

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. E005 OF 2023

REPUBLIC.....
.....PROSECUTOR

VS

HAJIO MAALIM NOOR.....
ACCUSED

JUDGMENT

1. The accused person herein is charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on 01.02.2023 at Mandera market in Mandera East Sub - County within Mandera County jointly with another not before court murdered Hashim Okash Mohamed.
2. The accused person pleaded not guilty to the charge and the prosecution summoned a total of six witnesses in support of its case.
3. PW1, Asli Okash Mohamed a housewife, testified that on 01.02.2023, she was with her brothers, Hashim and Abdimalik Okash. That after sending Abdimalik to the market, the three later proceeded together to buy food. At the market, they encountered two unknown men. One of them confronted Abdimalik, and a quarrel broke out. It was her testimony that she witnessed one of the men stab Hashim in the chest while the accused held Hashim's hands from behind. That the attacker allegedly fled while Hashim later died in hospital. She identified the accused at the police station as one of the assailants.

4. On cross-examination, she admitted that she recorded her statement nearly a year after the incident, citing emotional instability. She confirmed that the accused did not stab her brother but maintained that he restrained him during the attack. She acknowledged that the attacker's family later paid compensation (*maslah*) to her family. She also clarified that the stabbing occurred outside the attacker's shop, which was not owned by the accused, and that the attacker was not the accused person's employee. It was her testimony that there was no prior quarrel between the accused and the deceased. In re-examination, she reaffirmed that she saw both the accused and the attacker now at large participate in the assault, with the accused holding her brother with his hands backwards during the stabbing.

5. PW2, Abdimalik Okash, a businessman from Mandera, testified that on 01.02.2023, he was at his family's shop with his brother Hashim (the deceased) and their sister Asli. While buying vegetables and chips from Omusirma's shop, he saw the accused and another man by the name of Ahmed Maalim, standing outside. That Omusirma told some lady in the shop to sell them vegetables but the lady told them to pay first and therefore, he left to get the cash.

6. After leaving briefly to get the money, he returned with Asli Okash and Hassan. He stated that without provocation, Ahmed stabbed Hashim on the left part of the chest and stomach while the accused held Hashim firmly. That his brother told him to run away and upon pushing the accused person away, Ahmed Maalim stabbed him once in the chest. That the two attackers fled into a nearby shop.

Hashim later died while he was taken to Mandera Hospital for treatment. He reported the matter to the police who in turn issued him with a P3 form. In cross-examination, he confirmed that only Ahmed had a knife and was responsible for the stabbing. He stated that no reconciliation (*maslah*) had taken place and no one had approached him for one.

7. PW3, No. 237982 PC Jared Omondi, an officer attached to DCI Mandera East, testified as the investigating officer in this case. It was his evidence that on 01.02.2023 at around 2:30 PM, he received information about a violent incident in Mandera town. Together with the DCIO, OCS, and other officers, he proceeded to the scene where they found the accused, Hajio Maalim, locked inside a shop. That due to a hostile crowd, the accused was evacuated and taken to the police station.
8. The officers visited Light Hospital, where they found the body of the deceased, Hashim Okash, and later took it to the mortuary. They also found Abdimalik Okash undergoing surgery for a stab wound to the chest. At the scene, they observed scattered vegetables, damaged stalls, and looted shop items. Photographs of the scene and injuries were taken and later processed by the DCI's scenes of crime unit. These were produced in court as Pex 2 A- E, along with an electronic certificate dated 22. 04.2023 as Pex 3.
9. PW3 stated that witness statements, including that of Abdimalik, confirmed that Ahmed Maalim stabbed Hashim four times while the accused held the deceased. That Ahmed fled to Somalia and remains at large. In cross examination, PW3 confirmed that no

motive was established. He stated that the accused did not have a knife but held the deceased during the stabbing. He stated that there was an initial fight between the accused and the deceased. In re-examination, PW3 reiterated that the accused did not possess a knife during the incident.

10. PW4, Abdullahi Maekar Ali, a medical officer at Mandera County Hospital, testified that although he is a qualified doctor with five years of experience, he did not perform the post-mortem in this case and neither did he know the doctor who did. He testified that the report presented did not indicate the author's name. Following this, the prosecution counsel, Mr. Okemwa applied to step down the witness to allow the medical superintendent clarify who the proper doctor was.

11. PW5, Dr. Abdi Jabal Ali, a senior medical officer with the Ministry of Defence and formerly of Mandera Hospital, testified that he examined Abdimalik Okash after the stabbing incident. He observed a penetrating stab wound under the left arm, with an injury to the auxiliary artery and nervous system, consistent with grievous harm caused by a sharp object. According to him the patient had lost significant blood but was in a fair condition. He completed a P3 form, which he produced as Pex 1. In cross examination, he confirmed there was only one stab wound and that the patient showed signs of blood loss (pallor).

12. PW6, Dr. Abdi Aziz Adan, a senior medical officer at Mandera County Referral Hospital, testified that although he did not personally conduct the post mortem dated 01.03.2022 on the

deceased, the same was done by Dr. Mohamed, his colleague who has since left employment. He recognized Dr. Mohamed's handwriting and signature hence sought to produce the post-mortem report on his behalf.

13. He stated that the post mortem was done at Mandera Hospital as witnessed by Abdi Aziz who identified the body. That the body was covered with blood as there was an injury on the abdomen and other four injuries in the chest near the collarbone. The cause of death was internal and external bleeding due to penetrating injury caused by sharp edges. The said report was admitted as Pex 4. In cross examination, Dr. Adan confirmed he was not related to the deceased or Abdi Aziz. He acknowledged the differences in regards to the cause of death between the report he presented and another version held by the prosecution. He noted that in as much as the body was not opened, the internal injuries could still be evident.
14. According to him, the post mortem report had showed that there were five injuries. It was his testimony that the deceased would not have survived even with immediate medical attention. In re-examination, he explained that separate post-mortem forms may be filled when a coupon is unavailable and further, that about three hours had passed between the subject death and examination.
15. DW1, Hajio Maalim Noor the accused herein, a cosmetic shop owner in Mandera, testified that on 01.02.2023, he returned from noon prayers and found Abdimalik (PW2) near his shops. He stated that his employee, Ahmed Maalim, was in one of the shops, and a disagreement arose involving Abdimalik, Hashim and Ahmed over

the sale of vegetables. That he tried to calm the situation and instructed Ahmed to return to the shop. He said Hashim threw onions at him, and Ahmed responded by throwing the same back.

16. According to the accused, a commotion ensued between the three leading to a fight. That he saw Ahmed running with a knife while being pursued by Hashim and Abdimalik. He denied witnessing the stabbing nor did he touch or harm anyone. He claimed he tried to separate the parties and later locked his shop after the crowd turned hostile. He called the police, who arrived and took him to the station. He denied having any grudge with the deceased. He further stated that Ahmed's family later paid compensation (100 camels) to the victim's family. He also claimed to have lost his business due to the incident. In cross examination, he conceded that he was present during the altercation but denied any involvement in the stabbing.
17. He confirmed that he could not call any witnesses and acknowledged that Ahmed, who fled, was responsible for the stabbing. In re-examination, he reiterated that he had no grudge with the deceased and that the victim's family had been compensated.
18. The prosecution filed submissions dated 24.06.2025 where it was submitted that the prosecution had proved the following: that the deceased died; the deceased met his death due to an unlawful act or omission on the part of the accused and that the said unlawful act was committed with malice aforethought.

19. On the first element, it was urged that PW1 and PW2 testified on how the incident occurred. That upon being stabbed, the deceased was taken to Blue Light Hospital but succumbed to his injuries and thereafter, the body of the deceased was transferred to Mandera Hospital where post mortem was carried out. That the evidence of the foregoing and the act of carrying out post mortem was evidence of the fact that the deceased was dead.

20. On the cause of death, it was submitted that Dr. Abdi Aziz who produced the post mortem report confirmed to the court that the cause of death of the deceased was consistent with the injuries as narrated by the prosecution witnesses. On malice aforethought, counsel submitted that the same could be inferred from the circumstances under which the offence was perpetrated. Reliance was placed on the case of **Tubere s/o Ochen vs Republic [1945] EACA 63**, where the circumstances under which malice aforethought could be inferred were discussed to include:

- i. The nature of the weapon used against the deceased to inflict the injuries;**
- ii. The part of the body targeted by the attacker whether vulnerable or not;**
- iii. The manner in which the lethal weapon was used and whether in furtherance to cause the grievous harm the assailant used the weapon repeatedly and;**
- iv. The conduct of the accused before, during and after the attack.**

21. While urging this court to find the accused person guilty of the offence charged, counsel submitted that the accused person held

tightly the deceased while he was being stabbed. That the accused person first quarreled with the deceased before his accomplice retreated to the shop and went back holding two knives that were used to kill the deceased. It was urged that the doctor noted multiple abdominal injuries, deep penetrating wound at the back and a stab wound in the abdomen and further, the kind of weapons used and the part of the body attacked clearly showed that the attackers wanted the deceased dead.

22. The accused person filed submissions dated 12.05.2025 urging that the prosecution did not prove its case to the required standard. That the circumstances that led to the deceased's death remain that he was involved in a fight with the assailant who ended up fatally stabbing him.

23. I have considered the evidence as adduced by the prosecution witnesses and the defense proffered by the accused person. In my view, the main issue for determination is whether the prosecution has proved its case against the accused person beyond reasonable doubt to sustain a conviction for the offence of murder as charged.

24. Section 203 of the Penal Code provides that: *"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."*

25. In the instant case, this Court is duty bound to make a finding whether the prosecution's evidence as a whole proves beyond reasonable doubt the following elements of murder: that there was the death of the deceased and the cause of the said death, the death was caused by unlawful act or omission, that the accused

committed the unlawful act which caused the death of the deceased and that the accused had malice afore thought.

26. The above was espoused in the case of **Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR)** where the court of appeal held that;

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See Nyambura & Others-vs-Republic, [2001] KLR 355)”.

27. On whether there is proof of death and the cause of the said death, it was not controverted that indeed the deceased died. Thus PW1, PW2, PW3 witnessed the body of the deceased. The foregoing was corroborated by PW6 (Doctor) who opined that the cause of death was hemorrhage due to penetrating thoracic abdominal injury. From the foregoing, it is my view that the first element on death was thus proved by the prosecution.

28. On whether the death of the deceased was caused by an unlawful act and whose unlawful act it was, Article 26 (1) of the Constitution of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law. The evidence before this Court irresistibly points to an unlawful act

that led to the death of the deceased as it was established that the cause of death was hemorrhage due to penetrating thoracic abdominal injury which was not a natural death.

29. On whether the prosecution proved beyond reasonable doubt that it was the accused person and not any other person who committed the unlawful act which caused the death of the deceased, pw1 and pw2 recorded their statements with the police stating that it was Ahmed who stabbed Hashim on the left part of the chest and stomach. PW3 who investigated the matter was of the view that witness statements, including that from Abdimalik, confirmed that Ahmed Maalim stabbed Hashim while the accused held the deceased. From the foregoing, it is clear that even after such a long period of time, the direct witnesses who saw the deceased being stabbed could still narrate their statements corroboratively.

30. It is not lost to this court that the accused person was accused jointly with another committed the offence of murder. This brings into perspective the provisions of Section 20 as read together with Section 21 of the Penal Code. Section 21 of the penal Code provides the features of criminal responsibility as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

31. The other overriding elements of a common intention concerns characteristics of it being formed at the very onset or during the commission of the offence. It may also arise spontaneously on the spur of the moment. According to Section 10 of the Evidence Act, anything said, done or written by any of the persons deemed to have a common intention, in reference to their common intention is relevant evidence of such intention. What is required of the prosecution is evidence tending to show that the individual accused persons were in fact part of the conspirators in a gang of two or more, sharing a common intention, purposed to commit a particular offence.

32. The Court in the case of **Ismael Kiseregwa & Another vs Uganda CA CRIM Appeal No. 6 of 1978** held as follows:

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose, which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter.”

33. As already mentioned, it follows that an unlawful common intention does not imply a pre-arranged plan. Common intention may be

inferred from the presence of the accused persons, their actions, and the omissions of any of them to disassociate himself from the assault. It can develop in the course of events, though it might not have been present from the start. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of the events. It is also irrelevant whether the two participated in the commission of the offence where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.

34. In the instant case, it was alleged that the accused person held the arms of the deceased at the very time his employee, Ahmed Maalim stabbed the deceased. A perusal of the accused persons defence does not address this strong accusation. To the contrary, the accused person urged that he did not see his employee stab the deceased. In fact, he did not address himself to the accusation levied against him in totality but simply in blanket denied his involvement.

35. The offence was committed during the day hence the element of mistaken identity does not arise. The evidence of pw1 and pw2 is well corroborated. It is no wonder that members of the public took upon themselves to revenge against him thereby looting his shop calling for police intervention. I am convinced that the accused did participate and indeed aided the attack by restraining the deceased thereby making it possible for the deceased to be subdued by the principal perpetrator.

36. From the foregoing, it is thus my conviction that the prosecution proved that the accused person in a concerted effort committed the unlawful act which caused the death of the deceased.

37. On whether the accused had malice aforethought when he unlawfully participated in the killing of the deceased, section 206 of the Penal Code comes to play. Section 206 provides that 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

(c) an intention 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.”

38. The prosecution has a duty to prove malice aforethought in order to prove the charge of murder. Thus in the classic case of **Republic vs Tubere S/O Ochen [supra]**, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in

which the weapon was used and the conduct of the accused before, during and after the attack.

39. In the instant case, the circumstances leading to the death of the deceased have already been laid bare. Thus the fight between the parties was commenced as a result of the quarrel that started with Abdimalik and the accused person and/or Ahmed Maalim. As such, the accused person's reaction was spontaneous and not pre-arranged

40. Sections 179 of the Criminal Procedure Code stipulates:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

[See also Republic v Irene Kageni [2022] eKLR].

41. From the circumstances of this case, I find that the prosecution did not prove the element of *mens rea* as the death of the deceased was caused by the quarrel that ensued between the parties. As such, I hereby substitute the charge against the accused from murder contrary to Section 203 as read with Section 204 of the

Penal Code to manslaughter contrary to Section 202 of the Penal Code as read with section 205 of the penal code.

42. Consequently, I find the accused guilty of the substituted charge and I convict him accordingly of a lesser charge of manslaughter.

Dated, signed and delivered virtually this 3rd day of November 2025

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J. N. ONYIEGO

JUDGE