lady was saying she was stabbed, she had seen 2 ladies nearby so she screamed because that area had insecurity.
9. PW3 testified that a motor cyclist followed the 2 ladies and arrested them and brought them to where the injured lady was and that is when she saw Magdalene and identified her and asked her what they had done to the other lady to which the 1st accused informed her that the other lady lying down had bitten her breast so, she had slapped and kicked the lady that is why she was lying down. PW3 testified that they interrogated the 2 ladies and the 1st accused informed them how her husband told her to come and collect money when the lady lying down assaulted her. She testified that they told the 1st accused to call her husband which she did but the husband was not responding so Kevin called him and he arrived after about 15 minutes.
10. PW3 testified that they searched for the knife but never found it and that the victim’s husband came and took her to hospital. She further testified that the following morning she learnt that Alga had died in hospital so they went to her house where they met her husband. She testified that they searched for the knife which they recovered and gave it to the police.
11. It was her testimony that there were security lights and that she saw the 2 accused persons and recognized the 1st accused even as she ran but that they were captured and brought to the scene.
12. In cross-examination PW3 testified that when they heard that the knife was recovered, all the residents went to see it and she saw it. She testified that the knife was found inside the fence while Alga lay on



- the opposite side of the fence on her tummy with blood oozing from her body. PW3 reiterated his testimony on her interaction with the deceased and further stated that she had not known her well.
13. PW4 Otieno Mark Okoko testified that the deceased was her sister-in-law as her husband was his brother. He testified that Kennedy was only but her boyfriend. It was his testimony that on the 21st March 2023 at 11.00pm, he went to Jaramogi Oginga Odinga Teaching and Referral Hospital with Samson Odero Odinga, the deceased's father to identify the deceased's body for post-mortem. He testified that he had known the deceased as his in-law for about 3 – 4 years.
 14. In cross-examination, PW4 stated that he saw stab wounds on her chest and further that he learnt from the post-mortem exercise that the deceased was 4 months pregnant. When questioned by court PW4 testified that the deceased was buried in Karachuonyo North in his late brother's homestead and that her children now live with their grandmother.
 15. PW5 No. 239958 Inspector Siaka Stephen the in-charge of Nyamasaria Police post testified that on the 16th March 2023 at around 11am he returned to the scene of serious assault behind Nyamasaria Secondary school. He testified that he went to observe what was going on on the ground because an incident had happened at night but it was dark and the victim had been taken to hospital.
 16. Inspector Siaka testified that it was reported that on 15th March 2023 that three females fought and one was seriously injured. He testified that at the scene on 16th March 2023 he found a group of people standing around a pool of blood and in a small bush nearby, the people showed him a knife which they had seen earlier stuck in the grass.
 17. It was his testimony that the knife was blood stained and that he photographed the knife and took it and called the Investigating officer through his phone and returned to his office where he found him waiting and handed over the knife to him for further investigations. PW5 testified that the knife had blood and a black handle with three bolts on both sides.
 18. In cross-examination PW5 testified that the crowd he met never touched the knife but rather pointed it out to him. He testified that he never saw any other objects. He reiterated that he only took the photograph of the knife as he is gazetted to take photographs of crime scenes as a trained inspector of police.
 19. PW6 No. 74483 Corporal Charles Munyiri testified that on the 15th March 2023 at around 8.48pm, he was the duty officer at Kasagam Police Station when he received a telephone call from the in-charge Nyamasaria Police Post, Inspector Stephen Siaka who informed him of a serious injury report within Nyamasaria Primary. He testified that he boarded a duty officer vehicle driven by Sergeant Wamalwa and went to the scene where he found other officers from Nyamasaria police post who had already arrested two suspects at the scene.
 20. It was his testimony that he told them to escort the suspects to Nyamasaria police post and Inspector Siaka joined him later and instructed that they visit the victims at JOOTRH. He testified that the 2 suspects are the accused in court and that the scene was near Nyamasaria Primary school at the fence.
 21. PW7 No. 231159 PC Dominic Makori stationed at Nyamasaria Police Patrol Base under Kasagam Police Station testified that on the 15th March 2023 at around 21.10 hours he was with PC Rotich, Ngetich, and PC Lowoto on patrol when they received information from IP Siaka of a serious assault behind Nyamasaria Secondary.
 22. It was his testimony that Inspector Saika instructed them to rush there and manage the situation and on reaching the scene, they found two ladies whom they later learnt were Mary Magdalene Atieno and Martha Awino Otieno who were being questioned and beaten by the mob. He testified that they



- rescued them and learnt that the two were fighting with another lady who had been stabbed and who had been rushed to hospital.
23. PW7 testified that some officers arrived and took the suspects to the Nyamasaria police post and booked them. He testified that it was dark and did not see the scene well. He further testified that the following day, he learnt that the victim had succumbed. He testified that the two ladies they rescued were the accused persons.
 24. In cross-examination PW7 testified that he found more than 30 people at the scene and that some were assaulting the accused persons though he could not tell if the accused were treated for the injuries. He testified that from the scene, the two suspects were taken to Nyamasaria police post and further that it was dark and there was no light so he did not see blood.
 25. PW8 Dr. Ombok Lucy produced the postmortem Report for one Alga Akinyi dated 21st March 2023. She testified that the body was of a naked African female about 28 years old with good nutrition and 170cm in height.
 26. Dr. Ombok further testified that externally, there were 2 cut wounds the larger of 6cm penetrating into the internal organs and that internally, there was a stab wound penetrating to the heart causing massive bleeding. She further testified that the uterus was pregnancy of 3 – 4 weeks whereas the rest of the systems were essentially normal.
 27. Dr. Ombok testified that as a result of examination she formed the opinion that the cause of death was a stab to the heart, penetrating to the heart causing massive internal bleeding. It was her testimony that she issued Death Certificate number 1552700 and signed the postmortem Report on 21st March 2023. She produced the Postmortem Report as P. Exhibit 1.
 28. In cross-examination Dr. Ombok testified that the deceased was about 3 – 4 weeks pregnant. She clarified that there was no way the deceased could have stabbed herself through her heart because of excruciating pain experienced when the stab is deeper into the internal organs.
 29. PW9 William Godwin Khamala, a Government Analyst working at Kisumu Government Chemist testified that he received an exhibit memo form from Inspector Kalis Emmanuel Kasan of DCI Kisumu on 22nd March 2023 requiring an examination of three items submitted and determine if they had any biological evidential material and do a DNA profile of the said material. It was his testimony that the items submitted were:
 - i. Blood sample of Alga Akinyi in a tube marked 'A'.
 - ii. A knife with a metallic handle in a brown envelope marked 'A2'.
 - iii. Finger nail cutting of Alga Akinyi in a tube 'A3'
 30. PW9 testified that he noted that the knife item 'A2' was moderately stained with blood of human origin and that he proceeded to generate DNA profiles comparisons and came up with the conclusion based on findings that the DNA profile generated on the blood stains on the knife 'A2' matched the DNA profile of the generated from reference samples of the blood and nails of Alga Akinyi, the deceased. It was his testimony that he signed the report and sealed it on 16th January 2024 and produced it as P Exhibit 2.
 31. PW10 No. 237532 CIP Karis Emmanuel Kassin testified that on the 16th March 2023 he received a complaint of two ladies who had stabbed Alga Akinyi and he subsequently took over investigations. It was his testimony that he organized for postmortem of the deceased and that he took items to the Government Chemist for DNA analysis. CIP Karis further testified that he recovered the knife,



murder weapon, from officers who first visited the scene and saw blood stain at the gate of Nyamasaria Secondary School. He produced the knife as P. Exhibit 3. He further testified that he also filled exhibit Memo form which he produced as P. Exhibit 4.

32. In cross-examination CIP Karis testified that the knife was given to him immediately after the officers who visited the scene first recovered it. He testified that the incident took place at night and that the recovery of the knife was the following day and that he visited the scene on 17th March 2023 and noted that the scene was bloody near the fence of Nyamasaria Secondary School. He further testified that he did not dust the knife for finger prints but it was not true that the deceased was stabbed by anyone else including police officers.

The Defence Case

33. The 1st accused person gave a sworn testimony in which she denied knowing the deceased and stated that she no longer lived with her husband Kennedy Onyango Adier. It was her testimony that on the night of 15th March 2023, she was at her marital home when her husband called her to go and collect money for food for their children.
34. She testified that she requested the 2nd accused to escort her as it was at night and when she reached at Nyamasaria Secondary where they were to meet, she saw two people standing about 6 metres away using his torch light and that the two people were quarreling. The 1st accused testified that as they reached closer to them, one ran away while the one remaining was holding her abdomen then she fell down.
35. The 1st accused testified that they moved closer to find out what had happened then people on a motorcycle came and asked them what had happened and arrested them and took us them to the police station where she met her husband. It was her testimony that she did not recognize the person who escaped and that she had no link to the knife which was produced as exhibit. She reiterated that she did not know who killed the deceased. The 1st accused reiterated her testimony in cross-examination.
36. The 2nd accused testified as DW2 stating that on the 15th March 2023 she was at his house when 1st accused asked her to accompany her to go pick money for food from her husband at Nyamasaria and that he had called her to go near the school. She testified that the 1st accused told her that she feared going alone.
37. The 2nd accused testified that they went together and on reaching the place, they saw two people, as if they were holding each other but one, who was a man left the scene. She testified that the one who remained at the scene was a lady and she lay down as they approached her to find out what the issue was.
38. It was her testimony that two people came on a motorcycle and asked them what had happened but they said nothing after which the people on the motorcycle looked at the deceased and said ‘mumemuua’ you have killed her. She testified that the same people also said that that road is bad as people are normally killed there.
39. The 2nd accused testified that the people told them to sit down and they later took them to the police station at Kondele. She denied seeing the 1st accused’s husband at the scene. It was her testimony that their clothes were never checked and they had no blood on their clothes. She testified that they even changed their clothes at Kondele Police station. The 2nd accused denied killing Alga and further stated that she had not known her before that day.
40. In cross-examination the 2nd accused reiterated her testimony and further stated that the 1st accused had never asked her to escort her to collect money for food from her husband neither had she ever



complained to her about the husband sleeping out in the pool table. She further testified that she was not aware of any disagreements between the 1st accused and her husband. The 2nd accused further testified that they never met the 1st accused's husband on that day and no money for food was given to the 1st accused but that instead, they found Alga who was stabbed. She testified that she never heard Alga screaming but that she just held her abdomen and bend. The 2nd accused denied screaming.

Analysis and Determination

41. I have carefully considered the evidence adduced in this case and the defence offered by the accused persons. The defence counsel was to file written submissions which she never filed as at the time of writing this judgment. The accused faces a charge of murder contrary to section 203 of the Penal Code. That section defines murder as follows:

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

42. The prosecution has to adduce evidence to establish that there was death, the cause of that death, that the death was due to an unlawful act or omissions and that the accused caused the death of the deceased. The prosecution must also prove that the accused person's action was motivated by malice aforethought.

43. The deceased's death is not in doubt. PW4 who testified that he was the deceased's brother-in-law stated that he and the deceased's father witnessed the deceased's autopsy that was carried out on the 21st March 2023 at JOOTRH. The fact of the deceased's death was further proved by the testimony of PW8, Dr. Ombok Lucy who carried out an autopsy on the body of the deceased and arrived at the conclusion that the death was due to a stab to the heart, penetrating to the heart causing massive internal bleeding.

44. As to whether the death was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report revealed that the deceased sustained 2 cut wounds that penetrated into the internal organs specifically stabbing the heart causing massive bleeding. All these injuries in my view, if caused by an individual, amount to an unlawful act as no-one has the right to deprive another of their life. I am thus persuaded beyond reasonable doubt that the deceased person died out of an unlawful act.

45. As to whether it was the accused persons herein who unlawfully caused the deceased persons death, PW2 was the only eye witness to the incident. He testified that he knew the accused persons and that on the date of the incident he saw 3 ladies fighting forcing him to stop his motorcycle. It was his testimony that one of the ladies later approached him saying “wamenidunga kisu.”

46. PW3 on her part testified that she found the deceased lying on the side of the road and when she asked her what was wrong she replied saying “wamenidunga kisu”. She further testified that the 2 accused persons who were at the scene were subsequently arrested by a person who had a motorcycle.

47. On their part, the accused persons testified that they found the deceased already stabbed by a man whom they could see from a distance but could not identify him.

48. The deceased told PW2 and PW3 that she had been stabbed. PW2 reached the scene and found the two accused engaged un a fight with the deceased before the deceased moved towards him saying they had stabbed her. The accused persons were in close proximity with the deceased, from the testimony of PW2. These two witnesses were very unfaltering and I find it a fact from the evidence that the deceased indeed made the statements to them. As to whether those statements amount to a dying declaration, Section 33 (a) of the *Evidence Act* (Cap 80) provides that:-



33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—
- (a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question...”
49. The principles governing dying declarations were considered by the Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR. The court held that: -
- “Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.
- Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in CHOGE V. REPUBLIC (supra):
- “The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”
50. The court reiterated those principles in the case of Charles Njonjo Gituro v Republic [2019] eKLR; and in the case of Moses Wanjala Ngaira v Republic [2019] eKLR where it held inter alia:-
- “19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying



declaration. We take it from *Choge v Republic* [1985] KLR 1, citing the predecessor of this Court in *Pius Jasanga s/o Akumu R* (1954) 21 EACA 331:

“In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (*Republic v Muyovya bin Msuma* (1939) 6 EACA 128. See also *Republic v Premanda* (1925) 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed...The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (*Ramazani bin Mirandu* (1934) 1 EACA 107; *R v Okulu s/o Eloku* (1938) 5 EACA 39; *R v Muyovya bin Msuma* (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (*R v Eligu s/o Odel and another* (1943) 10 EACA 9; *Re Guruswani* [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in *R v Eligu s/o Odel and Epongu s/o Ewunyu* (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (*R v Said Abdulla* (1945) 12 EACA 67; *R v Mgundulwa s/o Jalo* (1946) 13 EACA 169, 171).”

51. See also *R v Eligu s/o Odel* (1943) 10 EACA 90, *Okethi Okalo v Republic* [1965] EA 555, *Aluta v Republic* [1985] KLR 543, and *Kihara v Republic* [1986] KLR 473.



20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence."
52. I reiterate that both PW2 and PW3 testified that the deceased told them that "wamenidunga kisu." PW2 testified and identified the accused persons as the ones who were fighting with the deceased, that he personally restrained them as they tried to leave the scene. Accordingly, there's no doubt that the deceased was referring to the accused persons, they were the only ones fighting with her. The statements by the deceased to the two witnesses related to the events that eventually led to her death and I am therefore satisfied that they amounted to a dying declaration. Whereas a dying declaration does not require corroboration, in this case the same was made to two different people who I found credible and trustworthy witnesses as they had no reason to lie against the accused persons.
53. As regards the defence by the accused persons, it is my finding that though sworn, the same was not credible. The accused persons did not go far from the scene where they were found engaged in a fight with the deceased. They were at the scene and were arrested at the scene. I am satisfied beyond reasonable doubt that the accused persons herein committed the unlawful act that led in the death of the deceased. Their defence, I reiterate, was an afterthought.
54. Finally, as to whether the accused had malice aforethought when they unlawfully killed the deceased, the essential ingredient for the offence of murder is malice aforethought. The circumstances which constitute malice aforethought are described under Section 206 of the Penal Code as follows:
- "206. 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."
55. Malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 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.

56. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions. In *Joseph Kimani Njau v Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v Republic* (1993) KLR 171, held as follows:

“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 vs. Director of Public Prosecutions* (1975) AC 55”. (emphasis added).

57. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

58. The deceased was stabbed with a knife on the chest that penetrated into her heart leading to massive internal bleeding. It is clear that the accused persons intended to cause her grievous harm. I note that the doctrine of common intention as defined under Section 21 of the Penal Code applies in this case. The section provides that:-

“When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.



59. The Court of Appeal for Eastern Africa in *Wanjiru d/o Wamerio versus Republic* 22 EACA 521 as follows: -

“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”

60. The ingredients of common intention were enunciated in *Eunice Musenya Ndui versus Republic*, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

1. There must be two or more persons;
2. The persons must form a common intention;
3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
4. An offence must be committed in the process;
5. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

61. In *Njoroge versus Republic* 1983 KLR 197 and *Solomon Munga versus Republic* 1965 EA 363, both Courts had the following to say of the elements of the doctrine of common intention: -

If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they factually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.

62. In this case, I find that the accused persons purposed to do harm to the deceased. They were all present and acted in unison.

63. Considering the cumulative actions of the accused persons in the manner that they killed the deceased, it is without any shred of doubt that the accused, with common intention, purposed to kill the deceased. The second accused aided the 1st accused in attacking the deceased and it matters not that she did not know that the 1st accused was carrying a knife to use to execute the act of stabbing the deceased. Using a knife to stab another human being is an act whose consequences are known-grievous harm an eventually death, considering the part of the body that was targeted by the accused persons, being the chest area where the heart and lungs are located. The deceased was also pregnant, 3-4 weeks, according to the post mortem report. She died with her unborn child.

64. Motive is immaterial in criminal cases. Under Section 9(3) of the Penal Code, the particulars of a crime need not provide for motive as an element to be proven by the prosecution. However, there is nothing offensive in establishing motive of the offence.

In the case of *Karukenya v R* 1983 (KLR 53) the court held:

“Whilst motive and opportunity are important matters to be considered when weighing the prosecution case they have in themselves be regarded as corroboration.”



65. Further in R v Kersher Meza w/o Tankiwawa 1940 7 EACA 67 subject to the above principle in Karukenya, the court held:

“We appreciate of course that evidence of motive and opportunity is not of itself corroborative but such evidence in conjunction with other circumstances may constitute such circumstantial evidence as to furnish some slight corroboration in a case where the degree of criminal complicity to be contributed to the illegal accomplice is very slight indeed.”

66. In this case, the accused persons denied knowing the deceased. The evidence of PW1 was expunged from the record since he was the 1st accused person’s husband. This court shall therefore not speculate on the motive of the attack on the deceased.

67. The prosecution, in my view, proved malice aforethought against the two accused persons, beyond reasonable doubt.

68. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person herein, beyond reasonable doubt.

69. Accordingly, I find the accused persons Magdalene Atieno Owuor and Matha Awino Otieno GUILTY of the offence of murder as charged contrary to section 203 of the Penal Code. I convict them accordingly. Sentence will follow after records and mitigations.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

