

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE NO. E006 OF 2022

REPUBLIC.....PROSECUTION

VERSUS

KEVIN MBUGUA MAMBO alias KABOGOACCUSED

JUDGMENT

1. The accused, Kevin Mbugua Mambo *alias* Kabogo, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 26.8.22 at about 2330 hours at Zebra Village, Lamu West Sub-county, Lamu County, the accused murdered Muthui *alias* Arabu.
2. The Accused person pleaded not guilty to the charge. In the trial, a total of 7 witnesses testified for the prosecution.
3. PW1, John Kitili Wamugare testified that he used to brew *mkoma* (palm wine) with the accused. The deceased worked at the home of PW1's parents tending cattle and they shared a room. On the material day at 5pm, he was at a *mangwe* (local brew den) in Mukuru with Shiro, the owner. The accused and the deceased were also present. He told the deceased with whom he shared a room, that because he was drunk, he would sleep at the house of the accused which was next to the den, and that the deceased should call him when going home. He left the 3 of them at the *mangwe*. Later at 9pm, he heard Shiro screaming and when he went to the *mangwe*, she told him that the deceased had been slaughtered and was lying outside the den. PW1 saw blood oozing from the deceased's neck which had been slashed. He did not see anyone else there and other people started coming. He stated that he does not know what happened to the deceased and did not witness the deceased being slashed. He stated that Shiro witnessed what happened and told PW1 that the accused had fled.
4. PW2 Stephen Mugo Gitari, a *nyumba kumi* elder stated that on the material date, while at home at about 9 pm, he heard Shiro's screams. He ran to the *mangwe* and found the deceased's body on the ground with blood oozing from it. On inquiry, Shiro told him that the accused had slashed the deceased and fled. PW2 called the area chief Munene Ndambiri of Bomani and informed him that the Accused had killed the deceased. The chief then called the police from Mpeketoni Police Station who came at 10pm. The police took pictures and

removed the body to Mpeketoni Hospital. On 27.8.22, police came with accused who told them where he had discarded the knife but the same was not found. The police told PW2 to look for the knife the following day, which he did, and found it in the grass. He did not touch the knife. The police came and took the knife.

5. PW3 Japheth Gichuhi Njara, the village elder for Lake area, Bahari location, Mpeketoni, testified that the accused is from his area. On the material day, at about 1 am, he got a call from the area chief Joseph Mwangi who told him that either the deceased or the accused had been killed and asked me to make inquiries on the matter. He called Michael Mungai, of *nyumba kumi* and asked him to investigate. In the morning at 6am as he was on the way to James Kariuki's *mangwe*, he met with the accused who told him he was going to see him as the village elder. The accused told PW3 that the night before, he was drinking and fought with the deceased and he stabbed him but he did not know his condition. As they were conversing, Michael, the *nyumba kumi* elder came. They both arrested the accused and handed him over to the police. At the *mangwe*, there were drunkards who wanted to beat the accused but PW3 pleaded with them not to beat him.
6. PW4 Mohamed Abdulhussein from Mpeketoni Subcounty Hospital produced the post mortem report for the deceased, which had been prepared by Dr. Kamami Samuel who was away pursuing further studies. He testified that the post mortem was done on 27.8.22 at 2pm. He stated that the deceased had a deep cut on the head from the right posterior of the neck to the left posterior of the neck. There was severing of the carotid and jugular arteries. The trachea and oesophagus were also dissected. He stated that the pathologist formed the opinion that the cause of the deceased's death was acute haemorrhage, secondary to massive blood loss after severing of major blood vessels of the neck. There was also respiratory failure after severing of trachea. PW4 further stated that nail clipping of the hand and feet and hair clipping from the sculp were removed for further investigations. PW4 did not however know where they were taken.
7. PW5 Mwidadi Omar, a government analyst from the Government Chemist in Mombasa produced a DNA report dated 12.9.22. He testified that on 31.8.22, they received at their offices exhibits for analysis. The exhibits were a yellow striped T-shirt with blood stains, a stained black vest, as well as hair follicles, finger and to nail clippings from the deceased. They also received a red striped black T-shirt with stains recovered from the suspect and a silver knife with stains. He did the analysis and his findings were that the knife, black vest and black striped T-shirt all tested positive for human blood. The knife generated a DNA profile that matched that generated from the fingernails of the deceased. The black vest and red black

striped T-shirt generated a male DNA profile that matched that generated from the fingernails. The yellow black striped T-shirt did not generate any DNA profile.

8. PW6, Lucia Wanjiru Ngure stated that she is a resident of Bomani, Zebra, Mpeketoni. She sells soap making chemicals. In August 2022, she was engaged in selling *mkoma* at Mugumoini and the deceased and the accused were her suppliers. On 26.8.22 at 4pm, she went to the bush to collect *mkoma* from the deceased. He told her he had had a conflict with the accused earlier in the day and was anxious. They went to her *mangwe* for him to collect his money. The accused came to the *mangwe* later and was already drunk. He sat at a corner smoking bhang and tobacco. He was with people she did not know. At about 8pm other patrons left the *mangwe* and she remained with the accused and the deceased.
9. PW6 asked the accused to hold her child while she did the dishes. The deceased was with her as she did calculations on how much he owed her for the alcohol he had consumed with his friends. He then left the *mangwe* singing a song “*guzanisha nyama kwa nyama*”. He sang twice but the third time he went silent. PW6 went to check why he had gone silent and saw as the accused finished slashing his neck with a knife. The accused then came towards PW6 and she went to the counter where he could not reach her. PW1 was present but too drunk to understand what was going on. She then screamed and the accused ran out. PW2 came in and other people also came from the *mangwe* next door. The DCI collected the body and she recorded her statement. The accused was arrested the following day. He was wearing the white black and red T-shirt he had worn the previous day and it had blood stains. She identified the T-shirt. PW6 stated that on the material night while in the club, the accused and deceased did not argue. They had however argued a week earlier over a woman called Shamim, who had a relationship with the accused but was going out with the deceased in the sight of the accused.
10. On cross examination, PW6 stated that there was an argument between the accused and the deceased. She was however busy with customers and did not know the cause or who started it. Further that the two were in constant conflict over a week before. She stated that the meaning of the song deceased sang meant having sex without a condom. The deceased had told her that he was anxious as he had had sex with the accused’s girlfriend. She stated that she was bent over washing dishes and did not know what happened. She denied knowing whether the deceased had ever urinated on the accused.
11. PW7 PC Peter Macharia testified that on the material day at around 2140 hours, on instructions from Chief Inspector Njaramba he and a colleague visited the murder scene at

Zebra area, Mpeketoni. They got to the *mangwe* where they found a large crowd of people. PW6 showed them where the body of the deceased was lying, within the *mangwe* but outside the counter. The body had a deep cut wound on the neck. PW6 told him that she heard a commotion outside and when she went out, she saw the accused stabbing the deceased. The accused followed her holding the knife but she locked herself inside the counter and began screaming, whereupon the accused fled. Neighbours responded to the screams and called the police. Upon arriving at the scene, PW7 and his colleague documented and photographed the scene and removed the body of the deceased to Mpeketoni Subcounty Hospital mortuary. The accused was arrested by members of the public the following day and handed over to the police. His black and red T-shirt had blood stains. The murder weapon, a stainless-steel bloodstained knife was recovered on 28.8.22 about 300 meters from the murder scene. He sent the accused's T-shirt, the knife as well as a yellow/black bloodstained T-shirt, blood stained black vest, hair follicles, finger and toe nail clippings all retrieved from the deceased, to the Government Chemist for DNA analysis. The report of the government analyst and witness statements led him to charge the accused.

12. On 1.3.24, this Court delivered a ruling on a case to answer and the Accused was placed on his defence. He opted to give a sworn defence.
13. In his sworn defence, the accused denied the charge. He stated that prior to his being charged, he lived in Mukuru, Mpeketoni tapped *mkoma* for a living. On the material day, he left home at 9.30 am and went to the forest where he visited other tappers Fikiri and Omari and together began to enjoy themselves as they took alcohol. He stayed there till 6pm when his friend took him home on his motorcycle. He changed his clothes and told his friend to take him to a *mangwe* called Omega 005 in Mpeketoni. They arrived at about 6.30pm and began to drink. When he got drunk, he left the *mangwe* and went home to sleep. The following morning, he went to another *mangwe* and drank 5 bottles of alcohol. At about 10 am, he told his friend Joram that he was leaving for work. As he got up to leave, some people who were drinking at the *mangwe* pounced on him and they tied his legs. They handed him over to the DCI officers who took him to the police station. He stated that Mugure was his customer and that he had given her credit of 2 weeks and she owed him Kshs. 26,000/=. She kept giving him false promises for payment but paid him small amounts leaving a balance of Kshs. 23,000/=. Her refusal to pay him strained their relationship.
14. On cross examination, the accused stated that he knew the deceased and they worked together. He last saw him on the morning of 26.8.22 when he went to the forest to meet his fellow tappers. He stated that he did not see him at the *mangwe* of PW6 as he did not go there

that day. He denied knowing Shamim or having a relationship with a girl by that name. He stated that the police did not take anything from him, not even his clothes.

15. The foregoing is the totality of evidence before this Court.
16. In spite of being given several opportunities, the prosecution did not file submissions.
17. For the accused, it was conceded that the Accused was responsible for the death of the deceased. However, that the prosecution did not prove malice aforethought beyond reasonable doubt. It was contended that the proved offence, if any, is manslaughter. It was further submitted that the prosecution's own witnesses, PW1 and PW6 testified that the Accused was excessively drunk and had consumed alcohol, tobacco, and bhang on the material day. Additionally, that the surrounding circumstances, as borne out by the evidence, do not support premeditation.
18. It was further submitted that the alleged weapon, namely the knife was, on the prosecution's witnesses' testimony, a normal tool commonly carried by wine tappers in the area, including the Accused, a known wine tapper. Further that while intoxication is not a complete defence in ordinary cases, it must be taken into account when determining whether the accused formed the specific intent required for murder. It was thus submitted that there is no evidence of planning, preparation, or prior grudge proved to the required standard. The defence urged the Court to find that malice aforethought was not proved and that the offence disclosed is manslaughter.
19. I have considered the evidence and submissions on record. What this Court must determine is whether the prosecution has proved the ingredients of the offence of murder against the Accused to the required standard.
20. Section 203 of the Penal Code defines murder in the following terms:

Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.
21. The ingredients of murder were set out by Odero, J. in the case of **Republic v Mohammed Dadi Kokane & 7 others [2014] KEHC 1088 (KLR)** as follows:

This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

 1. ***The fact of the death of the deceased.***

2. ***The cause of such death.***
3. ***Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***
4. ***Proof that said unlawful act or omission was committed with malice aforethought.***

22. The undisputed facts herein are the death of the deceased and the cause of his death. PW4 produced the post mortem report. He stated that the deceased had died as a result of acute haemorrhage, secondary to massive blood loss after severing of major blood vessels of the neck. There was also respiratory failure after severing of trachea. It is conceded in submissions that the Accused caused the death of the deceased through his unlawful act.

23. What must be determined is whether the unlawful act of the Accused that caused the death of the deceased was committed with malice aforethought.

24. Section 206 of the Penal Code defines malice aforethought as follows:

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.***

25. The defence has urged the Court to make a finding that malice aforethought was not proved on account of the Accused's state of intoxication.

26. The fact of the Accused's state of drunkenness and intoxication is not disputed. The evidence on record shows that the Accused was intoxicated on the material night. The Accused and the deceased were palm wine tappers and were suppliers of PW6 who operated *mangwe*. PW6 stated that when he arrived at her *mangwe*, he was already drunk. He sat at a corner smoking *bhang* and tobacco. In his own testimony, the Accused stated that he left home at 9.30 am and

went to the forest where he joined other tappers, Fikiri and Omari and together began to drink. He stayed there till 6pm when he went home. After changing his clothes, he went to PW6's mangwe and began to drink until he went home.

27. Part IV of the Penal Code provides for the general rules as to criminal responsibility. Section 13 deals with intoxication as a defence. While Section 13(1) provides that intoxication shall not constitute a defence to any criminal charge, subsection (4) provides as follows:

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.

28. The trial court is required to take into account the state of an accused person's intoxication for purposes of determining whether he had formed any intention to commit an offence, in the absence of which, he would not be guilty of the offence.

29. In **Said Karisa Kimunzu v Republic [2007] KECA 481 (KLR)**, the Court of Appeal stated:

But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son.

30. And in **Kimathi alias Kuguru v Republic [2023] KECA 1584 (KLR)**, the Court of Appeal stated as follows:

From the foregoing, the evidence that the appellant was drunk is critical, and the prosecution was required to prove that despite the fact that the appellant was intoxicated, he still had malice aforethought, for a conviction of murder to stand. In the instant appeal, the learned Judge did not consider the fact that the appellant was drunk when navigating the element of intent to kill.

31. As enjoined by Section 13(4) of the Penal Code, I have taken into account the intoxication of the Accused herein. There is nothing in the prosecution evidence to show that the Accused had any intention to kill the deceased. The Court notes that PW6 stated that the deceased had told her earlier in the day that he was anxious as he had had a conflict with the Accused earlier in the day as he had had sex with the Accused's girlfriend. It is quite evident that the deceased had no fear of the Accused as they were in the same *mangwe* drinking and the Accused did him no harm. It is when the deceased left the *mangwe* singing a song "guzanisha nyama kwa nyama" which PW6 said meant having sex without a condom, that the Accused attacked the deceased. The Court also takes note of the fact that as a wine tapper, the Accused ordinarily carried a knife, a necessary tool of trade. To my mind, the Accused being incensed by the song by the deceased attacked him with the knife that he carried as a wine tapper.
32. Without any evidence by the prosecution that the Accused intended and planned to kill the deceased, coupled with his state of drunkenness and intoxication, the Court finds that the element of malice aforethought was not proved. As such, a conviction of murder cannot stand. In this regard, I take guidance from the holding in the Court of Appeal case of **Moses Olesugut Paranai vs Republic (2007) KECA 200 KLR**. The Court considered a case where the facts were that the appellant had returned home from a drinking spree and inquired from his wife where one of the family calves was. She did not give a satisfactory answer, whereupon the appellant was so incensed on account of the missing calf and started beating up the deceased. In that state, he took a panga and started cutting up the deceased. The deceased raised an alarm which attracted neighbours. When the accused saw the neighbours, he turned violent against them and caused them to flee. He returned to the scene where the deceased was lying and inflicted several cuts, killing her on the spot. In its judgment, the Court of Appeal stated:
- We have come to the conclusion that, given the fact that the appellant had been on "a drinking spree" prior to his return to his house where his wife was, this is a proper case for his conviction of the offence of murder under section 203 of the Penal Code being substituted with a conviction for the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.*
33. While the Accused herein caused the death of the deceased through his unlawful act, the evidence adduced cannot sustain the offence of murder as the key element of malice aforethought was not established. The offence disclosed is manslaughter.

34. Section 202 of the Penal Code makes provision for the offence of manslaughter and provides as follows:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

35. The punishment for the offence of manslaughter is set out in Section 205 which provides:

Any person who commits the felony of manslaughter is liable to imprisonment for life.

36. Having considered the circumstances under which the unlawful act of killing the deceased was committed, the Court finds that the Accused was intoxicated to the extent that his sense of judgment was impaired. Pursuant to the provisions of Section 179(2) of the Criminal Procedure Code, I find the evidence tendered supports the lesser offence of manslaughter. Accordingly, the Accused is hereby convicted of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED SIGNED and DELIVERED in MALINDI this 13th day of February 2026

M. THANDE
JUDGE