



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 52 OF 2011**

**LESIT, J**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**DAVID MWANGI MONICHA.....ACCUSED**

**JUDGMENT**

1. The accused **DAVID MWANGI MONICAH** is charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the charge are:

**“On the 17<sup>th</sup> June, 2011 at Soweto Estate in Kayole within Nairobi County, murdered JESSE MACHARIA KABUI”**

2. The prosecution called nine (9) witnesses. The brief facts of the prosecution case were that the accused was seen by PW1 outside Makutano Bar in company of a man quarrelling with a woman. PW1 later learnt that the woman was the wife of the accused, who is PW4 in the case, while the man was accused brother apparently DW1. According to PW1, he saw that the three were drunk. PW1 saw DW4 trying to leave the accused and DW2 but accused pulled her back, removed a knife and stabbed her twice in the stomach. PW1 shouted for help. As the accused aimed the knife at PW4's neck. PW4 blocked the stab with her hand and was therefore stabbed on the hand.
3. PW1 testified that he then started shouting and also picked a stone with which he hit the accused on the head. That is when the accused let go of the wife. PW4 started running away and the accused chased her. At the same time because PW1 continued shouting, people came in response to his call. Among those was his brother, the deceased who approached from in front of the accused while the rest including PW1 chased accused from behind.
4. PW1 saw the accused stab the deceased on the stomach right in front of them. The deceased fell down giving accused chance to continue running. The accused was cornered and apprehended by members of public led by PW1. He was rescued from mob justice by Police Officers, including PW3 who was with others on mobile patrol within the Nyando area of Kayole.
5. PW4 explained that the accused was her husband but that they parted that same month. PW4 stated that she and accused had one child aged 6 years who was living with her. PW4 stated that on **15<sup>th</sup> June, 2011** the accused did not sleep at their home. The following evening the accused summoned her to Makutano Club where she went. PW 4 testified that the accused informed her that their son had disappeared from school, a matter she did not believe because accused appeared calm, and also because it was accused brother, one Macharia who used to pick the child from school. Macharia, accused brother, was DW2 in the case.
6. PW 4 testified that DW2 pulled her outside and asked her why she had disagreed with the accused. She stated that as she was in the process of explaining to DW2 why the differences, the

- accused found them outside the club and was not happy about their discussion. That is when he removed a knife and stabbed her twice in the stomach.
7. PW4 testified that she screamed, and PW1 who was nearby hit the accused on the head with a stone which he had picked, giving her a chance to slip away. She also saw another man running towards her and the accused, and saw the accused stab that man with a knife. PW4 then collapsed and woke up in Kenyatta National Hospital where she remained for 18 days. She stated that she had not fully recovered from the accused assault on her.
  8. Dr. Minda Okemwa, PW9 performed post-mortem on the body of the deceased and found that he had a stab wound on the left upper abdomen below the chest wall with a penetrating stab into the intestines which was 6 centimeters (6cm) long. The deceased had the intestines repaired surgically. He formed the opinion that the cause of death was a stab wound to the abdomen.
  9. The accused gave a sworn defence and called his brother as his witness. In his sworn defence the accused stated that he had separated with his wife, PW4 and was living with their son. He stated that on **17<sup>th</sup> June, 2011** PW4 called him on phone and asked him to meet her at Prime Rosa Bar.
  10. He said that he had a meeting of his 'Chama' between 2.00 and 4 p.m. at Ngugi's Bar. He then started drinking from 4.00p.m. up to 6.00p.m. when he left the bar and proceeded to Makutano bar to meet his driver of his taxi business.
  11. The accused stated that his wife called him again at around 7.00 p.m. and he proceeded to Prime Rose to meet her. He found her in the company of three men who said they wanted accused to commit himself on how he will be maintaining his son. He said that when he said he would only discuss that matter at the Chief's place, the three men and PW4 became rowdy and almost caused a fight. He then returned to Makutano Bar.
  12. The accused stated that he called his brother DW2 who went to Makutano Bar to meet him. He said that as he and DW2 left Makutano Bar, they met PW4 at the door. PW4 then started talking to DW2 as the three of them walked. Upon reaching a dark alley the 3 men he met earlier with PW4 emerged. One jumped at him and stabbed him in the chest with a knife the other two went towards DW2.
  13. The accused stated that he made PW4 his shield and she was stabbed. He then struggled with the man who attacked him trying to get the knife from him. He said that in the process both of them fell down and that the man fell on his knife and was pierced. The accused said the other two men also attacked him hitting him with clubs on his head.

The accused said that members of public who gathered there advised him to go away before Mungiki men came. He therefore walked to Soweto Police Station where he reported the matter. He was placed in cells. DW2 went there later in a *bodaboda* but was released.

14. DW2 in his evidence stated that his brother, the accused called him and informed him that if anything bad happened to him he should blame it on PW4. DW2 then proceeded to Makutano Bar where accused was and he found him near the counter. The talk in the bar was that Mungiki had come there.
15. DW2 said that he saw his brother and that they discussed what had transpired between PW4 and accused about PW4 demanding maintenance for the child. DW2 told his brother that the matter should be reported to the Police and both of them left to report. DW2 said that they met PW4 outside the club. They walked together discussing, when they were attacked by 3 men who emerged from an alley.
16. DW2 stated that one of the three (3) men had a knife and the other two had clubs. The one with the knife jumped on the accused and stabbed him in the chest. The other two ordered him and PW4 to lie down and produce phones and money. DW2 testified that his brother jumped and grabbed PW4 and used her as a human shield as a result she was stabbed in the stomach. He then saw accused release PW4 and grab the man with the knife.
17. He said that the accused held him from behind upon which the other two beat accused with clubs ordering him to release the man with the knife. DW2 stated that instead the accused started screaming as he struggled with the man with the knife and that eventually both the accused and the knife man fell down. He noted that the man fell on his knife and he was stabbed in the stomach as his accomplices ran away.
18. Eventually PW4 and the knife man, the deceased in the case were taken to Kenyatta National

Hospital. The deceased died later while PW4 was admitted.  
19. I have carefully considered the entire evidence adduced by the prosecution and defence. Mrs. Kinyori represented the accused and gave submissions while Ms. Tumaini Wafula, Prosecution Counsel, prosecuted the State case.

Ms. Gichuhi Prosecution Counsel gave the final submissions for the State since Ms. Wafula was indisposed.

20. The burden of proof lies with the prosecution to prove the charge against the accused beyond any reasonable doubt. The prosecution must adduce evidence to prove that the accused stabbed the deceased, and that at the time he stabbed him, the accused had formed the intention to either cause death or grievous harm to the accused.

21. Section 203 of the penal code defines murder as follows:

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

22. Under Section 206 of the penal code the circumstances which constitute malice aforethought are set out as follows:

**“Malice aforethought shall be deemed to be established by evidence proving anyone 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.”**

23. There is no dispute in this case that the PW4 was the estranged wife of the accused in this case. There is no dispute that the accused, PW4 and DW2 met outside Makutano Bar or club on the evening of 17<sup>th</sup> June, 2011. There is a disparity of the events that followed between the prosecution and the defence case. I will examine, evaluate and analyze them herein below.

24. According to PW1 and 4 the accused, PW4 and DW2 stood outside Makutano bar quarrelling after which the accused produced a knife, stabbed PW4 with it twice in the stomach and once on the hand. According to her evidence, PW4 thought the attack was because she resisted entering accused vehicle or going with him. After PW1 hit the accused on the head with a stone, accused released PW4 but soon thereafter chased after her. By that time PW1 and PW4 were both screaming attracting members of public. Among them was the deceased who approached from the front side of the accused, which is the direction to which the accused was running, and he was stabbed by the accused as he tried to escape from the group which had gathered and was chasing him.

25. The defence case is that PW4 had organized with three men to attack the accused. It is the accused defence, and the evidence of DW2, that as the two of them walked from Makutano Club in company of PW4, the three men who had confronted the accused earlier and who were in the company of PW4, emerged. The three pounced on them, one with a knife who went for accused. It is the defence case that the accused used PW4 as a shield and that PW4 was stabbed in the

process. It is the defence case that the deceased fell on the knife as he struggled with the accused suffering the fatal wound.

26. Mrs. Kinyori for the accused urged the Court to find the evidence of PW1 was fabricated, his demeanor wanting and his evidence biased, on account of being the brother of the deceased. Mrs. Kinyori submitted that PW1's evidence differed from the evidence of the other witnesses because he stated he did not know if the accused suffered any injuries. Counsel urged the police and police doctor saw the injuries the accused suffered.
27. Mrs. Kinyori urged that PW1 though an eye witness did not describe the knife the accused used in the attack. She urged that PW4 described the knife as a pen knife and also said that accused was defending himself at the time.
28. Ms. Gichuki learned Prosecution Counsel urged the Court to find that the deceased was stabbed by the accused as the deceased tried to intervene for PW4. Counsel urged that it was not true that PW4 had organized to have the accused attacked.
29. The evidence of PW1 is clear that he was outside Makutano Club collecting food for his employers cows when the incident unfolded. PW1 was not in the company of PW4, and nowhere does the defence make such a claim. PW1 had no reason to fabricate the case against the accused. After all it is not a dispute that PW1 was at the scene of incident on duty for his employer when the incident occurred. PW4 also did not say that she was with PW1 prior to the incident. Infact PW4 said she was not with anyone on that night of attack except the accused who had summoned her there.
30. I find that PW1 was an independent witness, and an eye witness of the incident. There is nothing on record to suggest he was biased, or that he may have fabricated his evidence. I find him a credible and reliable witness.
31. Regarding a description of the knife PW1 said that at the time the accused stabbed PW4 he was 15 to 20 meters from the accused, DW2 and PW4, and could only make out that the weapon the accused used was a knife. PW4, who was the victim and was near the accused as she stabbed her saw that the accused pulled out a penknife which he used to stab her and later the deceased.
32. I do not find any material contradiction in the description of the weapon used in the evidence of PW1 and 4. I noted that PW9 who conducted post-mortem found that the deceased had a penetrating wound which was 6cm long, that length can fit the size of a bigger penknife and also that of a knife. In the circumstances I find no material contradiction in the description of the weapon as given by PW1 and PW4.
33. The weapon was not recovered. PW3 said he re-arrested the accused from members of the public. He visited the scene in company of PW1 and looked for the weapon but found none. No weapon was given to him either. I noted that from PW3's evidence, the members of public were walking the accused, apparently to the Police Station when he and his colleagues met with them. There was therefore ample opportunity for the knife to either be gotten rid of, or lost in the melee that followed this attack especially as members of the public went for and apprehended the accused.
34. Mrs. Kinyori submitted that PW1 was biased and his evidence fabricated for reason, *inter alia*, he did not see any injuries on the accused. I find that that piece of submission cannot be correct because it was the evidence of PW1 that he hit the accused with a stone on the head, and that is how he let go PW4 who he had stabbed 3 times by then. PW1 said he injured the accused as he tried to save PW4. Indeed PW1 succeeded to save PW4 because the blow to the head caused accused to release PW4.
35. Mrs. Kinyori submitted that PW1 was biased in his evidence because the deceased was his brother. PW4 in her evidence stated clearly that it was after PW1 hit accused with a stone that she

got a chance to run away but accused was in her pursuit. Before accused could reach her, it was PW4's evidence that he met with deceased who had come in answer to the screams, only to stab him in the stomach.

36. I find no basis of declaring PW1 biased or his evidence fabricated as I have demonstrated herein above.
37. I have analyzed and evaluated entire evidence in both sides in order to make a finding whether the prosecution has discharged its burden to prove their case on the standard required.
38. The defence alleged that the accused was under attack by PW4, the deceased and two others. They also both claim that after the accused struggled to defend himself from the knife attack by the deceased, and the clobbering by the other two, the accused walked to Soweto Police Station to report the case.
39. The arresting officer was PW3. PW3 testified that he re-arrested the accused from members of the public within Nyando area. PW3 testified that members of public stopped their police vehicle and handed over the accused to them. They then reported that the accused had injured two people. According to PW3, the accused had injuries on the head and was bleeding. The evidence of PW3 regarding the injury the accused had was corroborative to the evidence of PW1 and 4 that accused was injured on the head when PW4 hit him with a stone.
40. PW3 is clear that after re-arresting the accused, the accused did not file with him any report of any kind, , neither did he claim that he was under attack or that he had acted in self-defence.
41. PW3 testified that the same night of incident, PW1 went to the station and reported that the accused had injured his brother, the deceased and one woman. PW1 even took PW3 to the scene of incident where he saw blood on the ground.
42. I noted that PW8 who took over Investigations of this case on **19<sup>th</sup> June, 2011**, on the day the deceased died, testified that the information he got concerning the accused was that the accused had alleged he got incensed by his wife when she went out of Makutano bar to talk to someone because he suspected she had a man-friend.
43. Even though this statement was not supported by other evidence, it suggests that the accused was annoyed by his wife's action to talk to another man. It does not tally with accused defence that the accused was under attack by three men acting in cohorts with his wife. It does not suggest that accused was under attack or that his wife had a conspiracy to have him harmed as he claimed in his defence.
44. I find that the prosecution case is clear, consistent and unambiguous that the accused was reacting against his wife's resistance to stay with him or enter his car on the night in question. According to PW4, the accused had lured her to the club only to turn against her.
45. The fact the accused was apprehended by members of public, supports PW1 and 4's evidence that the accused was the one who attacked the two victims of this incident. I do not believe the story by accused and DW2 that the accused was the one lured to the scene, or that PW4 had conspired with deceased and others to attack the accused.
46. From the evidence and the facts of the case, I find that the accused had lured PW4 to the bar on the guise that he wanted to discuss with her. The medical report on PW4 was not produced in evidence. However, we have PW4's evidence that her intestines were protruding after the accused stabbed her. PW1 also gave more light that PW4 collapsed after running a few steps. The injuries on PW4 were undoubtedly severe ones. They led to PW4 being admitted for 18 days after also suffering a concussion.

47. In **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of 1996 (UR)** the Court of Appeal while considering what can constitute malice aforethought stated as follows:

**“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later.”**

48. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

**“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.**

**In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”**

49. I am guided by the above cases. Repeated assault with a weapon can be construed to prove the presence of malice aforethought on the perpetrator. Similarly repeated assault on more than one victim can constitute malice aforethought. I considered that the accused had armed himself with a knife before luring PW4 to the scene of this incident. He then stabbed her twice on the stomach. I find that the accused had both the *mens rea* and *actus reus* to cause grievous harm or death of PW4. That constitutes malice aforethought under section **206 (b)** of the Penal Code. Luckily, PW4 did not die. The accused was in pursuit of PW4 when he met and stabbed the deceased. That constitutes malice aforethought under section **206 (a)** of the Penal Code, as clearly, the accused was after PW4 not the deceased.

50. The accused stabbed the deceased as is clearly shown in the evidence of PW1 and 4, both eye witnesses. It was a single stab wound. However it followed after three stabs against PW4 the intended victim of the attack. It is clear accused had had no altercation on confrontation with deceased prior to that. It is doubtful that accused knew the deceased before, and he does not say he did. The attack on the deceased was clearly transferred malice since it happened as the deceased ran towards the accused to keep him off from attacking PW4 any further.

51. In this case it is clear that the accused had formed an intention to cause death or grievous harm on the wife PW4, from whom he had just become estranged. At the time the accused stabbed the deceased, he was pursuing PW4 to stab her the fourth time. It is clear that the accused intention was to cause death or grievous harm on PW4, given the number of times he stabbed her. The accused was pursuing PW4 to stab her some more and in the process of his pursuit he met with and stabbed the deceased because he intercepted him or stood in his way. I find that malice aforethought is proved as stipulated under **section 206 (a) of the Penal Code.**

52. The accused had injuries which necessitated PW3 to take him to Mama Lucy Hospital where he was treated. The injuries were on the head and PW8 saw the bandages two days after the incident. It has been shown that accused was injured by PW1 and later by members of public in the process of arresting the accused. The injuries themselves do not correspond with accused defence and DW2’s evidence that accused had wrestled with the deceased, including falling forcefully on the ground.

53. No injuries were found on accused which support a struggle as described in accused defence and DW2 evidence except for the claim of clobbering with clubs on the head. The story of clobbering was a made up story and reject it.

54. The accused had claimed that he had been summoned by his wife only to find three people who were demanding that he commits himself concerning the maintenance of his son. That explanation

is not plausible or reasonable for the simple reason that there was no dispute and the accused stated as much in his defence, that his son was living with him. There would be no sense for the accused committing himself to perform a duty he was already committed to and was performing voluntarily. I find that line of accused defence was meant to create an explanation for going to meet PW4 in order to counter PW4's evidence. I reject that explanation as without any plausibility or reasonableness.

55. In accused defence he said he had taken some alcohol but he was not specific as to the amount he took. Section 13 of the Penal Code sets out the circumstances that would constitute the defence of intoxication. It states as follows:

**“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -**

**(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

**(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.**

**(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.**

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

56. I considered accused defence and find that there is nothing to show he was temporarily insane or incapable of knowing what he was doing or of knowing what he was doing was wrong. The accused did not claim, neither was such evidence adduced in this case that the accused was intoxicated by acts of another without his consent or knowledge. The defence accused gave, the descriptions of his actions both in relation to PW4 and the deceased at the scene are all resounding proof that the accused was very much in the control of his senses. The defence of intoxication as provided under **section 13** of the **Penal Code** is therefore not available to him.

57. Having carefully considered the evidence adduced by the prosecution and defence in this case, I am satisfied that the prosecution has proved the charge of murder **section 203 of penal code** against the accused beyond any reasonable doubt.

58. Consequently I reject the accused defence, find the accused guilty of murder under **section 203** of the **Penal Code** as charged and convict him accordingly under **Section 322 of the Criminal Procedure Code**.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY 2015.**

**HON. LESIIT J.**

**JUDGE**