



**REPUBLIC OF KENYA**

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

**HCCR 21OF 2019**

**REPUBLIC.....**

**PROSECUTOR**

**VERSUS**

**MAINGI MASILA NDINGILI .....ACCUSED**

**JUDGMENT**

1. The accused **MAINGI MASILA NDINGILI** was charged with murder contrary to section 203 as read with section 204 Procedure Code. That on the night of 4<sup>th</sup> & 5<sup>th</sup> August , 2019 at Emali Sublocation, Nzau Subcounty Makueni County he murdered Onesmus Muendo Musau.
2. He pleaded not guilty.

3. After a full trial and hearing his defence, the issue is whether the prosecution has proved the charge against him beyond a reasonable doubt to warrant a conviction.

**4. Section 203 of the Penal Code provides**

***Murder***

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

**5. S 204 provides for the Punishment of murder**

***Any person convicted of murder shall be sentenced to death.***

6. Malice afore thought is defined by s. 206 thus:

***206. Malice aforethought***

***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

***(a)an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b)knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

***(c)an intent to commit a felony;***

***(d)an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

7. The case for the prosecution was that on 4<sup>th</sup> August 2019 PW1 Chris Mwangela was with his friend one Mwangi at Emali. Mwangi had a motor bike and he carried him as a pillion passenger. They went to a club where they met 'Mwendwa' with whom they stayed till about 1:00am. At some point PW1 needed to withdraw money from an MPESA and they rode there. They left the motorbike behind the shop but there was a place where eggs were being sold : cooked and sold to customers as they waited. When they returned it appears as if Mwendwa was

behind PW1 because that they had passed the place where the eggs were being sold when he says he heard a commotion. On turning back, he heard Mwendwa say that he had been burnt. When he checked he saw that Mwendwa was bleeding from the lower abdomen. Mwendwa told him that he had been stabbed by the person who prepared eggs. He took Mwendwa to Misuuni Hospital where he was given first aid while he rushed to Emali Police station to get an OB. While at the police station the police land cruiser arrived with suspects one of whom was said to be the one who had stabbed someone. The police went to the hospital and took Mwendwa to Makindu Subcounty Hospital after which PW1 left, he testified that he spoke to Mwendwa who told him that he was going to theatre. Thereafter they did not talk because Mwendwa could not talk.

- 8.** He testified that Mwendwa had initially told him that it was the person who prepared eggs who stabbed him. That he was just passing when the person held his shoulder and when he turned, he just stabbed him. He said he was not aware of any grudges between them.

- 9.** He said he saw the accused at the police station among other suspects
- 10.** He said that when he went to the place where eggs were sold, he heard and saw someone tell a policeman '*Afande I am sorry*' but that he did not observe that person's features.
- 11.** On cross examination he told the court that he saw the accused person among others at the police station; that he recorded his statement the following day; that the injured person did not say he had been stabbed; that the lighting around the place where it happened was not good; that he did not recognise the person who stabbed the deceased at the scene; he did not know the egg seller; that where the deceased was stabbed there were many people.
- 12.** PW2 Ruth Wangari Kahi the government analyst from the government Chemist told the court that the Government Chemist received from no. 99804 PC Jacob Soyinka sample accompanied by an exhibit memo with a request to examine the exhibits and determine the presence and origin of any biological evidential material.

- 13.** The exhibits were a blood sample Marked B and nail clippings Marked C in vacutainers marked Onesmus Muendo Musau, Deceased, blood sample marked D of Maingi Masila. On 13<sup>th</sup> September 2019 They also received a knife marked A with an orange handle.
- 14.** On examination the knife was moderately stained with human blood And the DNA profiles from the knife marched the DNA profiles from the samples B and C. She produced the DNA report as PEx 1 and the Exhibit memo as Pex 2.
- 15.** PW3 Dr Nicholas Ndombi conducted the post-mortem on the body of Onesmus Muendo a male African of good nutrition. On examination He had a wound in the right groin and internally the right lung was white in colour due to loss of blood and the left lung had collapsed totally. The cause of death was penetrating injury in the anterior abdominal wall and excessive blood loss resulting to cardio respiratory arrest. He produced the Post-mortem Report dated 14<sup>th</sup> August 2019 as Pex 3.
- 16.** PW4 no 89081 CPL Amos Arile was stationed at Nzaui Police Station at the material time. On the night of 5<sup>th</sup> August 2018, he was walking along Under 18 Street in Emali when he saw

people crowding at a place. He went there and found a young man who had been stabbed with a knife bleeding profusely. There was another young man holding a knife on the handle side. . It was just then that PC Ahmed ( now deceased) and PC Mwangi showed up . They young man who had the knife was arrested and the knife retrieved from him. He was taken to the police station. He said he could ID the person that was arrested if he saw him closely but proceeded to say it was a long time ago and he could not do so. Even the knife he said he could not identify it.

**17.** On cross examination he told the court that he was not on duty but was from a friend's place. That it was PC Ahmed and Mwangi who were on duty. They were not in uniform.

**18.** PW5 no 99804 PC Jacob Suyanka was the I.O in this case. . A report of assault of Onesmus Muendo Musau was booked vide OB 5/5/8/2019 that he had been assaulted by Maingi Masila Ndingili and that the victim had been taken to Emali Hospital, later to Makindu Subcounty Hospital however he passed on while undergoing treatment. He received the report of death on 7<sup>th</sup> August 2019.

- 19.** Investigations into the death commenced, the suspect was processed and charged with this offence. He said he was handed over the knife by the late PC Ahmed, he identified the knife and the accused . Knife was produced as PEx 4.
- 20.** On cross examination he told the court that other than PC Ahmed the accused had told the Hon Magistrate when the Misc. file was placed before court that he had stabbed the deceased. That PW1 also confirmed the fact that the deceased was stabbed with a knife. He said that the accused did not tell him that the said Chris Mwongela had injured him and broken his tooth. He stated that the knife belonged to the accused which he was using at the place where he was cooking and selling eggs using it to cut tomatoes. He said the knife was recovered at the point of arrest.
- 21.** Upon close of the case for the prosecution the accused was put to his defence. He gave a sworn statement of defence. He told the court That and the material time he was working in a hotel as a cashier He spoke about the evening of the 9<sup>th</sup> of September 2019 at 8 PM when three customers came in. They ordered three teas when the waiter came for the bill to, it

turned out that the three had planned to rob him. He had money in the apron pocket where he was giving change from. One came to pay, the other went and sat on their motor bike while the other hand around. The one who went to pay attempted to strangle him. He screamed. He raised alarm. They ran out, but this last one was beaten by a mob. He said he and 4 others were arrested . He said they were in the cells for two days, police asked them for bribes. Those who paid were released. He was not and this case was planted on him. He denied killing the deceased. He said he was attacked by thieves, and rescued by members of the public.

22. On cross examination he told the court that he could not recall any of the people who rescued him because he had been in remand, he said he had four colleagues at the time of the attack and when he raised the lung his colleagues came together with customers to rescue him. He said he did not get to report the incident because he was arrested at the scene he did not recall the officer who arrested him and 4 others he said he was arrested by two officers he said when he was arrested he was washing his head as he was bleeding from the head

That the other 4 were found at the scene Where they were beating the deceased He said it was the deceased who was caught by members of the public forbidding and injuring him He said there were other businesses that show for an emphasis on that deputies planted the case on him because he was claiming to have been beaten to have been robbed and those who paid bribes were released

23. At the close of the defence, the defence counsel filed written submissions which I have considered.

24. After summary of the evidence, he relied [Republic v Nicholas Onyango Nyolo \[2014\] KEHC 6459 \(KLR\)](#) on the critical elements of the offense of murder

***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 and***

c. **Proof that the said unlawful act or omission was committed with malice afterthought- which constitutes the “mens rea” of the offence.**

25. And [Peter Mwangi Kariuki v Republic](#)

[\[2015\] KEHC 1904 \(KLR\)](#) on the Prosecution’s burden of proof where the court stated:

**Viscount Sankey L.C.** in the celebrated case of **Woolmington vs. DPP<sup>[10]</sup>** in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

*‘Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’*

*The above quotation expresses the correct legal position, which is the legal burden of proof in criminal cases rests on the prosecution and this burden must be discharged at all material times. Thus, the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial the prosecution has failed to establish these to the appropriate standard, the prosecution will lose.*<sup>[11]</sup> (Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, paragraphs 13 & 14) *It is clear the legal burden of proof in criminal cases is only one and rests on the shoulders of the prosecution.*<sup>[12]</sup> (Peter Wafula Juma & others vs REPUBLIC High Court Criminal Appeal no. 144 of 2011) *The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt.*<sup>[13]</sup> (Republic vs Derrick Waswa Kuloba [2005] eKLR) *The question that follows is whether the prosecution in this case established its case beyond reasonable doubt.*

26. It is submitted that the evidence of Pw1 was that the incident occurred around 1:00 AM in the morning and the

deceased stated he had been burnt and it is PW1 who noticed the deceased had been stabbed. He also stated that the lighting was very poor, there were many people and the deceased said that he had been stabbed by a person who prepares eggs. He also stated that there were many people at that place waiting to be served and that he did not see the accused and that the deceased did not say he had been stabbed. He also stated that he saw a quarrel but later said that the deceased informed him that the accused stabbed him when he turned. It was submitted that his testimony was contradictory and rendering him an untruthful witness whose testimony should be taken with caution. The defence urged the court to find that the evidence of this sole witness to the alleged attack by the accused is incredible and unreliable when held up against the defence of the accused person. The defence relied on [Republic v Mwangi \[2023\] KEHC 3205 \(KLR\)](#) where the court dealing with similar issue stated relied on the following cases stating:

It was held in [Ndungu Kamanyi vs Republic \[1976-80\] 1 KLR](#):-*“The witness in a criminal case upon whose*

*evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person, or raise a suspicion about his trust worthiness or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”*

In [Republic v Jeremiah Juma Wekesa & another](#) [2020] eKLR the learned Judge stated; *A witness in any proceedings before court should not give an impression that he is not telling the truth. This severely erodes the credibility of the witness before court and materially affects the reliability of his evidence. In this case, the only identifying witness has not from his testimony and previous statement not earned the confidence at this court that he is saying the truth.*

**27.** It was also submitted that PW1 claimed to have gone to withdraw money from an MPESA but no statement was

produced to prove the same so as to place him at the scene with the deceased, or where the incident is said to have happened. It was the accused's testimony that most businesses had closed at that time.

**28.** It is also evident from his testimony that he was ahead of the deceased and only turned when he heard a commotion. The first thing deceased said was that he was burnt, and he PW1 noticed the bleeding. He saw the accused while at the station when he was brought among others. He did not identify him as the person who stabbed the deceased . That he did not know the egg seller, and did not see the stabbing.

**29.** It was submitted on the strength of several authorities including **Kiarie vs R (1984) KLR** , **Nzaro vs R (1991) KAR 212** , **Anjanoni & Others vs R (1976-1980) KLR 645** that the evidence of identification fell short of the required standards aa there was no positive identification of the accused as the egg seller or the stabber. The court was urged to find that the dock identification by the witnesses was worthless as it had not been preceded by a properly

conducted identification parade see the CoA in **Gabriel Kamau Njoroge vs R (1982-1988) 1 KAR 1134.**

**30.** It is submitted that the evidence of PW4 was about the arrest of the accused person. This witness testimony was that both the deceased and the accused were at the same scene when he arrived. That this testimony was inconsistent with that of the PW1 who never spoke of any police officers at the scene when the deceased was there. That the testimony of PW4 was not credible that the accused was found with the knife.

**31.** Counsel submitted further that the deceased's conversation with the accused could not be considered a dying declaration because the deceased told the PW1 that he had been burnt.

**32.** It was submitted that no investigations were conducted other than the recording of witness statements and taking the exhibits to the government Chemist. That there is no conclusive evidence that the knife belonged to the accused person, or any evidence that it was recovered from him

33. The defence relied on [Martin Mwangi Kihuri v Republic \[2019\] KEHC 7431 \(KLR\)](#) where the court stated:

*While it is a fact that deceased died, and the cause of death was established the foregoing evidence shows that there was no evidence as to whether it was at the act or omission of the accused person with malice aforethought.*

*It is glaringly evident that this is one of those cases that should never have come for trial as there was nothing to connect the accused person with the murder.*

*The Investigating Officer conducted no investigations - none at all. Recording statements of the relatives of the deceased who arrived after the fact and who had no idea who could have done this is only part of investigations, so is the calling the scenes of crime personnel to take photos of the scene and visiting the scene and drawing a sketch plan.*

**Black's law dictionary 10th edition 953** defines to investigate: - *Inquire into a matter systematically, to make a suspect the subject of a criminal inquiry.*

*The Investigation officer went through the motion of carrying out an investigation but did not demonstrate the outcome of the Investigation: - The activity of trying to find out the truth about something, such as a crime, accident, or historical issue; esp., either an authoritative inquiry into certain facts, as by a legislative committee, or a systematic examination of some intellectual problem or empirical question, as by mathematical treatment or use of the scientific method. There was no activity to find the truth about the allegations made about the accused person. Just a collection of things, ideas etc. without any analysis making this is one of those cases I have come to know in my career as a judicial officer, as time wasters, fillers where the investigating and prosecuting authority for reasons best known to them which do not have anything to do with the interests of justice shrug their shoulder and say “wacha itupwe na koti.” It is an abuse of the rights of the accused person and the Criminal Justice System to prefer charges against a person when*

*you have not conducted any investigations and when you have nothing to even establish the bare minimal, 'bare necessities 'of the charges. Prosecuting counsel must of necessity interact with the evidence gathered by the investigators, before approving charges against a suspect. It is not just about prosecuting the person, but the lived reality of the accused, his family and the family of the victim going through a hopeless trial. That Constitutional mandate to prosecute given under Article 157 must of necessity be exercised within the values and principles of our Constitution as set out at Article 10 viz.....*

34. In conclusion counsel submits that the defence has discredited the evidence by the prosecution and urged the court to find that the prosecution failed ultimately to prove the case against the accused person and the accused ought to be acquitted.

35. The prosecution did not submit.

36. I have carefully considered the evidence of the prosecution and the defence before me and the submissions by the defence.
37. The issue that stands out is whether the ingredients of murder were established: That means whether the evidence of the prosecution witnesses was contradictory and inconsistent vis a vis the accused person's defence, there was death of a person, whether death was caused by the unlawful act/omission of the accused, whether the accused was properly identified, whether the accused has malice aforethought.
38. To begin with the onus is always on the prosecution to prove the charge beyond a reasonable doubt.
39. There is no doubt that the deceased died out of a penetrating stab wound to his groin that resulted in severe blood loss and cardio respiratory arrest. That death was unlawful.
40. Did the accused do it? In answering this question, we deal with the issue of consistency of evidence, the identity of the perpetrator

41. We have to start from the beginning. The I.O told the court that the assault report was made against one Maingi Masila Ndingili. However, this statement appeared to have fallen out of the blue as the PW1 told the court he did not know who had assaulted the deceased. Hence it would be strange that he would be the same person to have put a name to person he did not know. So, who reported that it was the person by the name of Maingi Musili Ndingili who had assaulted the deceased? This did not come out of the evidence before court and the prosecuting did not make any effort to establish the same. In light of the accused person's statement of defence it is not clear how the said name was associated with the egg seller alleged to have burnt/ stabbed the deceased.

42. PW1's testimony did not identify the accused person as the stabber. His evidence was a mix. In one breathe he said the deceased said he was stabbed by the egg seller. In another he said the deceased did not say he was stabbed. He said when he noticed the bleeding, they had already passed the egg seller's stall, and his business was

continuing. He did not know the egg seller and did not identify the accused as the egg seller.

43. PW4's testimony did not assist . It created a situation where it appeared like there were two different scenarios related to the same incident: the one by PW1 where the stabbing happened in such a way that he who was with the deceased did not see the stabber and the egg business was going on normally even as he noticed that the deceased was bleeding; and the second scenario where the stabbing was in the presence of many people, the victim was on the ground with a crowd around and the stabber with the knife in his hands just waiting to be arrested by PC Ahmed and to be disarmed. It has been demonstrated that that testimony was contradictory to that of PW1 whose testimony was that it is he who noticed that the deceased was bleeding from the abdomen and did not see who had stabbed him or anyone one arrested with the knife yet he was at the scene moments after the incident. According to PW1's testimony the police arrived after he had taken the injured to Misuuni

hospital and he had gone to Emali Police Station to book the incident and obtain the OB no.

44. Evidently this was inconsistent and contradictory with regard to the fact of the identity of the stabber and the owner of the knife. It also rendered the testimony of the two witnesses unbelievable.

45. PW4 could neither identify the knife nor the accused during the trial despite his testimony that he was there when the late PC Ahmed arrested the accused person.

46. Taking into consideration the accused person's statement of defence it provides a reliable and credible account of what happened . For instance, regarding his arrest, his testimony was validated by the testimony of PW1 , that the accused was taken to the police station among several suspects for things only the police knew. The arresting officers did not testify , Pc Mwangi who was in the company of PC Ahmed was not accounted for and hence there is no telling where the police arrested the accused and the other persons who were suspects. The accused described to the court the circumstances of his arrest and

those were not controverted by the prosecution. The accused stated in his defence that he was arrested together with other persons who had mob beaten a suspect who had tried to rob him. It was upon the prosecution to pursue clarity on this issue. The law gives the prosecution space to do so under s. 309 of the Criminal Procedure Code which states:

*Evidence in reply*

*If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.*

47. If the state considered this to be new evidence that indeed there had been a mob activity that night and police had arrested persons including the accused, it was upon the prosecution to follow up, and even avail evidence to rebut the same. Perhaps the OB entries of the arrest of the accused and 4 others. The state did not do that and hence

the accused's person's statement of defence on how and why he was arrested stands uncontroverted.

48. Was there a dying declaration? I found none guided by the CoA in [Henry Mulamba Bwire & another v Republic \[2019\] eKLR](#) reviewed the applicable principles thus;

*In the case of **Choge V. Republic [1985] KLR 1**...the Court of Appeal set out the threshold for the admissibility of a dying declaration in the following passage:*

***“The general principle on which a dying declaration is admitted in evidence is that in a dying declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction***

***but the exercise of caution is necessary in reception into evidence of such a dying declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”***

The predecessor of the court of appeal in the case of **Pius Jasunga S/O Akumu v Republic [1954] EACA 333** succinctly held as follows:

***“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7<sup>th</sup> Edition of Field on Evidence has repeatedly been cited with approval....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not***

***have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”***

49. According PW1 the first statement of the deceased stated that he had been burnt. He did not state who did it. The 2<sup>nd</sup> statement was that he had been stabbed by the person who prepares eggs. These statements do not carry the clarity that a dying declaration would. They are not corroborated by the PW1 who was present who said there were many people at that place and that there was poor lighting.

50. PW1 did not identify who this person was. The I.O on his part did not carry out investigations to establish this identity and the accused’s statement of defence challenged the

same. He was not the egg seller, he was not at the scene, he was in a completely different scene, it was not him.

51. Regarding the weapon. The I.O connected the knife to the deceased through the government analysts report but did not make the effort to connect it to the accused person. While he conducted basic investigations, the testimony of the accused exposes the fact that there was the possibility of another scenario that is in congruence with his innocence .

52. From the totality of the foregoing, I find that the defence has raised sufficient doubts as to whether the accused was at the scene of the stabbing on the material night, whether the knife belonged to him, who was the egg seller who allegedly stabbed the deceased.

53. Any doubt in the case for the prosecution must be resolved in favour of the accused person and I so do herein

54. The charge of murder is dismissed, the accused is acquitted accordingly and is to be set at liberty forthwith unless otherwise legally held.

55. Orders accordingly

**Dated, signed and delivered virtually this 8<sup>th</sup> January**

**2026 Mumbua T Matheka**

**Judge**

CA Chrispol

Accused present at Makueni Main

For the State: Mr. Musyoki

For Accused- Mr. Hassan