



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
[Coram: A. C. Mrima, J.]

CRIMINAL CASE NO. 8 OF 2019

REPUBLIC.....PROSECUTOR

-VERSUS-

1. MARY BOKE MWIKWABE
2. SUSAN JACKLINE BOKE.....ACCUSED

JUDGMENT

Introduction:

1. *Mary Boke Mwikwabe* (hereinafter referred to as '**Mary**') and *Susan Jackline Boke* (hereinafter referred to as '**Susan**') the first and second accused persons herein, were charged with the murder of one *Mongosi Mokaya* (hereinafter referred to as '**the deceased**').

2. The particulars of the information were that on 29/01/2019 Mary and Susan at Nyabohanse Township, Bugumbe South Location in Kuria West Sub-County within Migori County jointly with another not before Court murdered the deceased.

3. The accused persons denied committing the offence.

The trial:

4. A trial was held. The prosecution called five witnesses. **PW1** was *Joseph Sigano Mwita* (hereinafter referred to as '**Joseph**'). He was a brother to one *Patrick Nyakiruka* who was the husband of the first accused person. *Samson Muniko Robi* (hereinafter referred to as '**Samson**') testified as **PW2**. He was employed as a farm hand by *Sebastian Albanus Mokaya* who was the father of the deceased. *Sebastian Albanus Mokaya* (hereinafter referred to as '**Sebastian**') testified as **PW3**. *Dr. Olano Sylvester Ochieng* (hereinafter referred to as '**the Doctor**') conducted the post mortem examination on the deceased's body. He testified as **PW4**. The Investigating Officer was *No. 82026 Cpl. Christopher Samoei* (hereinafter referred to as '**Cpl. Samoei**') then attached to DCI Isebania. He testified as **PW5**.

5. The prosecution's case was that on 29/01/2019 at around 04:00pm the accused persons together with one *Patrick Nyakiruka* (hereinafter referred to as '**Patrick**') who was the husband of Mary severely assaulted the deceased thereby inflicting him serious injuries. As a result of the said injuries the deceased died 10 days later.

6. Joseph and Samson were eye-witnesses. Joseph testified that Mary was his in-law having been initially married by his brother Patrick. Mary had separated from Patrick. Whereas Patrick lived in Mushebe area, Mary lived with another man at Nyabohanse Township. Mary used to sell the local alcoholic brew known as '*chang'aa*' at Nyabohanse.

7. On the fateful day, Joseph had gone to Nyabohanse township to buy some kale seeds. As he approached the shop he heard screams on the other side of the road. He rushed to the direction the screams were from. Joseph met one *Nyankomo* (not a witness) who was a village elder. Nyankomo told Joseph that there was a serious fight at the place where Mary (who also used to be known as '*Mama Monjo*') sold alcohol. Nyankomo further said that he was looking for people to separate those fighting. The elder asked Joseph to rush to the home of Mary and assist.

8. Joseph reached the home of Mary. He found many people had gathered. He passed the gate into the compound. He found Mary and the deceased engaged in a vicious fight. They were struggling to come out of a house wherein people were drinking *chang'aa*. Mary held the deceased firmly. The two eventually came out of the house into the compound. Mary fell the deceased. The deceased stood. Mary took a

large stone which was used as a seat and aimed it on the head of the deceased. Mary hit the deceased with the stone. The deceased almost lost balance.

9. Susan emerged with a hoe/jembe handle. She also hit the deceased on the head. The deceased fell. Patrick also emerged. Finding the deceased on the ground Patrick pounced on him with several kicks on the abdomen. The deceased lay helplessly. Mary then took a slasher and hit the deceased severally on the back.

10. According to Joseph there was a lady one *Caro* (not a witness) who restrained Mary and Susan from assaulting the deceased. He decided not to intervene since his brother and his wife were involved in the fight. Patrick then pulled the deceased out of the compound and dumped him outside the gate. The deceased's clothes were torn and the deceased only remained with an underpant.

11. Joseph asked Patrick what had happened. He was informed that the deceased had taken Mary's alcohol worth Kshs. 20/= and refused to pay.

12. The deceased could not even stand. Joseph assisted him. He lifted the deceased and slowly led him to the home of the deceased which was about 500 metres from Mary's home. The deceased could only talk in a very faint voice. Joseph noted that the deceased had been injured. Joseph saw stripe marks on the back of the deceased. Joseph could not tell if the deceased was drunk. The deceased could not support himself.

13. When Joseph reached at the home of the deceased he met a worker. He informed the worker what had happened to the deceased and he left.

14. It was Joseph's further testimony that Sebastian, the father of the deceased, called him 7 days post the incident. He informed him that the deceased was admitted at St. Akidiva Hospital and that the deceased wanted to see him. Joseph accompanied Sebastian to the hospital. The deceased was on Bed 69. When Joseph reached the hospital he saw the deceased. By then the deceased only mentioned the name 'Monjo'. The deceased's condition had deteriorated.

15. The deceased was then transferred to Eldoret Referral Hospital. On 07/02/2019 Sebastian called Joseph and informed him that the deceased had passed on. On 14/02/2019 Joseph attended the post mortem examination of the deceased at Pastor Machage Hospital Mortuary. He identified the body of the deceased and also witnessed the autopsy. Joseph also attended the burial of the deceased on 15/02/2019. He later recorded his statement with the police. He testified that he had no grudge with Mary and Susan.

16. On cross-examination, Joseph stated that he was not related to Susan, but he knew her well. He stated that the fight was so vicious that he failed to intervene for fear of attack.

17. Samson had known Mary and Susan for a year. He was employed by Sebastian as a farmhand. He used to see Mary sell *chang'aa* at the Centre while Susan worked for Mary. Samson testified that on 29/01/2019 at around 04:00pm he was on his way to Nyabohanse township to buy some food items. He had been sent by the wife of Sebastian. As he approached Monjo area where Mary lived he heard noises from the home of Mary. He rushed to the direction the screams were from. Samson met Patrick, Mary and Susan beating the deceased. Samson knew the deceased well as he was a son to Sebastian. Mary was also known as '*Mama Monjo*'.

18. It was Samson's further testimony that he saw Mary hitting the deceased on the head with a big stone. Susan also hit the deceased on the head using a hoe/jembe handle. Patrick hit the deceased with fists and kicks on the abdomen.

19. The scene was parked with many people. Samson however saw Joseph in the crowd, but they were not together. Joseph just watched the fight. Like Joseph Samson did not do anything to stop the fight as Mary, Susan and Patrick were so charged and angry.

20. Samson heard Patrick saying that the deceased had taken Mary's alcohol worth Kshs. 20/= and refused to pay. Samson saw Joseph assisting the deceased. Joseph escorted the deceased to his home. Samson left the scene and went to the shop. He returned home at around 06:00pm and found the deceased there. He observed the deceased. He saw injuries on the head, thighs and the back.

21. Sebastian was then called. He came home. He also saw how the deceased was injured. Sebastian and Samson took the deceased to a health facility at Nyabohanse Centre where he was examined, treated and discharged. They returned home.

22. The deceased's condition was not getting better by the following day. Sebastian and Samson took the deceased to St. Akidiva Hospital at Mabera where he was admitted. The deceased did not get better. He was then transferred to Eldoret Referral Hospital where he died. Samson recorded his statement with the police. He testified that he had no grudge with Mary and Susan.

23. On cross-examination Samson clarified that he was the only farmhand employed by Sebastian. However, on the fateful day he was off-duty and another person relieved him. That was the person whom Joseph left the deceased with at home.

24. The deceased was Sebastian's first born. Sebastian knew Mary and Susan for 5 years and 3 years respectively. Mary used to sell *chang'aa* at the Centre whereas Susan used to work at a bar in Nyabohanse as a waitress.

25. In 2019 Sebastian was the Head teacher at St. Joseph Academy in Masaba. He however lived in Nyabohanse. In the evening of 29/01/2019 at around 06:00pm Sebastian walked back home from school. On reaching the Nyabohanse town he heard that the deceased had been beaten at Mary's drinking place. According to Sebastian that episode was the talk of town that evening.

26. Sebastian rushed home. He found the deceased in his house. He called him and the deceased responded. Sebastian asked the deceased

what had happened and the deceased told him that he had been beaten by Mary, Susan and Patrick. Sebastian observed the deceased. He had injuries on the forehead and at the back. The deceased wore a short. He explained the rationale behind the beating as his failure to pay for the *chang'aa* he had consumed worth Kshs. 20/=. The deceased further said that he had promise to pay later, but his assailants would not listen.

27. The deceased was rushed to a health facility at Nyabohanse township that evening by Sebastian. He was treated and discharged. The deceased's condition was not getting better by the following day. Sebastian took the deceased to St. Akidiva Hospital at Mabera where he was admitted. On 02/02/2019 he was diagnosed to have suffered a skull fracture. The deceased did not get better. On 05/02/2019 he was transferred to Eldoret Referral Hospital where he died on 07/02/2019.

28. Sebastian collected the body of the deceased to Pastor Machage Hospital Mortuary in Migori for preservation and police action. On 14/02/2019 Sebastian identified the body of the deceased prior to the post mortem examination which was conducted at the said mortuary by the Doctor. Sebastian laid his son to rest on 15/02/2019. He recorded his statement with the police. Sebastian had on 03/02/2019 reported an assault case on behalf of the deceased. On 08/02/2019 he reported a murder case. He testified that he had no grudge with Mary and Susan.

29. The Doctor conducted the autopsy at Pastor Machage Hospital Mortuary in Migori. It was on 14/02/2019. The body was identified by Joseph and *Samuel Mwita*. The body had bruises on the guillotine region, lower back, left shoulder and the left arm. There was bleeding under the skull which was caused by a linear fracture of the skull leading to blood in the scalp and brain matter. The Doctor opined that the cause of death was intra-cerebral haemorrhage secondary to skull fracture. The fracture measured 8cm to 10m cm in length.

30. The Doctor filled and signed a Post Mortem Report which he produced in Court as an exhibit. He confirmed that he was not aware on how the injuries were inflicted on the deceased and was equally unaware how the deceased was handled before the autopsy. The Doctor clarified that the contents on Page 1 of the Post Mortem Report were usually filled in by the police. He was categorical that the information therein did not influence his findings.

31. Cpl. Samoei took over the investigations of the case on the day after the post mortem examination had been conducted. That was on 15/02/2019. He was instructed by the In-Charge of DCI at Isebania to take over the conduct of the matter which had earlier on reported as an assault case. He visited the scene, interviewed some people and recorded statements.

32. From the investigations Cpl. Samoei gathered that the assault to the deceased was by Mary, Susan and Patrick. However, by then they had all fled the area. He then kept the police file in abeyance as he intensified his search on the assailants.

33. On 20/06/2019 Cpl. Samoei received information on the whereabouts of Mary and Susan. He arrested both on the same day. Mary was arrested at Nyabohanse whereas Susan was arrested at Isebania. Cpl. Samoei forwarded the police file to the Office of the Director of Public Prosecutions where he was given the nod to accordingly charge the accused persons.

34. On 26/06/2019 he escorted the accused persons to Migori County Referral and Teaching Hospital for mental assessment. Both were found to be fit to stand trial. Cpl. Samoei then charged the accused persons whom he did not know before.

35. On cross-examination Cpl. Samoei insisted that the accused persons fled Nyabohanse area after committing the offence otherwise he would have arrested and charged them much earlier. He did not recover any weapon suspected to have been used in assaulting the deceased.

36. The prosecution closed its case with the foregone evidence. By a ruling rendered on 22/05/2020 both accused persons were placed on their respective defences.

37. The accused persons gave sworn statements without calling any witness.

38. Mary narrated the events of 29/01/2019. She confirmed that by then she used to sell *chang'aa* at Nyabohanse area and that Susan was one of her waitresses. She also confirmed that the deceased went to her said premises on the fateful day.

39. There was however a departure from the evidence by the prosecution on how the events unfolded. Mary stated that the deceased went to her premises in the company of Joseph and Patrick. By then the deceased was bleeding from the head and blood was flowing towards the mouth. The shirt which the deceased wore was already torn and he carried one shoe by his hand while he wore the other shoe. The three were already drunk and noisy. Mary also saw Joseph's shirt stained with blood.

40. It was the testimony of Mary that he asked Joseph why the deceased was bleeding and Joseph told her that it was the turn of the deceased to buy them alcohol since they had religiously done so to him earlier.

41. Mary was hesitant to allow the three into the drinking place. He directed them to sit outside the main drinking area. The deceased however defied her directions and entered inside the drinking area. Since he was drunk he started disturbing the customers and even overturned the tables. Their drinks poured. The deceased was beaten by the clients. Joseph rescued the deceased and pulled him outside the main drinking area. The three then sat outside. Joseph insisted that the deceased should buy alcohol. The deceased removed a Kshs. 500/= note from one of his pockets. Joseph grabbed the money.

42. According to Mary she then left and collected alcohol. On return she demanded payment first as the three were so drunk. As Joseph handed over the money to Mary the deceased grabbed the note and it tore in the middle. The deceased was so angered and a serious fight broke out between the deceased and Joseph.

43. Mary pushed the three outside her premises and closed the main gate. She continued with her business and did not see the three again.

44. Mary stated that he had a problem with Joseph. She admitted that she had earlier on been married to Patrick who was Joseph's brother, but they differed and separated. Joseph then approached Mary and insisted that they live together as a husband and wife. Mary refused since that was incomprehensible to her more so given that Patrick was still alive. As a result, Joseph had threatened her with dire consequences. Mary stated that it would be Joseph's joy that she be jailed.

45. It was denied by Mary that Samson was at her premises as he alleged. Mary had known Samson for over 1 year and she could have readily recognized him had he truly been at her place of work.

46. It was the view of Mary that Sebastian was not happy that she differed with Patrick and went to live with a certain teacher instead of living with another family member.

47. Mary further denied ever disappearing from Nyabohanse area. She contended that she was at home all along as he had school-going children which she could not abandon. She stated that she was even arrested at her home.

48. To Mary the deceased was always drunk in the village and used to be assaulted every other time.

49. Susan also recalled the events of the day. She confirmed that the deceased, Joseph and Patrick went to the drinking place where she was working as a waitress. The deceased then took another client's drink and drunk it. The client refused to pay. Susan stated that by the time the deceased walked into the premises he was already bleeding from the head.

50. The deceased then asked Susan to take alcohol. She declined. The deceased was angered. He overturned the tables which were used by the other clients and their drinks poured. The deceased was assaulted by those clients. By then Mary was outside the main drinking area, but within the compound. She could not see inside as there was a curtain at the door. The deceased was then pushed outside by the then angry clients and he never returned. Susan could not however recognize the customers as they were new to her. Susan reiterated that the deceased was a very problematic person and used to fight every other time.

51. Susan knew Samson. She however denied what Samson testified of her. She did not understand why the prosecution witnesses settled on her yet she knew nothing of the alleged assault.

52. The defence cases were then closed.

53. At the close of the defense cases, the Defence Counsel filed written submissions. He referred to some decisions in persuading this Court to find the information not proved. The prosecution relied on the evidence on record in calling for a conviction.

Analysis and Determination:

54. It is on the foregone evidence that this Court is called upon to render this judgment. I have carefully considered the evidence on record as well as the exhibits. As the accused persons were charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

55. I will consider each of the ingredients separately.

a. Proof of the fact and the cause of death of the deceased:

56. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by all the witnesses save Cpl. Samoei. The first limb is hence answered in the affirmative.

57. As to the cause of the death of the deceased, the Doctor produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been was intra-cerebral haemorrhage secondary to skull fracture. As there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons:

58. I will now deal with the second ingredient. The accused persons denied taking any part in the killing of the deceased. The prosecution and the defence tendered their respective evidences.

59. Joseph and Samson were eye-witnesses. They narrated how the events unfolded. Their testimonies tallied. Sebastian also testified. He stated that he asked the deceased what had happened to him and the deceased told him that he had been assaulted by the accused person together with Patrick.

60. The accused persons tendered their defences as well. Mary had issues with Joseph, Samson and Sebastian. She had declined to be married to Joseph on account of the fact that Joseph and Patrick were brothers. Sebastian was not happy that Mary lived with another man and not a member of the family of Patrick. Samson was not at the scene.

61. As to where the deceased sustained the injuries, Mary mounted two possible causes. The first one was that the deceased walked into the drinking place while already bleeding from the head. Susan vouched so. The second version was that the deceased and Joseph viciously fought.

62. Was it probable that the deceased walked into Mary's drinking place while already injured and indeed bleeding from the head? Mary operated a *chang'aa* drinking place. One of the key aspects of such a business is the security of the customers. When the deceased walked into the place while injured it was reasonably expected of Mary to raise her antennae and demand to know what had happened. Depending on the gravity of the injuries and the explanation tendered, Mary would then have made a decision on whether to allow or deny the deceased access into the drinking place. From the evidence Mary did not ascertain why the deceased was bleeding.

63. As to whether Joseph and the deceased viciously fought, Susan and Samson did not witness such. Joseph also testified that the fight did not involve him. Susan was at the scene. The alleged fight was at the scene as well. Susan did not witness Joseph and the deceased fighting.

64. Susan also stated that the deceased walked into the place while already bleeding from the head. The deceased then overturned the tables. One of the customers whose drink was poured slapped the deceased twice. The other customers beat the deceased as well.

65. Mary was the proprietor of the business. She was at the business premises from the time the deceased walked in until he left. Mary did not witness the deceased overturning tables. She also did not witness any fight between the deceased and the other customers.

66. On the other hand, Samson corroborated the fact that Mary, Susan and Patrick assaulted the deceased. Samson also witnessed Joseph assist the deceased to his home. Both Sebastian and Samson found the deceased at home.

67. Joseph and Samson saw Mary and Susan assault the deceased. Mary used a large stone to hit the deceased on the head. Susan used a hoe stick to hit the deceased on the head as well. The deceased fell and he never regained his ability to manage himself independently.

68. The Doctor confirmed the presence of a linear fracture on the skull. There was no cut on the head. A fracture of the skull is not likely to be caused by slaps or any reasonable force used on the head. A fracture of such magnitude can only be caused by a heavy trauma. A large stone can reasonable cause such an injury. A stick can as well do so. Therefore, the injuries sustained by the deceased on the head which led to his death were consistent with the use of objects such as a stone and a stick. The Doctor's evidence hence corroborated the evidence of Joseph and Samson.

69. Section 124 of the Evidence Act, Cap. 80 of the Laws of Kenya vouches for corroboration of evidence in criminal cases save in sexual offences. But what is corroboration?

70. The *Black's Law Dictionary 10th Edition Thomson Reuters* defines 'corroboration' at page 421 as the '...confirmation or support by additional evidence or authority...'

71. The Court of Appeal in **Karanja & Another vs. Republic (1990) eKLR** said as follows on corroboration: -

.... Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime....

72. Corroboration is hence any further evidence that tends to support a factual proposition already put forth by some initial evidence. Corroboration is not limited to only eye-witnesses accounts. Corroboration may be by any other material evidence properly produced before Court.

73. Courts have even held that there can be a conviction based on the uncorroborated evidence of a single identifying witness. The Court of Appeal of Uganda in **Obwana & Others vs. Uganda (2009)2 EA 333** in dealing with the issue of conviction in the absence of corroboration presented itself thus:

.....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.

74. In this case I find that the evidence of Joseph was fully and variously corroborated by Samson, Sebastian, the Doctor and Cpl. Samoei.

75. The witnesses testified before me. I carefully observed them in Court. All the prosecution witnesses were straight-forward, consistent and answered all questions with ease and reasonability. I did not find any of their demeanors wanting. I hence believed their testimonies.

76. By placing the evidence of the prosecution on one hand and the defence evidence on the other hand, I am persuaded by the evidence of the prosecution. I find it rather difficult to believe that the events at Mary's premises were as how the accused persons alluded in their

respective defences. To me the defences were an afterthought. They were crafted to defeat the strong prosecution evidence. However, the art was not perfected. The defences did not cast any reasonable doubts on the prosecution's case.

77. I am equally persuaded that the accused persons disappeared immediately they assaulted the deceased otherwise there would be no reason why Cpl. Samoei had to wait for a whole 6-months to arrest the accused persons and more so to be still looking for Patrick who is at large.

78. The accused persons also raised the issue of discrepancies in the evidence. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR** discussed the issue of discrepancies as under: -

As regards contradictions in the prosecution's case, other than the fact that the appellants did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example Joseph Maina Mwangi v. Republic, CR, APPNo. 73 of 1993, Kimeu v. Republic (2002)1 KAR 757 and Willis Ochieng Odero v. Republic [2006]Eklr. In John Nyaga Njuki & 4 Others v. Republic, Cr. App. No. 160 of 200, this Court expressed itself as follows on the issue:

In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.

79. Having carefully gone through the evidence, I am satisfied that there were no discrepancies of the nature that would have created any reasonable doubt or vitiated the prosecution's case.

80. This Court is equally satisfied that the investigations in this case were comprehensive and the prosecution gathered sufficient evidence to prove its case.

81. I am therefore persuaded that the prosecution proved that the accused persons committed a crime beyond any reasonable doubt. In the words *Lord Denning* in **Miller vs. Minister of Pensions (1947) 2ALL ER 372**: -

... That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence, of course it is doubt but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.....

82. The second ingredient is also answered in the affirmative.

c. Whether the unlawful acts were committed with malice afterthought:

83. The starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.**
- c. An intent to commit a felony.**
- d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

84. The Court of Appeal has also dealt with this aspect on several occasions. In **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (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.

85. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of a bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

86. The Court of Appeal in **Republic vs. Tubere s/o Ochen (1945) 12 EACA 63** set out the parameters for determining the presence of malice aforethought. The elements include: -

- a. **The nature of the weapon used;**
- b. **The manner in which the weapon was used;**
- c. **The part of the body targeted;**
- d. **The nature of the injuries inflicted either a single stab/wound or multiple injuries.**
- e. **The conduct of the accused before, during and after the incident.**

87. In this case there was evidence that Mary and Susan beat the deceased as he refused to pay for what he had consumed. I find that the reaction by Mary and Susan was spontaneous and not premeditated.

88. In those circumstances I find no evidence of malice aforethought and the third ingredient fails.

Conclusion:

89. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder against Mary and Susan. Each of the accused persons is hereby found not guilty of the murder of Mongosi Mokaya and they are hereby acquitted.

90. However, from the evidence the deceased lost his life as a result of the actions of the accused persons, but of course without any malice aforethought.

91. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya this Court finds Mary Boke Mwikwabe and Susan Jackline Boke **guilty** of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

92. These are the orders of this Court.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT MIGORI THIS 15TH DAY OF OCTOBER, 2020.

S. J. CHITEMBWE

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Oyuer, Counsel for the accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.