



**Republic v Jimmy (Criminal Case 30 of 2016)
[2024] KEHC 16205 (KLR) (17 December 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 30 OF 2016
FR OLEL, J
DECEMBER 17, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ALEX MUSAU JIMMY ACCUSED

JUDGMENT

A. Background

1. The accused herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) of the Laws of Kenya. The particulars of the offence were that on the night of 10th and 11th July 2016 at Kyangundu Village Misakwany Sub-location within Machakos County murdered Fedelis Mutua Mbithi Alias Kimis.
2. The accused person was first arraigned in court on 01.08.2016, and eventually took plea on 22.11.2016. He pleaded not guilty and the case proceeded to full trial with the prosecution calling seven witnesses to testify in support of their case.

B Facts at Trial

3. PW1 Nicholas Kioko Mbithi testified that on 11.07.2016 at about 9.00 a.m. he was called by his brother Philip Kilate Mbithi, who informed him that their brother, the deceased herein had passed on in his house. He reported the matter at Machakos Police Station and was assigned police officers who accompanied him to their home. Upon arrival he found Muthu Mbithi, Philip Mbithi, his parents, and George Mwangangi, his nephew. The police officers entered the house, processed the scene, and removed the body to the mortuary. He did not enter the house to view his deceased brother's body but saw it when it was being removed and noticed that the deceased had sustained some injuries on his body.



4. They brought the body to Machakos General Hospital Mortuary and they later identified the body before the post-mortem was conducted on 19.07.2016. The doctor who conducted the post-mortem informed them that the cause of death was internal bleeding. They then arranged for his burial and he later recorded his statement with the police. PW1 further affirmed that the accused was his nephew and they were neighbours at home. They also did not have any family grudges or disagreements and knew the accused to be a friend of the deceased.
5. Upon Cross-examination he confirmed that he did not know how to write and had a cordial relationship with the deceased, who was not married and had no children. His deceased brother also used to enjoy his alcoholic drink a lot and sometimes would be quarrelsome. He also confirmed that he did not know which brand of alcoholic drink, his deceased brother would take, and generally the deceased was on good terms with the accused. Further, he never saw the accused beat up the deceased nor did he see the person who killed him. PW1 also confirmed that the accused was not present when he went home with the police.
6. Upon Re-examination, he reiterated that his statement was recorded for him as he narrated to the police officer what he knew, as he did not know how to write. It would be a mistake if it was indicated that the statement was self-recorded. Also, while at home, he never heard of any quarrel the deceased had with the accused and did not know the circumstances under which he was fatally injured.
7. PW.2 Philip Kilatia Mbithi testified that the deceased was his younger brother and they were cousins with the accused, whose mother was a sister to their father. On 10.07.2016 at around 5.00 p.m. he was enroute from their local Kalimani shopping center on his way home, when he decided to go greet the accused brother called “Kiki” and found the deceased seated with the said “Kiki” within “Kiki’s” home.
8. Shortly after he had arrived, the accused came and found them seated and after a while started abusing each other with the deceased. The accused then went to his house, and came back carrying a Rungu. They continued quarreling and at some point, the deceased stood up and the accused hit him with the said rungu, sending him sprawling down. This incident occurred at about 6.00 pm, when there was still light, and he then decided to escape fearing for his life. He went to his home and slept.
9. The following morning, he decided to go and check on his brother at his house. He knocked on the deceased’s door but he did not respond. The door was not locked, so he pushed it, and upon entering the house, he found the deceased on the floor where he was sleeping facing upwards. He called him, repeatedly but he did not respond. He then called their mother Nthemba, who came and confirmed that he was dead. He then called PW1 on phone and had the incident reported to the police, who came and later took the body away.
10. On 19.07.2016 he went to Machakos General Hospital to identify the body of the deceased, and after post-mortem was informed, that the deceased had suffered a broken right rib. He also reaffirmed that they were first cousins with the accused and their families harbored no differences. He also did not know what lead to the quarrel between the deceased and the accused, though it was the accused who started the quarrel as they were relaxing.
11. Upon Cross-examination, PW2 confirmed that he narrated his version of events to the police, who recorded his statement. When he went to his cousin’s “kiki’s” place, he found him and his deceased brother, just seated and were not drinking, though both, by then were already drunk. He also confirmed that he too had taken some alcohol before visiting his cousin. A disagreement arose between the deceased and the accused and he saw the accused carry a stick, which looked like firewood, and use it to strike at the deceased, who immediately fell on impact. Sensing danger, he immediately took off



- and did not see his brother until the following day, when he went to check on him and discovered that he had died.
12. Upon re-examination PW2 confirmed that he record his statement at the police station and signed it once it was recorded. He had seen the deceased and “kiki” earlier in the afternoon drinking alcohol within the Kilimani shopping center, and it was” kiki” who was buying the said drinks. Later, when he joined them at “kiki” home, they were not drinking and further confirmed that before the accused person struck the deceased, the two were quarreling. He affirmed that he had witnessed the incident, but immediately left the scene fearing for his safety. He also could not tell if the accused had inflicted further blows on the deceased after he had left.
 13. PW.3 Agripina Kyari Dighina testified that on 10.07.2016 she was at home at about 5.30 p.m. when her husband PW5, came back home accompanied by the deceased Fidelis, and Musau, the accused herein. They were drunk and were carrying beer bottles in their pockets. She gave them food, returned to the house, and after a while, heard people quarreling. When she came out to see what was happening, she saw that it was the deceased who was quarreling with the accused, while her husband was trying to calm them down. Thereafter, PW2 left and the accused went towards the direction of his house, staggering, while the deceased also went towards the directions of the shopping Centre. Her husband then told her the accused did the wrong thing by striking the deceased.
 14. The following day at about 10.00 a.m. her husband called and told her that the deceased was found dead in his house. She continued doing her chores and, in the evening, went to condole with the deceased’s mother.PW3 also confirmed that they were related as the accused was her husband’s brother and their respective families never quarreled.
 15. Upon Cross-examination, PW3 confirmed that both the deceased and the accused were drunk when they arrived at her home and continued to drink an alcoholic spirit known as Moonwalker, which they had each carried. PW2 later joined the party and when the quarreling picked up, she came outside and found both parties still hurling abuses at each other but did not see the accused strike the deceased. The accused was completely drunk and did not even enter his house before falling, while the deceased too was staggering as he left their compound. PW2 and her husband told her that the accused had struck the deceased, and her husband further remarked that what the accused had done was wrong.
 16. Upon re-examination she confirmed that her husband and his guests were all drinking Moonwalker spirit and each person had his drink that was packaged in small bottles that could fit in one’s pockets. Her husband and PW2 informed her that the accused had struck the deceased and the deceased as he walked away was also saying the accused struck him.
 17. PW4 George Mwangangi Kilatia testified that the deceased was his uncle and on 11.07.2016 at about 7.30 a.m., he was at home asleep when he heard wailing from his grandmother. He went outside to find out what was happening and found people had gathered by his uncle’s house. They tried opening his door but found that it was obstructed by the deceased leg. He went and pipped through the window and saw his uncle lying on the floor facing upward, but was not responding even when they tried to call him by name. His father (PW2), and grandmother also tried calling the deceased but he still was not responding. His grandmother started wailing and more neighbours came, helped them push the door open and once inside the house they confirmed that his uncle had already died. He too also confirmed that they were cousins with the accused and he did not have any personal differences with him.
 18. Upon cross-examination he stated that on 10.07.2016 he was in church the whole day and had arrived back home at about 6.30 p.m. On the said date, he did not see the deceased and did not know when he returned home. He also confirmed that his uncle would take alcohol but never saw the accused beat him up, nor did he know what caused his uncle’s cause of death.



19. PW5 Jimmy Munguti Maingi testified that on 10.07.2016, he was at Machakos in the morning and went back home at about 1.00 p.m. Later at about 5.00 p.m. his brother Musau (the accused) arrived home and they engaged in small chit chat. About 40 minutes later his cousin Fidelis, the deceased and PW2 joined them and they all continued to drink Alcohol. At some point, the deceased asked the accused for money and the parties disagreed. As the quarrel continued, he dosed off, and was woken up by the accused screams, but had not seen what transpired, which had made the deceased to scream. (At this point the accused was declared a hostile witness and state was given leave to cross examine him.)
20. Upon cross examination he confirmed that his witness statement was recorded on 28.07.2016, about 18 days after the incident. The statement was not self-recorded, and the police officer who recorded the statement would not have known what transpired as he was not present. It was his evidence that when the accused came to his home, he was asleep by the water tank where they had been drinking Alcohol and did not witness the fight, though was later informed by his wife (PW3) of what had transpired.
21. Upon cross examination by the accused counsel, PW5 confirmed that on the material day, he had drunk some Alcohol in town and had carried some when he went back home at about 1.00 p.m. The deceased and PW2 joined him between 2.00 p.m. and 3 p.m. and they too had carried Kenya cane vodka, which the continued to imbibe. The accused arrived home at about 5-6 p.m. and he did not witness any fight as he was tired due to lack of proper sleep during the previous night.
22. It was his further evidence, that the accused was not married, drunk alcohol daily and would be noisy after drinking. Over his sleep, he heard the deceased making noise as he left his compound headed towards the market. Further on the material day when he recorded his witness statement, he was drunk and had asked the police officer to accommodate him and allow him to come the following day, but the said officer had refused to heed to his request. The version of events as recorded was therefore not accurate.
23. PW.6 DR. Waithera Githendu stated that she was a Pathologist based at Machakos level 5 hospital and had conducted the post mortem on the deceased body on 19.07.2016, which body had been identified by his brothers PW1 and PW2. On examination, she found that the deceased had a bruise on the forehead with no other external injuries. He also had fractures on left first rib and the surrounding chest muscles had some bleeding. In the abdomen the spleen had ruptured and had caused about two (2) liters of internal bleeding in the tummy. The deceased left kidney also had lacerations, but all other systems were essentially normal. Based on her examination, she concluded that the cause of death was abdominal trauma caused by blunt force trauma and produced her Post mortem report as Exhibit P1.
24. Upon cross examination she confirmed that the deceased had no other external injuries save for the aforementioned injury on the forehead. The organ rupture and kidney lacerations must have been caused by the impact of an external force. The said injuries could have be caused by a fall from a height but, normally in such incidences, the injuries would have been pattern less injuries and not necessarily on one side as was the case herein. Finally, unless information on intoxication is given before the post mortem exercise was carried out, they would not normally conduct toxology examination.
25. PW.7 CIP Augustine Mwakio confirmed that he was previously the OC Crime at Machakos police station and was the investigating officer of this incident. On 11.07.2016 around 12.30 p.m., he was at the police station when PW1 reported that his young brother Fidelis Mutua Mbithi had been found dead in his house on the morning. The report was recorded in the occurrence book and together with Pc. Paul Nduva, Pc. Fatuma Oduor and Pc. Driver Mshote Nicodemus, they left station for the incident scene and found the deceased lifeless body in his house, where he was staying alone.



26. He inquired as to what may have transpired and was told that on the previous evening, the deceased and his other cousins were drinking Alcohol at their cousin's home, where a disagreement arose, between the deceased and the accused. The accused went to his house and returned with a piece of log, which he used to assault the deceased, who as a result fell down and the accused continued with his assault until the said log broke into several pieces. The deceased left his cousins home after the said assault, came back to his house and was found dead the following day. When he viewed the deceased body, he saw blood stains on his head and the chest area had reddish inflammation.
27. They took the body to Machakos Level 5 mortuary and on 19.07. 2016 had the post mortem conducted. During the subsequent period the accused was not at home, but he was later arrested and upon conclusion of the investigation process had him charged with offence of murder.
28. Upon Cross examination PW7 confirmed that the accused disappeared from home after the incident and was later arrested after burial at Machakos stage, where he worked as a tout. According to information he had received, the deceased and accused were cousins and on the material, day were drinking spirit Alcohol at PW5's home. Others present at the said home were PW2, PW3 who was doing house chores and unidentified adult, who was also inside the house. There was a disagreement which resulted in the fight and on the following day the deceased was found to have died at his house, which was about 100 meters away.
29. PW2, PW3 and PW5 all saw the accused assault the deceased and there was no evidence that after the assault, he had followed the deceased to his house. He also confirmed that the deceased body was found on the floor of his house the following morning and he had blood stains on his face.

C. Defence Case

30. DW1 Alex Musau Jimmy testified that on the material day, his brother PW5 summoned him to his home at about 9 a.m and requested that he accompanies him to Machakos Town, where he intended to buy hardware material for his cowshed. They met the deceased at the matatu stage and went to Machakos town together using tuk-tuk. In town, they went to "Kisambalau bar" where they settled and enjoyed 3 bottles of Blue moon and Spangler Alcohol spirits until at about 4.00pm when they decided to go back home. They arrived home at about 5pm and continued to drink the last spirit bottle at PW5 compound.
31. While enjoying their drinks, he never had any differences with the deceased or others present. PW5 by then was drunk and had blacked out, while the deceased was making noise and was chased away by PW3. He too had, had enough and decided to pass a shortcut through his mother's shamba to enable him get to his house. In the process, he fell down, blacked out and later found himself on his bed. He denied beating up the deceased with a wooden stick as they had a good and healthy relationship with the deceased and his family. He also confirmed that he was unable to attend the deceased funeral as he was way at work.
32. Upon cross exam DW1, confirmed that the deceased was his uncle, they had a good relationship and again denied that he assaulted him in any manner on the material day. According to him, he was wrongly implicated in this case by a cousin known as Elijah, to get back at him over a land dispute, a fact the area chief was aware of and could be summoned to testify over the same. He further confirmed that on 10.07.2018 they drunk three (3) bottles of spirits and were all drunk by the time they went back home. He also remembered seeing his sister in law chasing away the deceased away from her home and later blacked out and was not sure of what transpired. His son later told him that he was the one, who took him home. In reexamination he reaffirmed that no dispute arose, on the material day when they were enjoying their Alcohol spirits.



33. DW2 Esther Wambui Maina affirmed that the accused was her husband, while the deceased was her father in law (husband's uncle). On 10.7.2016, her brother in law (PW5) called her husband and requested him to accompany him (PW5) to Machakos town. They came back at about 2.30 p.m. inebriated and went to her mother in law compound. Her house was situated on top of the hill, while her mother in law house was situated on the lower end of the said hill and from her compound, she could see her husband, PW2, and the deceased enjoy their drink until about 7.00 pm when they departed.
34. At about the said time, she went to collect milk from her mother in law compound and met the deceased at the gate, leaving enroute Kalimoni Market but did not talk to him. She also saw her husband had blacked out in the shamba and also did not disturb him. She picked her milk, went back to her house to cook and later, requested their lastborn son Enock to go pick up his father from the shamba and bring him home. It was her further evidence, that her husband, PW2 and the deceased were habitual drunkards and the deceased was known to be noisy and stubborn when drunk.
35. On the material day, she saw the trio, happy and singing Kamba songs. It was her belief that her husband did not hurt or injure the deceased, and their families enjoyed cordial and good relationship. Upon cross examination, she stated that her house was about 100m from her mother in laws house and PW5 also resided within the same compound. The trio, had came back home at around 2.30 p.m. and continued to drink until about to about 6.30p.m. During this period, she was within her compound but could hear the trio laugh and sing. At no point did the parties fight or shout at each other but later on in the evening, she heard PW3 chase away the deceased from her compound as he was already drunk. In reexamination DW2 reiterated the same evidence.

D. Accused Person's Submissions

36. The accused counsel, rehashed the evidence presented and submitted that what the court had to consider was whether or not the prosecution had discharged the burden of proof to the required standard to reach a finding that the accused was guilty of the offence he was charged with. In particular, they had to prove cause of death, secondly that the deceased death was as a direct result/ consequence of the accused unlawful act and/or omission and finally also prove that the said unlawful act or omission was committed with malice aforethought as defined by Section 206 of the Penal code. Reliance was placed in the case of Republic Vrs Pius Kikungu John (2019) eKLR.
37. Death was proved and established by the postmortem report (Exhibit P1), produced by PW6 but in totality, the evidence adduced in court by the prosecution witnesses was inconsistent and inconclusive, when considered in light with PW6 findings. Secondly the accused also gave a plausible defence that they indeed were with the deceased and drank alcohol the whole day at Kisambalau Bar situated within Machakos town and continued with their drinking binge at home, before PW3 chased the deceased away from her home.
38. It was to be noted that by then he too had blacked out and was later assisted by his last-born son and taken home where he slept until the following morning. Reliance was placed on the case of State vs Daniel Okumu Owino [2015] eKLR , where it was held that a court could not convict, where the prosecution had not proved that cause of death was as a direct consequence of an unlawful act or omission on part of the accused person.
39. Finally, it was also submitted that the evidence placed before court did prove that all the parties were relatives, with no family disputes or grudges and were heavily intoxicated after enjoying their Alcohol drink on the material day. If the court were to find that the accused assaulted the deceased, the court was urged to find that his state of mind was impaired and had no mens rea. Reliance was placed in



the case of Republic vs Lawrence Lokulani Lotukuni [2006] & Republic v Patrick Kyalo Munywa & Another (Machakos Cr. 62 of 2013).

40. The prosecution therefore had not discharged the burden of proof to the required standards to warrant conviction of the accused and urged the court to return a verdict of not guilty. The prosecution did not file any submissions and relied on the evidence presented on record.

E. Determination

41. I have considered the evidence presented by both parties and submissions on record. The question which arises before this court is whether the prosecution has proved beyond reasonable doubt that the accused murdered one Fedelis Mutua Mbithi, the deceased herein.

42. Section 203 of the Penal Code defines the offence of murder as follows:

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

43. Arising from the foregoing the ingredients of murder were explained in the case of In Mombasa High Court Case Number 42 of 2009 between Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno, Ojwang J (as he was then) expressed himself as hereunder:

“The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:

- a. Proof of the fact as well as the cause of the death of the deceased persons.
- b. Proof that the death of the deceased’s resulted from an unlawful act or omission on the part of the accused persons.
- c. Proof that such unlawful act or omission was committed with malice aforethought.”

44. In Joseph Kimani Njau vs Republic (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in Nzuki vs 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”.

45. In *Roba Galma Wario vs. Republic* [2015] eKLR the court also held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

(i) The death of the deceased and its cause.

46. Dr. Waithera Githendu (PW6) confirmed that she conducted the post mortem on the deceased body on 19.07.2016 and found that the deceased had a bruise on the forehead with no other external injuries, on the chest he had fractures on the left first rib and the surrounding of the chest muscles had some bleeding, the spleen was ruptured and two liters of blood was found in the tummy. Finally, the left kidney too was bruised and determined that the cause of death to have been caused by abdominal trauma secondary to blunt force trauma. From this evidence, it was clear that the death was not a natural and was caused by injuries inflicted by a third party.

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

47. PW2 confirmed that on the material day in the evening, he was with PW5 and the deceased at PW5’s home where they were enjoying their Alcohol drink and were later joined by the accused. A quarrel ensued between the deceased and the accused, whereupon the accused stood up, went to his house and came back with a rungu/ big stick which looked like firewood and used it to strike the deceased, who subsequently fell down. It was his further evidence that fearing for his life he took off, and the following morning when he went to check on the deceased at his house, unfortunately found that he had died a fact also confirmed by PW1, PW3 , PW4, PW5 and PW7.

48. PW3, the accused sister in law also corroborated PW2 evidence and confirmed that the accused quarreled with the deceased and when she came out of her house, she saw the deceased stuttering away, while shouting and the accused too, was shouting back at him. Her husband (PW5) told her that, “the accused did a wrong thing in striking the deceased”. Under cross examination, PW3 reconfirmed that PW2 told him that the accused had struck the deceased on his legs and fact disapproved by her husband, who was also present. Finally in reexamination she reiterated that “My husband and PW2 are the ones who informed me that the accused struck the deceased. The deceased was also saying the accused struck him.”

49. PW5, the accused elder brother who was also present at the incident scene recanted his statement made to the police and turned into a hostile witness. But he confirmed that he was present with the accused and the deceased and that they had enjoyed their Alcoholic drink within his compound, but he had blacked out and did not see any incident occur. In defence, the accused also admitted that he was with the deceased and PW5 and had enjoyed their Alcoholic drink within Machakos town and later in the evening returned home and continued to enjoy the extra alcoholic drinks/spirts they had carried from town.

50. Later PW5 blacked out, the deceased, who was also drunk was making noise and was chased away by his sister in law PW3, while he also decided to walk to his home, but fell and blacked out within his mother’s shamba, and woke up the following day in his house. He confirmed that he had no personal



grudges or difference with the deceased and had no reason to fight him. DW2 affirmed the accused version of events and that her husband did not fight with nor did he assault the deceased.

51. While the accused, strenuously denied assaulting the deceased, there is direct evidence of PW2 who saw him carry out the assault on the deceased using a big stick/ firewood. PW3 also confirmed the commotion within her compound and also affirmed being told by PW2 and her husband PW5, that, the accused had assaulted the deceased, and act which her husband disapproved of and stated that, “the accused did a wrong thing in striking the deceased”
52. PW3 also further affirmed in reexamination that, when the deceased was stuttered away he was also saying that the accused had struck him. The totality of the evidence adduced by the prosecution confirms the accused person’s presence and involvement in assaulting the deceased on the evening of 10.07.2016 and he subsequently succumbed to injuries sustained on the said night. The only logical and reasonable conclusion based on the aforestated evidence is that the assault occasioned, which obviously was unlawful, directly caused the injuries suffered by the deceased and lead to his untimely death.

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

53. 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 cause 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.

54. In Joseph Kimani Njau vs. Republic [2014] eKLR the Court of Appeal stated that:-

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may



be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

55. A charge of murder may therefore not be sustained unless the mens rea for murder is proved. The element of intention in committing the offence was examined in the English case of *Hyam v DPP* [1974] 2 ALL ER 41 where Lord Diplock observed as follows:

“No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”

56. The prosecution and defence evidence presented confirmed that on the material day at about 9.00 am, PW5, the accused, and the deceased went to Machakos town, and enjoyed their drinks at “Kisambalau bar”, before returning home later in the afternoon to continue with their drinking binge. DW1 confirmed, that they drank three (3) bottles of Blue moon and Spargler brands of Alcohol spirits and returned home carrying an extra bottle, which they continued to enjoy. PW2 also joined them at PW5’s home and by the time the incident occurred all the parties were seriously inebriated. This fact was independently confirmed by PW3 and DW2.

57. In this case, though the accused denied having a hand in assaulting the deceased, the evidence adduced confirms otherwise. He further explained what transpired on the material day and indirectly raised the defence of having been intoxicated, which evidence was also affirmed by PW2, PW3, PW5 and DW2. As the trial court, I am duty-bound to take it into account and determine whether under the said circumstances, the appellant was capable of forming malice aforethought, in the absence of which he could not be guilty of murder.

58. Section 13 of the penal code, deals with the issue of intoxication in criminal matter’s and provides that:

- “ 13 Save as provided in this section, intoxication shall not constitute a defence to
- (1) any criminal charge.
 - (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –
 - (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
 - (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
 - (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.
 - (4) 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.



(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

59. Under section 13 of the Penal Code, intoxication is not a general defence to a criminal offence, except in the circumstances set out therein. A person who commits an offence while intoxicated is not ipso facto excused from the consequences of his act. The aforementioned section affords a defence of intoxication in three situations as follows.

60. The first situation is in what is called involuntary intoxication, where at the time of the commission of the act complained of, the accused person does not know that it is wrong or does not know what he is doing, because of intoxication caused without his consent by the malicious or negligent act of another person. In such a case, the court is required to discharge the accused person.

61. The second situation is where the accused person, by reason of intoxication is insane, temporarily or otherwise, so that at the time of commission of the act complained of, he does not know that it is wrong or does not know what he is doing. This situation brings the case within the M’Naghten Rules and the court is required to deal with the accused person in the manner prescribed by the Criminal Procedure Code for accused persons who were insane at the time of commission of the offence, culminating in a special finding of guilty but insane and the detention of the accused person in a mental hospital at the pleasure of the President.

62. In *Rex v. Retief* [1940-1943] EA 71, the former Court of Appeal for Eastern Africa explained this aspect of the defence of intoxication as follows:

“The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man’s intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the Criminal Procedure Code ‘guilty of the act charged but insane when he did the act.’ ”

63. The third situation, contemplated by section 13(4) of the Penal code, arises where by reason of intoxication the accused person is incapable of forming a specific intent, which is an element of the offence charged. Sometimes this situation is referred to as “intoxication or drunkenness negating mens rea”. In *Said Karisa Kimunzu v. Republic*, CR App No. 266 of 2006 (Msa), the Court stated thus regarding intoxication or drunkenness negating mens rea:

“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."

64. Based on the evidence presented, am not satisfied that malice aforethought has been established in terms of Section 206 of the Penal Code as all the parties involved were in a state of drunken stupor, when the dispute arose, resulting in the accused person assaulting the deceased and inflicting the injuries that unfortunately lead to his death. PW1 to PW5, the accused and DW2 all confirmed the close family ties between the accused family and the deceased family and no prior grudge was shown to exist, which would have motivated the assault occasioned.
65. Having so determined, the court falls back to Section 179 of the Criminal Procedure Code, which 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.

66. In the premises, I find that the offence of Murder has not been proved and accordingly reduce the charge of murder to manslaughter. The accused is acquitted of the charge of murder but convicted of the lesser offence of manslaughter contrary to section 202 as read with Section 205 of the Penal Code.
67. Right of Appeal, 14 days.
68. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN VIRTUAL COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

In the presence of:-

Mr. Kyalo for Appellant

Mr. Mang'are for O.D.P.P

Susan/Sam - Court Assistants

Accused present in court

