**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 10 OF 2015**

**REPUBLIC**

**VERSUS**

**JONAH MACHARIA KIAMA**

**JUDGMENT**

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

On the night of 1 March 2015, Nicholas Wanyiri together with his neighbours were awakened by disturbances in a neighbouring house in which the accused's estranged wife lived. They left their houses to help the accused's wife who appeared to be in some distress though they were as much interested in some peace and tranquility for the rest of the night. As they attempted to talk to the accused into some peaceful resolution of his dispute with his former wife outside their house, the accused emerged from the house and stabbed Nicholas Wanyiri to death. He then escaped from the scene and could not be immediately traced; however, he surrendered himself to the police, three months after the incident.

It is against this background that the accused was arraigned on 2 July 2015 and charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63, the particulars of the charge being that on the 1st day of March 2015 at Amboni trading centre in Nyeri County, he murdered Nicholas Wanyiri.

He entered a plea of not guilty to the charge after having been examined by Dr Moses Mwenda (PW7) and found fit to take plea and stand trial.

Annette Wambui Muchiri (PW1) testified that she was Njeri Maina's immediate neighbour at Mweiga. On the material date at night, she heard Njeri open the door for the accused. She could tell whatever was happening in her neighbour's house because their houses were timber houses and the common wall separating them was made of timber too. Apparently, the accused wanted them to leave the house and go back to the accused's home where they lived previously. Njeri was opposed to the idea but she was apparently willing to leave if their children and her neighbours were made aware of their departure. Not being satisfied, the accused started beating Njeri and it is then she screamed for help. As a result of the disturbances, Muchiri and other neighbours ventured outside their houses to help, if they could, and protect Njeri from what might have been an imminent danger.

They engaged the accused in some conversation in the process; he is alleged to have asked them if they knew who he was but they told him that they were interested in peace. Suddenly, he emerged from the house and stabbed the deceased who happened to have been standing next to the door to his wife's house. Before then, Njeri had alerted them that the accused had picked a kitchen knife from the table.

The witness testified further that he had known the accused before and that she also knew that he was Njeri's former husband. She also testified that the accused was drunk. Apart from stabbing the deceased, he tried to stab other people but they all ran away.

Patrick Mwangi Nyaruai's (PW3's) testimony was to the effect that he knew both the deceased and the accused. He lived in the same neighbourhood as the deceased. Muchiri (PW1) woke him up on 1 March 2015 at about 11.00 PM and told him that the accused was beating his wife and children. While they were out, the accused emerged from the house and everybody ran away except the deceased. They later found out that he had been stabbed in the abdomen. The police later came and collected his body. He was aware that the accused and Njeri were married before but they had separated and it is after the separation that the latter rented her own house in their neighbourhood.

It was also his evidence that the neighbours were standing outside her house when the accused stabbed the deceased. The accused had even called out his name when he heard him talking. In fact, there was a conversation between the accused and the people who were outside his estranged wife's house.

Michael Githaiga (PW4) testified that he lived together with the deceased and that on the night of 1 March 2015 at about 10.30 PM they heard screams outside their house. The deceased wanted to come out but Githaiga asked him not to. However, they both ventured out when Muchiri (PW1) came out of her house and asked them to get out and assist because the accused was going to kill Njeri. While out, they knocked at Njeri's door but the accused started insulting them. The deceased asked him to open the door so that they could talk. He opened the door but, rather than talk, he immediately stabbed the deceased. The deceased told him that he had been stabbed and that he was dying. Githaiga tried wrestling the accused down but he managed to escape from his grip.

Mwangi Miano (PW5) testified that he was a member of the local security committee and that his house was about 250 metres from where the deceased was murdered. He went there when he heard screams. He found the deceased dead and he is the one who called the police at Mweiga police station and informed them of the murder.

The investigation officer was chief inspector of police Helen Kitavi (PW9). She testified that she undertook investigations together with constable Kibet and together they visited the scene of murder. Constable Kibet had been there before and collected the body. They went to the accused's home at Bondeni but he had escaped. His mother told them that the accused had disappeared the previous night. His house had been burnt down by members of the public after he disappeared.

On 23 June 2015 at around 9.25 AM the accused presented himself to the police. He told the investigation officer that he had stabbed somebody on 1 March 2015 and that he surrendered because he knew that the police were looking for him.

Corporal Kibet (PW10) testified that indeed on 1 March 2015 he was at the station when he received a call from the assistant chief of Amboni sublocation to the effect that somebody had been stabbed and died at Amboni trading centre. He in turn informed the officer in charge of the station who, apparently, had been informed of the same incident. They found the deceased's body along the road; it had been brought there by members of the public who had attempted in vain to take him to hospital. The body was about 9 metres from where the deceased had stabbed. They took it to Mary Immaculate Hospital at Mweiga.

When the accused surrendered himself on 23 June 2015, he said that he was being haunted by the murder. Apparently, he had been hiding in Subukia. He led the officer to a bush where he had hidden the knife with which he had stabbed the deceased but they could not find it.

The pathologist, Dr. Murimi Peter (PW11) testified that he conducted the post-mortem on the deceased's body at Mary Immaculate Hospital on 9 March 2015. The body was identified to him by the deceased's relatives, Joseph Mwangi Wanjeri (PW2) and Joseph Wang'ombe Wanjeri (PW6) both of whom testified in this regard. Police constable Peter Ngichu (PW8) too testified that he attended the postmortem of the deceased at Immaculate Hospital in Nyeri. He observed that the deceased's body had a stab wound on the left side of the chest.

The pathologist observed that the body was of a male African aged 20. Like Ngichu (PW8), he also noted a single stab wound on the anterior chest wall on the left side measuring 4 centimeters. The penetrating wound went through pericardium to the left ventricle from the inferior aspect. There was massive bleeding in the pericardium sac. He opined that the deceased died of a single stab wound on the left side of the chest causing perforation of the left ventricle which led to the death due to excessive bleeding.

The accused gave a sworn statement when he was put on his defence. It was his evidence that on the material day he had been drinking at Amboni trading centre from 4.00 PM to about 10.00 PM when he went to his house where he found his wife and children. He quarreled with his wife over a loan she had taken or wanted to take from the Kenya Women Finance Trust. He then heard people making noise outside the house. They were throwing stones at the house and hitting the door. He came out of the house and enquired who they were. He thought that they were not up to any good. One of them hit him on the leg as he came out of the house. He took a knife to defend himself. As he struggled with one of them, he stabbed him. However, he did not know that he had stabbed him. Everybody else ran away. It is then that he left and went to his home, where his parents lived. He, however, did not reach his parent's home. He went to Naromoru where he stayed until he presented himself to the police.

Although he said he was drunk, the accused testified that he could remember vividly all that happened that night. He could even recall the subject of the conversation between him and his wife before they started quarreling.

Section 203 of the Penal Code under which the accused was charged reads as follows:

> **203. Murder**
>
> **Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

The section primarily defines the offence of murder. Prior to the Supreme Court's decision in Petition No. 16 of 2015, **Francis Kariokor Muruatetu & Another versus Republic (2017) eKLR,** section 204 which was read alongside section 204 has since been invalidated as being unconstitutional to the extent that it deprives the trial court of the discretion to mete out an appropriate sentence depending on the circumstances of each particular case.

Going back to section 203, a case of murder is established when first, death of a person is proved; secondly, that the death was caused by the act or omission of another person; thirdly, that the act or omission was unlawful, and; finally, that the other person was motivated by malice aforethought or had the criminal intent of causing death.

There is no much dispute about the first three components. It was the evidence of Muchiri (PW1), Nyaruai (PW3) and Wamuyu (PW4) that they were present when the deceased was stabbed and killed. Corporal Kibet (PW10) and his colleague chief inspector Omuga collected the deceased's body from the scene and took it to the mortuary. Wanyiri (PW2) and Munyiri (PW6) identified the deceased's body for post-mortem purposes. Also, at the mortuary for this exercise was constable Peter Ngichu (PW8) who even observed that the body had a stab wound on the left side of the chest. Finally, the pathologist, Dr Peter Murimi (PW11), not only performed the post-mortem on deceased's body but he also certified his death.

The accused has not denied stabbing the deceased and thereby killing him; the explanation of his action appears to be that either he did not know he had killed the deceased, or that he was defending himself or he was drunk to the extent that he did not know what he was doing. None of these explanations would justify the murder of the deceased and therefore the act of killing him was unlawful.

The primary question for determination is the fourth component which is whether the accused had the criminal intent or malice aforethought to murder the deceased.

Malice aforethought is either express or implied. It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130),** but it is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm **(see DPP v Smith [1961] AC 290).**

It has also been held to be constructive if it is proved that the accused person killed in furtherance of a felony ( for example, rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm (see **Raphael Mbuvi Kimasi versus Republic (2014) eKLR; Isaak Kimanthi Kanuachobi versus R (Nyeri Criminal Appeal No. 96 of 2007** (unreported).

This concept has a statutory underpinning in section 206 of the Penal Code; this section prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

> **206. Malice aforethought**
>
> **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.**

When I consider the accused's defence and the submissions filed by his counsel, he appears to be presenting two defences either simultaneously or one in the alternative to the other; as I understand his case, these defences are that he was acting in self- defence or that he was so intoxicated that he was incapable of forming the necessary mens rea or the criminal intent to murder the deceased.

Perhaps it is necessary, at this point, to go back to the pertinent parts of the accused's statement and his counsel's submissions in order to understand the accused's case better. He stated thus in his testimony:

> **On 1 March 2015 I was at Amboni trading centre…I went to County Bar at County Bar at Amboni trading centre…we drank from 3.00 PM to 9-10.00PM. I then went back to my house…I started quarreling with my wife…I heard people makimg noise from outside. They were throwing stones and hitting the door. I did not know who they were. I came out of the house and asked whom they were. They never responded. I thought those people were not up to any good. One of them hit me on the leg as I came out of the house. I took the knife to defend myself. There were people but I cannot know how many they were. I struggled with somebody and it was in the cause of the struggle that I stabbed him. I did not know that I had stabbed him. Everybody ran away. I then left and went to my home where my parents are.**

Mr Kimunya, the learned counsel for the accused, picked up that aspect of intoxication and submitted as follows:

> **PW1…told the court that the accused was drunk. PW4 told the court that the accused looked like he was mad. In his defence, he told the court that he had spent considerable time between 4PM or thereabouts to and 10 pm (sic) at the County Bar at Amboni drinking alcohol. He said he was very intoxicated and his judgment was impaired neither could he remember the events of the day very clearly**.

The learned counsel proceeded to invoke section 13 of the Penal Code which provides for a defence of intoxication and the decision of the Court of Appeal sitting in **Nyeri in Criminal Appeal No. 352 of 2012, Anthony Ndegwa Ngari versus Republic** where subsection (4) of the section was applied; the court cited its own decision in Criminal Appeal No. 266 of 2006, **Said Karisa Kimunzu versus Republic** where it was said of the provision of the law as follows:

> **But under subsection (4) the court is required to take into account the issue of whether 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 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 circumstances of this appeal, the learned trial judge was required to take into account the appellant's drinking spree 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.**

Section 13 generally deals with the defence of intoxication and subsection (4) referred to reads as follows:

> **(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**.

I agree and indeed, in principle, I am bound by the pronouncement of the Court of Appeal in **Said Karisa Kimunzu versus Republic** as representing the correct position in law; where a defence of intoxication is raised, the trial court is bound to consider it. It must, however, be noted that a mere assertion that one was drunk at the time of committing the offence is not, of itself, sufficient to avail an accused this defence; if that were the case, all an accused would be required to say in his defence to secure an acquittal or be convicted on a lesser offence and thus escape a severer penalty is that he was drunk. Such a position would be legally untenable and would, no doubt, ridicule criminal justice. It is for this reason that, in considering this defence, the court has to consider such factors as whether there is proof that that the accused was not only drunk but also that while in such state, he is prone to committing the kind of offences that he is accused of. To be precise, there has to be proof or some material upon which the court can make a determination that because of his drunken state, the accused was in such a state of mind that he was incapable of conjuring an intent, whenever it is necessary, of committing the kind of offence that he has been accused of.

It was so succinctly put in **R v Alden and Jones [2001] EWCA Crim 3041**, at paragraph 35:

> **"In our judgment, so far as the question of alcohol and specific intent are concerned, we do not take the view that there are two divergent, inconsistent, lines of authority. The crucial question in every case where there is evidence that a defendant has taken a substantial quantity of drink, is whether there is an issue as to the defendant's formation of specific intent by reason of the alcohol which he has taken. As the passage in the judgment of Lane LJ in Sheehan & Moore, makes clear, the necessary prerequisite to a direction of the kind identified in that case is that there must be an issue as to the effect of drunkenness upon the defendant's state of mind."**

The reasoning was followed in **R versus Ioan Campeanu (2020) EWCA Crimin 362** in which the Court of Appeal of United Kingdom (Criminal Division) emphasised that there must be sufficient evidence of the defendant claiming not to have formed the requisite intention due to his state of intoxication. The court stated:

> **The mere fact of intoxication is not sufficient of itself. There must be a causal connection between the two. The evidence relied upon by Mr Bromley?Martin QC about the applicant being in a state of paranoia because of the drugs was not evidence of his state of mind at the time of the stabbing and, as Mr O'Neill QC said, it does not create a causal connection between himself induced intoxication and killing her.**

So, it may be true as the accused himself and his estranged wife's neighbour have suggested, that the accused was drunk; but that, by itself, could not justify his actions. For the accused to benefit from this defence, he had to discharge the burden on him and demonstrate that he was so intoxicated that he was not able to form a particular intent to kill the deceased or cause him grievous bodily harm. It was incumbent upon him to prove that his ability to form a rational judgment and exercise self-control and also to understand the nature of his conduct was impaired.

In my humble view, this burden was not discharged satisfactorily; at least on the balance of probabilities. All I see is someone who voluntarily armed himself with a murder weapon and set out to either cause death or grievous harm to any person as soon as he emerged from his or his estranged wife's house. Unfortunately for the deceased, he fell victim of the accused's ill-motive; the accused struck him with so much venom that just a single blow was enough to penetrate through the deceased's heart. He did not present any evidence to the effect that in striking the deceased in the manner he did, he had no intention of causing death or grievous harm to the deceased. Neither am I satisfied that the accused was not aware that his actions would probably cause the deceased's death or cause him grievous harm and that he was not reckless whether death or grievous harm would result. He has also not demonstrated that, by his actions, he did not intent to commit a felony.

Besides the defence of intoxication the accused floated around, as earlier noted, the possibility that he was acting in self-defence.

Going by their very nature, I doubt the defence of intoxication and that of self-defence can be presented simultaneously; for the same reason, they may not be presented as alternatives. A person defending himself would, obviously, be clear in his mind of what he is doing and the only question for determination where the defence of self-defence is presented would be whether the accused (or some other person) was in any danger necessitating protection of some sort and if so, whether the force employed in self-defence was proportionate to the impending danger. The defence of intoxication, on the other hand, would suggest that the accused's capacity to make a rational judgment was impaired to the extent that he cannot be said to have had the necessary intent (in a crime where this is necessary) to commit the crime in issue and could also not tell the nature of his act or acts.

Simply put, one cannot be said to have been deprived of the capacity to rationalize but at the same time he is conscious of taking preemptive action to ward off danger targeted at him or some other person.

But if I have to say something about this defence, albeit briefly, I would say that considering the circumstances under which the accused murdered the deceased, it is unlikely that this defence would be available to him.

The rationale behind this defence is that if the act alleged to constitute a crime is done in self-defence or defence of another, it is justified and the accused's conduct is lawful provided that no more force is used than is necessary for mere defence **(see R v Wheeler [1967] 3 All ER 829).**

Where the force used is unreasonable and death results, the defendant is liable to be convicted of murder; he may also be convicted of manslaughter depending on his intent. However, there is no special rule to the effect that death caused by the use of excessive force in self-defence can only be manslaughter (see **R v Clegg [1995] 1 AC 482, [1995] 1 Cr App Rep 507, HL).**

It is worth noting that this defence is not available if what the defendant is defending himself or another against is neither a criminal nor an unlawful act (**DPP v Bayer [2003] EWHC 2567 (Admin), [2004] 1 WLR 2856, [2004] 1 Cr App Rep 493).**

The evidence shows the events that culminated in the deceased's death were set in motion by the accused himself. He followed his estranged wife to her house but which he regarded as his own. It was his own evidence that he had a quarrel with his wife that escalated from a discussion on some loan the latter had either taken or was to take. According to Muchiri (PW1), a neighbour, the accused was beating his wife and children. This prompted her to seek help from the rest of the neighbours because she was apprehensive that the accused was going to harm them. It is in these circumstances that the neighbours came out and sought to calm things down.

If the accused was in his own house as he wants the court to believe, there is no evidence that he was in any danger. On the contrary, even going by his own evidence, he was the aggressor. It was never suggested that the neighbours attempted to get into his house either forcefully or howsoever. If there was any need for self defence, it would have been easier for the accused to remain in the house. Instead, he came out and immediately stabbed the deceased. It was never suggested that the deceased or any of his wife's other neighbours was armed or that they threatened him. If anything, and this was accused's own testimony, they ran away immediately he emerged from the house.

So, going by the decision in **DPP v Bayer (supra),** there is nothing unlawful or criminal that the accused could be said to have been defending himself against. As a matter of fact, the neighbours, who included the deceased, were out to suppress an crime that was being perpetrated by the accused himself. It is possible that with the kitchen knife within his reach, he would probably have harmed his estranged wife and children had it not been for a responsible neighbour who sought the help of other neighbours to intervene and calm down the situation.

Thus, there was no basis for self-defence and if, peradventure there was, the force employed by the accused was excessive and for that very reason, he would still be culpable for the offence of murder and not manslaughter. It has been held in in **De Freitas v R (1960) 2 WIR 523 (per Lord Morris of Borth-y-Gest)**:

> **'if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.'**

In other words, there is no half-way house. There is no hard and fast rule that an accused who has used a greater degree of force than was necessary in the circumstances should be found guilty of manslaughter rather than murder.

In 1971 a Court of Appeal of England consisting of Edmund Davies LJ and Lawton and Forbes JJ followed the same reasoning **in R v McInnes [1971] 3 All ER 295 at 301, [1971] 1 WLR 1600** at **1608 and** stated as follows:

> **'But where self-defence fails on the ground that the force used went clearly beyond that which was reasonable in the light of the circumstances as they reasonably appeared to the accused, is it the law that the inevitable result must be that he can be convicted of manslaughter only, and not of murder? It seems that in Australia that question is answered in the affirmative but not, we think, in this country. On the contrary, if self-defence fails for the reason stated, it affords the accused no protection at all.'**

The verdict may, however, be reduced from murder to manslaughter on other grounds, for instance, if the prosecution fails to controvert the evidence of provocation, where it arises, or fail to prove the requisite intent for murder. But so far as self-defence is concerned, it is all or nothing. The defence either succeeds or it fails. If it succeeds, the defendant is acquitted. If it fails, he is guilty of murder.

In the final analysis, I am satisfied that malice aforethought has established and with that, I find and hold that the prosecution has proved its case beyond all reasonable doubt. Accordingly, the accused is convicted of the offence of murder as charged.

**Signed, dated and delivered on this day of 9th April, 2020**

**Ngaah Jairus**

**JUDGE**