



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 47 OF 2017**

**REPUBLIC**

**VERSUS**

**GERALD MAJIRA NJERU .....ACCUSED**

**JUDGMENT**

1. The accused person, Gerald Majira Njeru, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 11<sup>th</sup> November, 2017 at Maskan Bar, in Likoni Ferry Terminal area, in Likoni Sub-County, within Mombasa County, murdered Frankline Kavayi Kilasi. The accused person pleaded not guilty to the charge. The prosecution called 7 witnesses to prove its case.
2. PW1 was Eric Omondi Omolo, a resident of Likoni at Mtaa wa Mbuzi in Shelly Beach Area. He was a businessman who used to sell second hand shoes at a stall in the mainland, at the Likoni Ferry area. He testified that on 11<sup>th</sup> November, 2017 at 6:30p.m., a man by the name Martin Kinyua (Kinyua) bought a pair of shoes from him at Kshs. 1,500/= . According to PW1, it appeared as if Kinyua had taken alcohol. PW1 stated that Kinyua then went to Maskan Bar which was 10 meters from his stall and joined the accused person, whom PW1 knew physically. The two started taking alcohol. It was PW1's evidence that after 10 minutes, Kinyua went back to the stall when drunk and told him that he had sold to him shoes, but he did not pick them. PW1 told Kinyua that the shoes were with the accused person. PW1 could see the accused person holding the said shoes. He accompanied Kinyua to Maskan Bar, took the shoes from the accused person and gave them to him.
3. It was PW1's evidence that after a while, he heard someone saying "***I have been stabbed with a knife***". He then saw someone walking away fast. PW1 testified that there was electric light at the scene which was fixed on a pole. It was a streetlight which was bright enough to enable him to see the people at Maskan Bar from his stall.
4. He further testified that Maskan Bar had electric light. He stated that he had seen the accused person selling pillows for about 2 months at the Likoni Ferry area and at times, he would see him at Maskan Bar.
5. PW2 was Lillian Kasango Kyenze, a resident of Likoni near the ferry area. She had a business near Maskan Bar. She testified that on 11<sup>th</sup> November, 2017 at 6:30p.m., she went to her business and released her son who was holding fort for her. She then sat down in her business area which she described as being in an open place, with only a corridor between it and Maskan Bar. She indicated that the distance between the two places was 4 meters.
6. It was PW2's evidence that among the people who were outside Maskan Bar, was a man who was seated close to her, who was chatting on the phone and there was another man standing next to him. She stated that the one who was chatting on the phone stopped and started talking to the one standing next to him. She described the latter as a man who used to sell pillows. PW2 testified that the other man told the man who used to sell pillows in Kiswahili "***kama huna pesa wacha kusumbua watu*** (if you have no money, stop disturbing people). PW2 stated that the man who sells pillows went towards the ferry and returned after 10 minutes. PW2 identified the man who sells pillows as the accused person herein. When he reached where Frankline Kilasi was, he looked at him and then looked at her. It was PW2's evidence that the accused person moved close to Frankline Kilasi (Frankline) and continued looking at him and then he looked at her.
7. The accused person then bent backwards and leaned against a wall and looked at PW2. She stated that she started feeling nervous and fearful because of the way the accused person was looking at her and Frankline. She gave evidence that the accused person looked at both sides of the corridor, put his hand in the pocket and removed a shiny object which looked like a knife. PW2 stated that she became afraid because she saw as if he wanted to stab her. She stood up, screamed and raised her plastic chair in front of her, to defend herself.
8. She testified that when she screamed the accused person stabbed Frankline on the chest below his breast. He then ran away towards the ferry area. She stated that the man who was stabbed as well as other persons who were seated at the bar stood up and ran after the accused

person.

9. She stated that the time then was 7:30p.m., and there was electric light fixed on a wall at the place where she was carrying on her business. She indicated that Maskan Bar had 2 electric bulbs which were on the outside part of the bar and there was one electric bulb inside the bar. She further said there was an electric security light which was about 8 meters from her business and it was on, at the time of the incident.

10. She indicated that on 14<sup>th</sup> November, 2017 she went to Coast Province General Hospital (CPGH) to visit Frankline as he was admitted. The following day, she was told that he had passed on.

11. PW3, Andrew Oyoko Opunga was the Manager of Maskan Club (the Bar), at the Kenya Ferry area. He testified that on 11th November, 2017 at 7:30p.m., he was doing supervisory work at the bar. While there, he heard a man by the name Kinyua and another one they used to call "Pillow" quarrelling in Kikuyu. After a short time, a man by the name Omondi (PW1) who sells shoes went to the club and told Kinyua that the shoes he had bought from his stall had been taken by "pillow" who had hidden them. PW3 stated that Kinyua was seated outside the Bar as he was busy on the phone. That "Pillow" and Kinyua then moved from where they were seated to where Frankline was seated outside the Bar.

12. It was PW3's evidence that Frankline told Kinyua that he was as old as his father and if he had taken enough beer he should go home and sleep. That Kinyua left. PW3 stated that Frankline told the same words to "Pillow" but he in turn started insulting him by telling him that he was foolish. PW3 further said that "Pillow" left and came back after 15 minutes and stood close to a person who sells clothes. PW3 stated that when he was in the bar, he heard someone shouting "knife"! On rushing outside, he saw "Pillow" running towards the ferry waving a knife in front of him. PW3 testified that he saw Frankline running after him as he held his chest. PW3 further testified that the person who shouted "knife"! is the one who was stabbed.

13. It was the evidence of PW3 that at that time people were disembarking from the ferry and they started beating "Pillow". PW3 identified the man he had been referring to as "Pillow" as the accused herein. He stated that they took him to Likoni Police Station and that Frankline accompanied them. He was taken to Kisangawa Clinic at Likoni for treatment. At 10:00p.m., PW3 was called by one Tom and told Kilasi's condition had become worse and they had taken him to Coast Province General Hospital. On 13<sup>th</sup> November, 2017, he went to see Frankline in the said hospital and found that he had been discharged from the Intensive Care Unit (ICU). The following morning, PW3 was called and told that Frankline had died. He went to Likoni Police Station and made a report about the death.

14. PW4, Geoffrey Kilasi was the father to the deceased Frankline Kavaji Kilasi. His evidence was that on 11th November, 2017 after 9:00p.m., his son's wife by the name Darlene (PW6) called and told him that Frankline had been stabbed and he had been treated at a private hospital. She called him the following morning and informed him that he had been taken to CPGH at night because he was in too much pain. She called him the following morning and informed him that Frankline was to be taken to theatre for an operation. She later called and told him that he was recovering well. PW4 indicated that he did not call Frankline between 12<sup>th</sup> to 14<sup>th</sup> November, 2017.

15. PW4 further testified that on 15<sup>th</sup> November, 2017 at 6:00a.m., Frankline's neighbor by the name Linet called and told him that Frankline died at 5:00a.m. PW4 traveled to Mombasa on 16<sup>th</sup> November, 2017. A postmortem was done on Frankline's body on 22nd November, 2017 after he and PW6 identified it to the Doctor. During the postmortem he noted that the deceased had a stab wound on the right side of his lower chest.

16. No. 94157, PC Titus Musembi of Likoni Police Station was the Investigating Officer and testified as PW5. His evidence was to the effect that in the morning of 13<sup>th</sup> November, 2017 he was instructed to escort suspects to court. One of them was Gerald Majira Njeru (accused person). PW5 prepared a holding charge of assault causing grievous bodily harm and escorted him to the Chief Magistrate's Court, Mombasa. He stated that the accused person denied the charge and an order was made for his release upon payment of cash bail or on depositing bond with a surety. He did not meet any of the conditions and he was given a mention date for 16th November, 2017. PW5 took him back to Likoni Police Station.

17. It was the evidence of PW5 that on 14<sup>th</sup> November, 2017 at 8:00a.m., he went to CPGH where Frankline was admitted. He found that he had left ICU at 5:00a.m., and he was in the ward. PW5 recorded a statement from him, but he noted that he was not in a good condition.

18. That on 15<sup>th</sup> November, 2017 the OCS Likoni Police Station informed him that Frankline had died. PW5 indicated that he went to CPGH accompanied by PC Mutai. He stated that on 22<sup>nd</sup> November, 2017, a post mortem examination was conducted on the deceased's body. PW3 identified the accused person as the one who was arrested for stabbing Frankline.

19. It was the evidence of PW5 that the incident was reported to Likoni Police Station on 11<sup>th</sup> May, 2017 at 8:26p.m. It was recorded that Frankline Kilasi made a report of the incident that occurred at Likoni Ferry terminal area at Maskan Pub. He reported that he was having a drink with his friends at Maskan Bar when a person who was not known to him stabbed him in the stomach. He screamed for help and members of the public apprehended the accused person, whom some people wanted to beat but others intervened. The report also stated that the accused person was then handed over to Likoni Police Station for having stabbed Frankline Kilasi. The accused person was thoroughly searched. He had sustained some injuries from being beaten by members of the public.

20. PW6 was Darlene Kanere Luiganji who had been married to Frankline Kavayi Kilasi for 2 years. She testified that at 8:00p.m., on 11th November, 2017, she called him as he was supposed to be at home. He told her he was in hospital and that he had been stabbed. After a short while, PW6 received a call from a strange number. The caller was a woman who told her that Frankline was at a private hospital called Singawa. She went there and found that he had been stitched in the middle of the chest, where they had put a bandage. She was given pain killers for him to take.

21. PW6 testified that Frankline could not walk without support and a Tuktuk driver supported him to board his Tuktuk. When they reached their house, Frankline said he wanted to sleep on the floor. She spread a lessa for him on the floor, gave him a pillow and he lay down. She then gave him a painkiller.
22. PW6 stated that Frankline told her that his stomach was painful and it was swelling. She called a neighbour who was a motor cyclist and asked him to take Frankline to hospital. He did so. On reaching there, the motor cyclist called her and said that Frankline had been referred to CPGH.
23. She called Frankline's friend and told him what had happened. He advised her to tell her husband and the motor cyclist to cross to Mombasa Island by the ferry. He later told her that the two had reached CPGH where Frankline had been told to go for an X-ray. He told her to go to CPGH early the next morning as he would not be available to stay with him.
24. The following morning, PW6 called her friend Linet and asked her to join her at CPGH. On going to the emergency department, she found her husband lying on a bed. She asked him what had happened and he told her he would explain to her what had happened to him. The Doctor appeared then and said it was time to operate on him. She went back to Likoni to feed her baby.
25. At 6:00p.m., Linet called her and told her to look for someone to go and take care of her husband as she had to go to her house where she had left her child. PW6 called the motor cyclist by the name Peter and asked him to go to CPGH to take care of Frankline. At 11:00p.m., he called her and told her that Frankline had been removed from the operation room to the ICU.
26. PW6 recounted that at 6:00a.m., on 13<sup>th</sup> November, 2017, she went to CPGH. At 8:00a.m, she was allowed to go to the ICU and found that Frankline had regained consciousness. She also found Peter and Linet there. She indicated that at 10:00a.m., she and Peter went back to Likoni. At 4:00p.m., Linet called and informed her that Frankline had been removed from the ICU and taken to the ward and he was conscious. PW6 spoke with him and asked what had happened to him. He told her that he would tell her after he recovered.
27. On 14<sup>th</sup> November, 2017, PW6 went to CPGH and found Frankline talking well. She spoke to him and he told her that police officers had gone to the said hospital and they recorded a statement. She called her husband's friend Newton and asked him to go to CPGH and look after Frankline.
28. She testified that at 5:00a.m., on 15<sup>th</sup> November, 2017 Peter called her and told her to go to CPGH with Frankline's identity card and hers. She went to CPGH. She found her husband's friends and Linet who met her at the main door. On reaching Frankline's bed, she found him dead. His body was taken to the mortuary.
29. She indicated that she went to Likoni and asked Linet to inform Frankline's parents about his death. That his father and aunt travelled to Likoni. On 22<sup>nd</sup> November, 2017, they went to CPGH accompanied by a police officer from Likoni Police Station for a post mortem examination to be done. Her father-in-law (PW4) identified Frankline's body to the Doctor and a post mortem was done.
30. PW7 was Doctor Nafisa Seif of CPGH. She indicated that she was familiar with the handwriting of Doctor Inham Mohamed who conducted the postmortem examination of the deceased. She produced the post mortem report under the provisions of Section 77(2) of the Evidence Act. Dr. Nafisa explained that there were 26 stitches on the deceased's abdomen which meant that the deceased's body was opened during post mortem. She stated that the incision was 29 cm. She indicated that the findings of the post mortem examination were that there was a stab wound between the deceased's breasts just below the sternum, on the right side. The deceased's body was pale meaning that there was internal hemorrhage. His stomach was distended because of the injury to the abdomen which had led to hemorrhage.
31. The Doctor further stated that the deceased's heart had enlarged as it tried to pump enough blood. The post mortem also revealed massive internal bleeding in the abdomen and reddening of the stomach region and small bowel. The stomach wall had thickened due to too much blood in the stomach area. The cause of death was established to be hemorrhagic shock due to a penetrating stab wound. PW7 produced the post mortem report as P.exhibit 1.
32. On being put on his defence, the accused person gave sworn defence. He stated that he used to live in Ujamaa in Likoni. He used to hawk bedsheets and pillows at bus stages, bars and villages in Likoni. He said that on the evening of 11<sup>th</sup> November, 2017 he was at the ferry area hawking his wares. As he was passing by Maskan Bar, he was called by a patron who bought 4 bed sheets and 3 pillows. He paid him. That the said customer's friends also bought some pillows and bed sheets. He stated that as he was walking out of the bar, he saw a group of people running from Shelly Beach towards the ferry bus stage which was near Maskan Bar. That he heard one of the said people saying "**Mpige huyo**"!, "**Mpige huyo**"!. The person who was being chased slid and fell. The accused person stated that the people who were chasing the man attacked him with their fists and legs (kicks). That one man picked a big stone and told the others to step aside as he wanted to finish the person who had fallen down.
33. The accused person said that at that time he was standing near the door of Maskan Bar and he told the members of the public to take the man to the police station. He indicated that they listened to him but the man who was being beaten ran away and the members of the public turned against him and told him he had assisted the man to run away. That he was taken to Likoni Police Station. He was put in the cells and on 16th November, 2017 he was taken to court and charged with the offence of assaulting Frankline Kilasi. On 29th November, 2017 he was charged with his murder.
34. He denied knowing Frankline and that there was an exchange of words between them. He denied stabbing the deceased. He referred to the evidence of PW5 who stated that the deceased wrote a statement indicating he was attacked from behind and stabbed in the stomach at an Mpesa shop. The accused person denied having been at an Mpesa shop but said that he was at the bar.
35. In the final submissions filed on 4<sup>th</sup> December, 2019 on behalf of the accused person, Mr. Obara submitted that the prosecution had not

proved its case beyond reasonable doubt for the reason that the deceased recorded a statement with PW5 and stated that he was at an Mpesa shop to withdraw money, when a person he did not know attacked him from behind and stabbed him. It was submitted that the above facts cast doubt on the evidence of the witnesses who testified that the deceased was stabbed at Maskan Bar.

36. It was further submitted that in the face of the information given by the deceased in his statement *vis a vis* the evidence adduced by the prosecution witnesses, which was conflicting, the prosecution failed to show that the Mpesa shop and the bar were one and the same or that they were close together so as to be seen as one. It was also submitted that if they were not in one place, the distance between the two premises was not given. It was stated by the defence Counsel that this court was faced with 2 likely scenes of crime and the issue of whether the accused person could have been at both scenes at the same time. It was submitted that the prosecution failed to shake the defence given by the accused person

37. It was argued that malice aforethought was not proved as the accused did not even know the deceased and had no reason to kill him. Mr. Obara prayed for the accused person to be acquitted.

38. Ms Mwangeka, Prosecution Counsel, filed her written submissions on 29<sup>th</sup> January, 2020. She stated that all the witnesses gave consistent evidence on the happenings of the material night and placed the accused person and the deceased at Maskan Bar. She submitted that their evidence on the identification of the accused could not be faulted as he was known to prosecution witnesses as a pillow hawker, which fact he confirmed during the defence hearing.

39. It was stated that the post mortem report proved that the deceased died of hemorrhagic shock secondary to a penetrating stab wound and that the said evidence corroborated PW2's evidence as she saw the accused person stab the deceased on his chest. It was stated that the accused person used the knife as a weapon with knowledge that it would cause grievous harm and/or death. Ms Mwangeka relied on the Court of Appeal decision in Ezekiel **Wakhwa Nandwa & Another v Republic** [2019] eKLR, as regards the factors which constitute malice aforethought.

40. It was stated that the accused person attempted to flee after stabbing the deceased and was arrested 20 meters from the scene of crime and subjected to mob justice. It was submitted that the act of running away incriminated him to the commission of the offence. It was submitted that from his defence, the accused person placed himself at Maskan Bar which was the scene of crime. It was further submitted that the defence did not dislodge the prosecution evidence and that the prosecution had proved its case beyond reasonable doubt. She urged this court to convict the accused person as charged.

## **DETERMINATION**

41. The issues for determination are:-

- (i) Whether the accused person was positively identified as the perpetrator of the crime;**
- (ii) If the accused person killed the deceased, whether he had malice aforethought.**

42. The accused person in his defence admitted that he was at Maskan Bar but denied having killed the deceased, whom he said he did not even know. He stated that he was apprehended when he intervened to assist a man who was being chased and beaten by members of the public. When he intervened, the man who was being beaten fled. The accused claimed that members of the public turned against him as they thought he had assisted a thief to get away. They took him to Likoni Police Station where he was charged with assault and later, with the present offence.

43. The evidence by prosecution witnesses is in sharp contrast to the defence raised by the accused person. He was placed at the scene of crime, namely, Maskan Bar, at 6:30p.m, on 11<sup>th</sup> November, 2017, by PW1. He stated that after a man by the name Kinyua bought a pair of shoes from him, he went to Maskan Bar where he found the accused person. PW1 knew the accused person physically. PW1's evidence was that Maskan Bar was close to his stall and he could see that the accused person was holding Kinyua's shoes. It was about 10 metres away. PW1 indicated that 10 minutes after Kinyua bought shoes from him, he went back and claimed that he did not give him the shoes he had bought. PW1 went to Maskan Bar and took the shoes from the accused person and gave them to Kinyua. In accordance to the evidence of PW1, there was a security light fixed on a pole, a bright street light at Maskan Bar. He further stated that from his stall, he could see the people at Maskan Bar. He indicated that the incident happened between 7:30p.m. to 8:30p.m., and there was electric light at Maskan Bar.

44. PW1 heard someone shouting he had been stabbed with a knife shortly after he took the pair of shoes from the accused person and handed them over to Kinyua. The accused person's identification as having been at the scene of crime was by recognition as PW1 had seen him selling pillows at the Ferry area for about 2 months prior to the incident and at times, he would see him at Maskan Bar.

45. Another witness who saw the accused person at Maskan Bar was PW2 who used to run a business in an open area opposite the said bar. The distance between the two places was 4 metres. On the material day, she went to work at 6:30p.m. There was a corridor separating her business and Maskan Bar. As per the evidence of PW2, there was light inside the bar, outside the bar and there was a security light 8 metres from her business. It is therefore not in doubt that both the interior and exterior of Maskan Bar was well illuminated with electric light.

46. According to PW2, the accused person was standing next to a man who was seated. PW2 heard the man who was seated telling the accused person that if he had no money, he should stop disturbing people. That the accused person then left and returned after 10 minutes. PW2 testified that she became uneasy because the accused person looked at her and Frankline several times. PW2 then saw the accused person putting his hand in the pocket and therefrom removed a shiny object which looked like a knife. She became afraid because she saw as if he wanted to stab her. She stood up and screamed. She raised her plastic chair in front of her to defend herself. When she screamed, the accused stabbed Frankline on his chest below the breast. He then ran away towards the ferry area. Frankline ran after the accused person and so did other persons who were at Maskan Bar.

47. PW2 knew the accused person well as a man who used to sell pillows. PW2 corroborated the evidence of PW1 that the accused person was at the scene of crime at Maskan Bar on the early night of 11<sup>th</sup> November, 2017. He was known to both PW1 and PW2 as a person who use to hawk pillows along the ferry area. Both PW1 and PW2 were categorical that at Maskan Bar there was sufficient electric light which enabled them to see the bar patrons. Further, both the businesses of PW1 and PW2 were in close proximity to Maskan Bar. PW1's stall was 10 meters to Maskan Bar while PW2's business was opposite Maskan Bar and 4 meters away from the said bar. This court's finding is that the circumstances at the scene of crime which was outside Maskan bar, were favourable for positive identification.

48. PW3, the Manager of Mskan Bar in his evidence also placed the accused person at the scene of crime. At 7:30p.m., while at the said bar he heard the accused person whom he used to see along the Likoni ferry area hawking pillows quarreling with Kinyua. He saw PW1 who sells shoes go to Maskan Bar and he told Kinyua that the shoes he had bought at his stall had been taken by the accused person who had hidden them. Kinyua and the accused then moved from where they were seated to where the deceased was seated outside bar. PW3 heard Frankline tell Kinyua that he was as old as his father and if he had taken enough beer he should go home and sleep. He left.

49. Frankline then told the accused person the same words and the accused person started insulting Frankline by telling him he was foolish. As per the evidence of PW3, the accused person left and returned to the bar after 15 minutes and stood close to a person who sells clothes. When PW3 was in the bar he heard someone shout **"knife"**!. He rushed outside and saw the accused person running heading towards the ferry as he waved a knife in front of him. He saw Frankline running after the said man as he held his chest. The accused person was apprehended by members of the public who started beating him. PW3 intervened and took the accused person to Likoni Police Station.

50. Apart from knowing the accused person as a pillow hawker, he used to be one of the customers at Maskan Bar. It is clear that the accused person was identified by PW1, PW2 and PW3 at the scene of crime, which was outside Maskan Bar. PW1 saw him there just before he heard someone shouting **"I have been stabbed with a knife"**. PW1 interacted with Kinyua and the accused person about the pair of shoes which the former had bought from PW1's stall. PW2 witnessed the accused person stab the deceased on his chest. PW3 saw the accused person, Kinyua and Frankline outside the Maskan Bar.

51. PW3's evidence of what he saw and heard amounts to circumstantial evidence. It lends credence to the evidence of PW2 that the deceased was stabbed by the accused person with a knife and to the fact that PW1 heard someone shouting he had been stabbed with a knife, shortly after he retrieved shoes which had been bought by Kinyua from the accused person and handed them over to Kinyua, at Maskan Bar.

52. The accused person's Counsel in his written submissions stated that in the statement that Frankline recorded, he indicated to PW5 that the offence happened at an Mpesa shop and that he was attacked from the back and stabbed in his chest. When PW5 was re-examined, he indicated that he recorded the deceased's statement after he came out of the ICU and he said he had gone to withdraw Kshs. 1,200/= from an Mpesa shop when he was attacked. The said information contradicted the report that the deceased made at Likoni Police Station on 11<sup>th</sup> November, 2017 at 8:26p.m. In making reference to the investigation diary, the report was made vide OB 76/11/11/2017. In the said report, Frankline reported that he was having drinks with his friends at Maskan Bar when a person who was unknown to him stabbed him in the stomach. He screamed for help from members of the public who apprehended the accused person and they wanted to beat him up but other members intervened. The said report also showed that the accused person was handed over to the police for stabbing the deceased. The report also indicated that the accused person sustained a few injuries after being injured by members of the public.

53. The foregoing report corroborates the evidence of PW3 to the effect that after the accused was arrested, he was beaten by members of the public. PW3 however intervened and took him to Likoni Police Station. PW5 confirmed that the accused person had some injuries when he was taken to the police station.

54. This court's finding is that the report the deceased made on 11<sup>th</sup> November, 2017 was credible and it was corroborated by the direct evidence of PW2 who saw the accused person stab the deceased. It was also corroborated by the circumstantial evidence adduced by PW3 that he saw the accused running away from Maskan Bar waving a knife in front of him as the Frankline gave chase. The accused person's defence that he was attacked by members of the public after assisting a thief who got away is unbelievable and cannot hold in the face of the overwhelming evidence adduced against him, as the person who stabbed the deceased, leading to his death.

55. This court notes that the statement which was recorded by PW5 on 14th November, 2017 at 8:00a.m. from Frankline cannot be relied on as he had come out of the ICU. It is this court's finding that having come from the ICU 3 hours before his statement was recorded, the deceased could not have been in the same frame of mind as he was in, on the date he made a report to the police station about the accused person having stabbed him. It is this court's finding that the 1<sup>st</sup> report made by Frankline at Likoni Police Station on 11<sup>th</sup> November, 2017 was the accurate one, notwithstanding the fact that he had been stabbed. In his examination-in-chief, PW5 was clear that Frankline was not in a good condition when he recorded a statement while admitted in hospital

**If the accused person killed the deceased, whether he had malice aforethought.**

56. Malice aforethought is described in Section 206 of the Penal Code in the following terms:-

***"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.”**

57. The evidence on record indicates that the accused person had been taking alcohol with Kinyua at Maskan Bar. He quarreled with both Kinyua and Frankline (deceased) at the said bar. The deceased told him that he was as old as his father and if he had taken enough beer he should go home and sleep. The accused person in turn insulted the deceased whom he called foolish. It is thus apparent that the deceased provoked the accused person for no apparent reason, as he was minding his business at Maskan Bar.

58. **Section 207** of the *Penal Code* describes *killing on provocation* as follows-

***“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.”***

59. **Section 208(1)** of the *Penal Code* defines *provocation* in the following terms-

***“The term “provocation” means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”***

60. According to PW3, the accused went away for 15 minutes and came back. PW2 said that the accused went away for 10 minutes and came back and stabbed the deceased. The post mortem examination revealed that the deceased died as a result of a hemorrhagic shock secondary to a penetrating stab wound. The duration of time taken for passion to cool down after a person has been provoked varies from one person to another.

61. The Court of Appeal in the case of ***Elphas Fwambatok v Republic [2009] eKLR*** held thus on the issue of provocation:-

***“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”***

62. Still on the issue of provocation, in ***VMK v Republic [2015] eKLR***, the Court of Appeal stated as follows-

“Provocation was defined in the case of ***Duffy [1949] I ALL ER 932*** as:-

***“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...”***

63. From the totality of the evidence on record and after taking into account the events preceding the stabbing of the deceased, it is my finding that the prosecution has not proved that the accused person had malice aforethought when he stabbed the deceased. The charge of murder against him has therefore not been proved beyond reasonable doubt. I hereby acquit him of the charge of murder contrary to Section 203 as read with 204 of the *Penal Code*.

64. This court however finds that the accused person killed the deceased by stabbing him after being provoked. The evidence adduced by the prosecution was overwhelming that the accused person caused the death of the deceased unlawfully, after being provoked. It is the finding of this court that the charge which has been proved against the accused person is that of manslaughter. I therefore convict the accused person for the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*.

**DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of May, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Accused person present

Mr. Obara for the accused person

Ms Valerie Ongeti - Prosecution Counsel, for the DPP

Mr. Mohamed Mohamud - Court Assistant