



**Republic v Nyakeri (Criminal Case E017 of 2022)
[2025] KEHC 11191 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE E017 OF 2022**

**RK LIMO, J
JULY 29, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

ROBERT MUNGEI NYAKERI ACCUSED

JUDGMENT

1. Robert Mungei Nyakeri, the accused herein is charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the case are that on 24/6/2022 at Kwanza Shopping Centre, Kwanza Sub-County, Trans-Nzoia County, he murdered Joseph Wanyangu.
2. The accused denied committing the offence and the prosecution called a total of 13 witnesses to prove their case while the accused gave unsworn defence and called no witness. The prosecution's case hinges on both circumstantial and direct evidence. The incident occurred at an entertainment spot known as CD Pub in Kwanza Centre and the incident as a result of a fight that broke out between the accused on one hand and the deceased and a colleague (who is a witness in this case) on the other side. Below is a summary of the evidence tendered.
3. Wilfrida Adhiambo Wanyama (PW1) a wife to the deceased testified that she was from Busia and that on 24/6/2022 (the material date) one Maureen called her and informed her that she was needed at Kitale and she rushed there where she was informed about the bad news that her husband the deceased had passed on. She stated that she went to Cherangany Hospital Mortuary where she confirmed the death upon seeing his body.
4. PC Gilbert Koech (PW2) on his part testified that he was a police officer attached at Kwanza police station where the deceased was also based. He recalled that on 23/6/2022 at around 9pm he left his house and went to a local pub known as "CD Pub" where he met 5 people namely Masoud Kirong,



Godfrey Apuya alias Loddu, Diva, Oliver, the accused, Ogodio and another person. He stated that he ordered for a beer as he waited for his mobile phone to charge.

5. He stated that the deceased arrived at the pub at around 2330hrs and happily greeted everyone at the pub as he was served with a drink. He stated that the accused who had left returned back to the pub and headed to the counter where Lagat (PW5) asked him to clear a bill of Kshs.70/-. He stated that the accused denied owing the amount and owing to some exchanges, other patrons urged the accused to pay the bill as it was late. He stated that the deceased also joined in but the accused responded harshly thus;

“Wewe si ulipe bill yako kwani wewe ni nani?”.

6. The witness stated that the deceased stood up and confronted the accused at the counter who responded by pushing the deceased who fell on the table as a result. He stated that given the respect he had for his boss he had to intervene and help the deceased. He stated that Masoud (PW3) a teacher joined in the fracas and the accused attacked him as the two fell on the floor. He stated that he pulled the two outside the pub and the deceased followed them out upon which he slapped the accused three times telling him that he should know people. He stated that the accused asked him for help and tried to reach where he stood but because of the blood in his hands he said that he moved back and called Lagat (PW5) who had ran away. He stated that he asked him to go back.
7. He stated that he then heard the accused calling out asking for his phone but he did not respond and that Lagat (PW5) shortly arrived with 2 others Godfrey Apuya and Ogodio. He stated that they closed the bar and outside, Ogodio picked up a phone and that he pressed the phone and saw the background photo to be that of the accused adding that the phone had blood stains. He stated that he kept the phone and moved on. He stated that at around 30 metres from the pub he saw the deceased lying in a pool of blood. He stated that the place was well lit and when the 3 saw the deceased in that state, they took off in fear and he was left alone.
8. He stated that he called the OCS and preserved the scene. He stated that the accused later came to the scene with a police officer named Eugene Barasa and demanded for his phone but he did not give him. He testified that other police officers arrived at the scene and when they turned the body of the deceased he saw four stab wounds on his back, one on his head and another stab wound on his neck.
9. He stated that he then led DCI officers to the house of Masoud Kirong. He clarified under cross-examination that the body of the deceased lay in a dark place and that it was past midnight. He further stated that the deceased lay facing upwards when they found him lying in a pool of blood 30 metres from the Pub. He said that when Masoud appeared at the scene later his clothes were soaked in blood and had a wound.
10. Masoud Kirong Peter (PW3) testified and largely corroborated the evidence given by PW2. He stated that he was a teacher at Kwanza Boys High School and that on 23/6/2022 the deceased who was a close friend called him and asked him to meet him at Makongeni Bar where they drank upto 8.30pm when the deceased left for his house. He stated that he remained at the bar until around 9.30pm when PW2 informed him that the deceased was on his way back and he waited for him.
11. He stated that the deceased later arrived to find the accused arguing with the waiter over a bill of Kshs.70/-. He stated that the deceased waited for a while to be served because of the altercation at the counter between the accused and the barman. He stated that the deceased then rose and went to the counter and asked the accused to pay the bill so that the barman could serve other customers. He stated that the deceased then requested the barman to play a song by Osago Winyo.



12. The witness stated that the accused upon hearing the deceased requesting for a number, he told the deceased that he should not be requesting for music to be changed when he had just arrived and had not taken any drink. He stated that the deceased told the accused that he was the officer in charge crime at Kwanza police station and had powers to close the bar. He stated that the deceased pushed the accused softly from the counter but the accused surprisingly turned and pushed the deceased so hard against the wall.
13. He stated that he rushed and held the accused so firmly around his waist from behind but the accused hit him with his elbow and that as he pulled away he realized a bottle had hit him on the head with blood oozing. He stated that he then rushed to Kwanza Sub-County Hospital for treatment.
14. He stated that after treatment he went back to the bar and found PW2 and before long he saw the OCS Kwanza arriving. He stated that PW2 used his phone light and led them to where the deceased lay and found him lying facing up with blood around him.
15. Mark Yego (PW4), a clinical officer from Kwanza Sub-County Hospital testified that he treated Masoud Kirong (PW3) on 24/6/22 at around midnight. He said that the patient (PW3) had a wound on the forehead measuring 2cm. He tendered treatment notes as Pexhibit 3a and P3 Form as Pexhibit 3(b).
16. Brian Kiplagat (PW5), the bar attender at CD Pub where the incident occurred testified that he is employed by PW2 as a bar attendant and recalled that on 23/6/22 he opened the Club and revelers started streaming from 7pm. He recalled serving among others his boss (PW2), Masoud (PW3) and the deceased. He stated that he also served the accused whom he knew as Robinson. He stated that the accused ordered ½ litre spirit known as “Magic” for a customer known as Titus.
17. He stated that when he wanted to close the bar later that night, he requested the accused to pay the bill for the drink he had ordered for Titus but the accused declined to pay. He stated that since he did not want to raise issues he decided to leave the accused and offered to pay the bill himself. He stated that the deceased told the accused to pay the bill and the 2 had bitter exchanges which degenerated into a physical exchange. He stated that PW3 joined the fray and fought.
18. He stated that the 3 that is the deceased, the accused and PW3 were pushed out as other revelers also left. He stated that he closed the counter and saw the 3 still fighting outside. He stated the deceased was bleeding as a result of the fight. He stated that the accused blamed him over the bill of Kshs.70/- and threatened him. He stated that he then left the club and met Godfrey Apuya Wesonga and Lelei who also had been in the club walking away. He stated that he realized that the accused was following him and he ran and hid in the bush before calling his boss on phone. He stated that PW2 told him to go back to the club in the company of the 3 and together they went back.
19. He stated that on reaching the club, he handed over the day’s sales to his boss and they closed the door. He stated that as they walked away from the club they saw the deceased lying down not far from the club and they were shocked. He stated that they took off from the scene and spent the night at Godfrey Apuya’s house.
20. He further testified that during the fight at the club, there were many breakages and heard bottles crushing outside as the fight went on. He recalled seeing the accused bleeding. He further recalled seeing a piece of broken bottle that had pierced the neck of the deceased and remained there. He further stated that had the deceased not picked up a quarrel with the accused over unpaid bill, the incident would not have happened.



21. Leonard Wekesa Makokha (PW6) on his part stated that on the material night he was also at CD Pub taking drinks. He recalled being joined by his friends Godfrey Apuya and Wesonga. He also later saw Masoud (PW3) (who he knew as a teacher) and the deceased joining them. He stated that he was so engrossed with his drink and miraa that he paid little attention to others but recalled hearing an argument over a 70/- bill. He stated that he saw the deceased, the accused and PW3 exchanging words and shortly heard bottles breaking and he took off. He stated that Godfrey Apuya and Wesonga followed and later decided to go back to the club for a phone but he refused to accompany them. He recalled that during the fight he heard the accused calling PW5 and saying that they wanted to kill him.
22. Chief Inspector Nelson Korir (PW7), the O.C.S Kwanza police station recalled that on the material night he was called from his residence by PW2 who reported to him that there was a serious incident at the Centre. He stated that though it was raining at the time he responded by proceeding to the scene which he found to be in total darkness because of a blackout which had occurred.
23. He stated that he met PC Koech (PW2) who led him to where the deceased lay in a pool of blood with the rain pounding on his body. He stated that he then called the Sub-County Commander as well as the DCIO but could not reach them forcing him to call the County Commander.
24. He stated that while at the scene, another police officer named Eugene Barasa arrived with the accused who was an Anti-stock Theft officer based at Chepchoina Camp. He further said that he saw a teacher named Masoud with a bloody bandage on his head. He stated that the teacher reported to him that the accused had assaulted him and had sought treatment at the hospital.
25. He stated that PW2 (PC Koech) narrated to him what had transpired and handed over to him a mobile phone recovered at the scene. He stated that the scene of crime officers processed the scene. He stated that when the body of the deceased was turned he saw a stab wound on the neck and forehead before the body was taken to Cherangany Nursing Home Mortuary. He also recalled seeing the accused with blood on his face.
26. APC (W) Mary Wakhisi, a police officer attached to County Commissioner's office Trans-Nzoia stated that she was a specialist in sign language having qualified from Excell Institute, Kitale with a Certificate in Kenya Sign Language. She testified that on 29/6/2022 she received a call from Corporal Ogola for assistance in translation because he had a certain witness named Dennis Wanyonyi who was dumb.
27. She stated that he accompanied Corporal Ogola to Kwanza Market where they picked the dumb witness took him to DC's office Kwanza where the witness gave answers to what he was being asked in form of a statement. She stated that the witness used sign language and at times wrote down some words.
28. She stated that she recorded the statement which was later typed. She tendered the statement as PExhibit 4. According to the statement by Dennis the incident occurred at 2am. He stated that the deceased was with his best friend Masoud and that a quarrel between the deceased and accused ensued which turned into a fight between the deceased and accused.
29. He stated that he saw the accused grabbing a bottle and breaking it on the ground before using the broken bottle to stab the deceased on the right side of his neck. He stated the incident happened outside the bar and he became worried and ran away.
30. Dr Tulen Fred (PW9), the doctor who performed post mortem examination on the body of the deceased stated that he conducted the autopsy on 30/6/2022 and found a wound on the left side of the neck approximately 4cmx1cm. He also noted a wound on the scalp around 4cm, and left shoulder approximately 2cmx1cm. He stated that there were 4 wounds in total on the back caused by a sharp



- object. He stated that internally there was bleeding to the brain around occipital region and that the vessels of the neck were severed.
31. The doctor opined that the cause of death was massive bleeding from the neck secondary to stab wounds/assault. He tendered the Post Mortem report as Pexhibit 5 and issued Death Certificate Notification No.0164857.
 32. PC Eugene Barasa (PW10) stated that at the material time he was on duty at Kwanza police station and recalled that a person went to the station and reported that there were fracas at a bar. He stated that the reportee reported that he had been beaten by two people. He stated that the accused was the reportee and that he had a wound on the head which was bleeding with top clothes soaked in blood. He stated that he recorded the incident and told him to go for treatment. He stated that as he was leaving, the reportee informed him that there was a possibility that one of the attackers had been seriously wounded. He stated that he knew the bar because it was owned by a fellow police officer (PW2) and that because it was not far from the station he decided to go and check at the situation.
 33. He stated that he met (PW2) and a boda boda rider who told him “hapo kinanuka damu” and left. He stated that PW2 was by then making a call and after he had finished he led him to where the deceased body lay. He stated that he went back to the station and gathered his colleagues and informed them about the incident.
 34. He further recalled that when he initially booked the assault from the accused, he informed him that he was a police officer and that he recorded at the OB NO. 2o f 24/6/2022 at 1.02am. He stated that the accused reported that one of the assailants was Masoud who was a Teacher at Kwanza High School and that he also reported that he lost his phone, a Samsung during the fight. He further stated that when he arrived at the scene it was very dark because there was a blackout but recalled seeing the accused at the scene when he reached there.
 35. Kipngetch Benard (PW11), a Government Analyst working at the Government Chemist Nairobi, testified that he received the following items for forensic analysis;
 - i. Black jacket marked “D1” reported to belong to the accused.
 - ii. Blue jeans trousers marked “D2” belonging to the accused.
 - iii. Jungle green T-shirt with utumishi kwa wote label marked “D3” belonging to the accused.
 - iv. A blue boxer underpant marked “D4” reported to belong to the accused.
 - v. A stone in a bag marked “E’ from the scene.
 - vi. Blood sample in a container marked “A” for Joseph Wanyangu (deceased).
 - vii. Blood samples in containers marked “B” and B2” for Robert Mungei Nyakeri (accused).
 - viii. Blue jeans trousers with a belt in a polythene bag marked “C” reported to belong to the deceased.
 - ix. A blue jacket in a bag marked “C2” belonging to the deceased.
 - x. A white vest in a bag marked “C4” belonging to the deceased.
 - xi. A white piece of tissue paper marked “C6” belonging to deceased.
 - xii. A torn white shirt with black flowers marked “C3” belonging to the deceased.
 - xiii. A pair of canvas shoes in a bag marked “C5” belonging to the deceased.



36. The forensic expert stated that the items were accompanied by an exhibit memo dated 6/7/2022.
37. He stated that he made the following observations;
- i. That C1, D2, D3, E4, C4, C6 and C3 were heavily stained with human blood.
 - ii. C2 was moderately stained with human blood.
 - iii. Both “E” and “C5” had no blood stains.
 - iv. Blood stains on the pair of trousers D1, D2, C4 and C6 did not generate any DNA profile.
 - v. Blood stains on D1 and D4 generated mixed DNA profile.
38. He stated that based on the generated DNA profiles he made the following conclusions;
- a. DNA profile generated from C2, C3 and D4 matched DNA profile generated blood sample marked D1 belonging to the accused.
 - b. DNA profile generated from profile on D1 and D4 match DNA profile from the blood sample from the deceased.
 - c. DNA profile from blood stains on D3 was for an unknown male origin.
- He tendered the Government Analyst report as Pexhibit 6.
39. He explained that the results showing mixed DNA means that the blood stains were from more than one person and that in this case the mixed DNA were for the accused and the deceased. He also stated that he found the blood stains on “D3” (jungle green T-shirt – labeled Utumishi kwa wote) from accused generated DNA sample of unknown male.
40. PC Wesley Masibo (PW12) a gazetted Scene of Crime Officer stated he was called between the night of 23rd and 24th June 2022 to visit a scene of crime at Kwanza Centre and take photographs. He stated that he arrived at the scene at around 4am to find the body of the deceased 30 metres from a bar lying down and being rained on. He stated he inspected the body and saw stab wounds around stomach, chest and 3 at the back. He stated that he took photographs and generated 15 photographs which he tendered as a bundle Pexhibit 2a with the certificate as Pexhibit2b.
41. CPL Godwing Ogola (PW13), the investigating officer in this case testified that on 24/6/2022 at 2am he received a call from DCIO that there was an incident at Kwanza involving a senior police officer. He stated that he was tasked with getting the scenes of crime officer and got PW12 and proceeded to the scene. He stated that they found a body lying at the scene and that the scene was documented. He stated that he noted 6 stab wounds on the body of the deceased. He stated that inside the club, he saw many broken bottles and a lot of blood at the entrance. He stated PW2 identified the suspect (accused) at the scene and he re-arrested him adding that the suspect had blood on his face and therefore they first took him for treatment at Kwanza Hospital before taking him into custody.
42. He stated that he was briefed about a fight that had broken out at the pub and that the accused told him that he had been fought by two people that he lost his phone in the process.
43. He stated that he later attended Post Mortem examination of the body of the deceased and organized for blood samples from the accused and forwarded the blood samples and other items to Government Chemist. He listed the following items which he also tendered as exhibits.
- i. Black jacket belong to the accused Pexhibit 7



- ii. Blue jeans (accused) – Pexhibit 8
 - iii. Jungle green T-shirt (accused) – Pexhibit 9
 - iv. Blue boxer with stripes (accused) – Pexhibit 10
 - v. Blue jeans (deceased) – Pexhibit 12
 - vi. Stone – Pexhibit 11
 - vii. Brown jacket (deceased) – Pexhibit 13
 - viii. Blood stained vest (accused) – Pexhibit 14
 - ix. Blood stained tissue paper (deceased) Pexhibit15
 - x. Torn white T-shirt with black flowers (deceased) – Pexhibit16
 - xi. canvas shoes (deceased)- Pexhibit17
 - xii. Exhibit memo dated 24/6/2022 – Pexhibit18
44. The investigating officer further stated that the items from the accused were recovered at the police station the same day after he was brought other clothes to change.
45. He further tendered pieces of broken bottles he recovered from the bar as Pexhibit 19.
46. He stated that they recovered a phone from PW2 who got it from entrance of the bar and that the phone belonged to the accused. He tendered it as Pexhibit 1 and the deceased’s phone as Pexhibit 20. He stated that he took blood samples from the accused in good faith to take care of possible contamination.
47. He stated that he recorded statements from most witnesses. He stated that there was a fight in the bar between the accused on one hand and PW3 and the deceased on the other. He stated that PW3 also suffered injuries that is why he went to hospital for treatment and later issued with a P3 Form (Pexhibit 3b).
48. He further testified that one of the witnesses in this case was a deaf witness and saw how the killing happened and that PW5 was the barman who also witnessed how the incident started and how it escalated.
49. When placed on his defence the accused chose to give unsworn defence. He stated that he is a police officer attached to Anti-Stock Theft Unit at Chepchoina. He denied the charge facing him.
50. He conceded that on the material night he was at the pub belonging to PW2 who was his friend. He further stated when he ordered for drinks at the counter, he was told there was a bill to clear because someone had taken alcohol on his account.
51. He stated that he declined to clear the bill and the waiter refused to serve him unless he first clears the bill. He stated that due to the impasse, a quarrel ensued after one of the patrons stood up and held him asking him why he could not pay a bill of Kshs.70/-. He stated that he asked PW2 whether he had failed to pay for his bills previously but before PC Koech (PW2) answered, he stated that one patron stood up and threw a bottle at him which hit him on the face. He stated that PW3 is the one who threw the bottle at him and that he knew him well.
52. He stated that he was beaten and floored but PW2 never rescued him and instead threw the 3 of them outside where the two continued assaulting him.



53. He stated that it was dark outside and he defended himself and managed to break free from the two and rushed to Kwanza police station to report which he did.
54. He also conceded that he lost his phone in the ensuing fracas and asked Barasa (PW10) to accompany him back to the club to fetch his phone but on reaching at the club, he found it closed.
55. He stated that he found PW2 outside the pub standing and that he asked him if he had seen his phone and asked him why he did not rescue him. He stated that PW2 told him the phone was locked inside the pub and that someone was lying dead outside the pub and used his mobile phone light to show them where the body was. He confirmed that the person lying dead was one of the persons who had fought him earlier. He stated that police officers came and arrested him and retrieved his phone at the pub.
56. In his written submissions through learned counsel D.N. Onyancha and Co Advocates, the accused contends that there was no evidence showing he was the one who attacked the deceased. He submits that the deaf witness was not called to testify adding that he referred to the pub as “Irene” pub when the correct name of the pub was CD Pub.
57. He testified that he tried to avoid the fight but the deceased and PW3 pushed him back.
58. He contends that there was darkness outside the pub at the time and no one can state for certain what happened outside the pub. He submits that the element of actus reus has not been proved.
59. He submits that because the Government Analyst expert noted some mixed DNA profile on samples submitted to him, there could have been other actors in the murder of the deceased. He faults the police for not sending the blood stained clothes belonging to PW3 for forensic analysis and comparisons.
60. He submits that the fact that he ran away from the scene from PW3 and deceased and went to report the incident shows that he never had any ill intentions.
61. He submits that the element of mens rea is lacking in the prosecution’s case. His main defence is the manner he conducted himself that fateful night stating that the conduct did not show that he had premeditated to cause death to the deceased at all.
62. He submits that PW3 threw a stone at him injuring him in the process and that the violent conduct by PW3 shows that he may have caused fatal injuries to the deceased.
63. The prosecution on the other hand submits that it proved all the 3 element of murder to wit; fact of death, actus reus and mens rea or malice aforethought.
64. The State points out that the forensic analysis of the items forwarded to the Government Chemist showed that the blood stains belonging to the deceased were found on the boxers and jacket worn by the accused. It submits that section 111(1) of the *Evidence Act* creates a presumption that the accused is the culprit of murder because he did not offer any explanation on how the blood of the deceased was in his clothes.
65. The State further submits that PW10 testified that the accused while reporting the incident stated that he had left one person in critical condition.
66. The prosecution further points out that the accused admitted that he was involved in a brawl at the club with deceased and PW3.
67. On malice aforethought, the State submits that the evidence tendered showed that the accused was so infuriated by the actions of the deceased and PW3 over a disputed bill of 70/-. The State further



- submits that the weapon used to inflict the injuries to the deceased going by the doctor's report was sharp and that using a sharp object against another person is a demonstration of malice.
68. The prosecution further points out that the deceased was stabbed four times adding that anyone stabbing another 4 times using a sharp object knows the consequences of doing so.
69. It submits that the deceased was unarmed and posed no danger to the accused contending that the accused stabbed an unarmed person. It submits that the target of stabbing infers malice.
70. This court has laid out the evidence tendered by the prosecution and the defence raised by the accused. As observed above the accused is charged with the offence of murder contrary to section 203 of the Penal Code which provide as follows:
- “ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.
71. Flowing from the above provisions, for the offence of murder to be sustained the prosecution has the burden to prove the following elements beyond reasonable doubt;
- i. Fact of death and its cause.
 - ii. That the death is caused by unlawful act or omission by the accused (Actus reus).
 - iii. Malice aforethought or mens rea.

(i) Fact of death and its cause.

72. The evidence tendered by prosecution witnesses all indicated that the deceased met his death after suffering injuries sustained from a brawl at CD Pub on the material night. PW9, the doctor who performed autopsy on the body of the deceased (Joseph Wanyangu) stated that he noted 4 stab wounds on the back of the body of the deceased and on the head. He stated that the deceased died due to massive bleeding from the neck because the left vessels of the neck were severed and that massive bleeding was secondary to stab wound/assault. He tendered the Post Mortem report as Pexhibit 5 and that he issued a certificate of death serial number 0164857. The fact of death and the cause were therefore well established by the evidence tendered by the prosecution. The deceased was murdered and the question as to who caused the murder is the next issue for determination.

(ii) Actus reus

73. The prosecution's case on this element majorly hinges on circumstantial evidence. This is because apart from the deaf witness (who was not called to testify) there is no witness who stated that he saw the accused stab the deceased with a broken bottle or any other sharp object.
74. The State had an eye witness who was reported to be deaf. The State availed a translator APC(W) Mary Wakhisi (PW8) to tender the statement made by the deaf witness named Dennis as Pexhibit 4 but the State would have done better by availing the witness to test the veracity of the statement recorded. It is true that the same translator would have come to help in translation but atleast the defence would have had the opportunity to cross-examine the witness. The statement therefore required corroboration to support the prosecution's case in particular with respect to the element of actus reus.
75. There is no dispute or contest on the fact that there was a brawl at a pub situate at Kwanza Centre known as CD Pub a bar associated with a police officer known as Gilbert Koech (PW2). All the witnesses present to wit PW2, PW3, PW5, PW6 and even the accused himself are all in concurrence that a vicious fight ensued pitting the accused on one hand and the deceased and PW3 on the other side.



76. The fight like many fights in such places began as a result of a minor issue of a bill of Kshs.70/- but it degenerated into a vicious fight that saw bottles getting broken and combatants all suffering injuries with the deceased of course ending up suffering fatal injuries.
77. The bar attender or waiter known at Brian Kiplagat (PW5) gave a clear account of the incident. The witness stated that the accused person whom he knew as Robinson with a friend named Titus arrived at the Pub when the waiter was about to close the day's business. He asked the accused to settle the bill and that is when the quarrel over the bill began because the accused denied knowledge of the bill. The defence account of the incident is in tandem with the account given by the prosecution's witnesses who were present.
78. What comes from the evidence tendered is that the deceased and PW3 were very close friends. PW3 stated as much and the fact was corroborated by the statement recorded by the mute witness named Dennis or "Denno". It is also apparent that the accused may not have known that the deceased was a senior police officer otherwise he would not have made the remarks heard by PW2. PW2 stated that the accused confronted the deceased when he requested him to pay his bill by remarking;
- “wewe si ulipe bill yako kwani wewe ni nani?”
- There is no doubt that had he known him and being a police officer, then most probably he would have backed off and averted the crisis. The evidence given by PW10 (PC Barasa) indicates that when the accused reported he only gave one name of the persons who reportedly attacked him which was Masoud (PW3) who was a high school teacher based at Kwanza High School. This shows he did not know who the deceased was at the time.
79. The accused kept asking PW2 also a police officer why he was not going to rescue him as the brawl went on but what he did not know was the fact that PW2 respected the deceased as his senior that is why he stepped in when the accused violently pushed the deceased at the counter as he pleaded with him to settle his bills.
80. This court further finds from the evidence tendered that PW2 pushed the 3 combatants that is the deceased, the accused and PW3 outside because the fighting inside was likely to cause damage and destruction already a number of bottles had been broken. The investigating officer (PW13) stated that he found broken bottles when he arrived at the bar.
81. It is also quite apparent from the evidence tendered by PW2, PW3, PW5, PW6 and the accused himself that the brawl both inside and outside the bar involved only 3 people. The deceased, the accused and PW3. All the 3 suffered various degrees of injuries.
82. The accused arrived at Kwanza police station bleeding from the forehead with clothes soaked in blood. PW10 saw his condition and advised him to go for treatment. PW3 on his part suffered injuries as well. PW4 treated him for a deep cut on the forehead and tendered treatment notes as Pexhibit 3(a) and P3 Form as Pexhibit 3(b).
83. The circumstances as narrated by the prosecution's witnesses PW2, PW3, PW5 and PW6 and confirmed by the accused himself in his defence were such that the only person who had beef with the deceased and PW3 at the time was the accused and no one else. His defence that maybe there was involvement of another person outside the bar is farfetched and not supported by the evidence tendered during the trial. PW10 stated that when he arrived at the scene he found lots of blood at the entrance of the Pub.



84. There was no other person who had quarreled with the deceased. It is said by PW3 that he arrived at the bar quite jovial and in fact greeted people at the bar when he walked in.
85. While it is true that it was dark outside as narrated by eye witnesses, there is no doubt going by the evidence tendered that there were only 3 people involved in the brawl, the deceased, the accused and PW3. PW3 as I have found out above appeared to have been a very close friend and ally to the deceased. This fact is even corroborated by the deaf witness statement. The defence faulted the mute witness stating that he referred to the pub as “Irene Pub” but it is apparent going by the evidence of PW2 that the deaf witness was more informed than what the defence opines. PW2 stated that the CD Pub was actually owned by his girlfriend known as Irene Chelimo. The deaf witness was therefore correct to refer to the CD Pub as “Irene Pub”. Both names refer to the one and the same pub which suffices to say was the scene of the crime in this case.
86. This court finds that the deceased having been a close friend to PW3 explains why the teacher (PW3) jumped into the fray risking all to rescue his friend, the deceased. It is on this basis that this court discounts the defence suggestion that the circumstantial evidence pointing at the accused is negated by the fact that outside the bar was dark and anyone could have stabbed the deceased.
87. The deceased was not stabbed once. He was stabbed four times at the back and twice at the head as per the doctor’s (PW9) observation during autopsy and the Post Mortem report (Pexhibit 5). It is quite apparent that he was stabbed during the vicious fight with the accused at the bar entrance and outside the bar. The accused in his defence conceded to this fight at the entrance of the pub and outside the pub. That explains why he dropped his mobile phone at the entrance and why there was a lot of blood seen there.
88. The accused person further told PW10 while reporting the incident that he had left someone ‘seriously wounded’ as a result of the fracas. The accused therefore knew too well what he had done to the deceased possibly using a piece of broken bottle.
89. I have also noted from the evidence tendered by the Government Analyst that the blood stains found on the black jacket (D1) belonging to the accused (and which he wore at the material time going by PW3) matched DNA profile of blood from the deceased. The Analyst also found the DNA profile of the accused in the blood stains and that is explained by the fact that the accused also suffered injuries and bled during the incident and that is why PW10 directed him to seek for treatment. The blood stains on the boxers (D4) worn by accused was also found to belong to the deceased because the Analyst was able to match the DNA profiles obtained from blood sample “A” from the deceased.
90. This court finds that the expert evidence tendered by PW11 directly linked the accused with the commission of the offence because as the State has correctly submitted section 111(1) of the *Evidence Act* creates a rebuttable presumption that since the accused’s clothes had blood stains which DNA analysis proved to belong to the deceased, the onus was on the accused to explain how that blood found its way to his black jacket and boxer. The accused did not refute the evidence by the investigating officer (PW13) that the clothes were taken from him after he changed upon being brought other clothes while in police custody.
91. This court finds that with the evidence of Government Analyst (PW11) the prosecution discharged its burden of proof and the evidential burden by dint of section 111(1) of *Evidence Act* fell on the accused. In his unsworn defence he failed to do so because he did not deny that the clothes forwarded for forensic analysis belonged to him or explain how the blood of deceased (found by the expert to be heavily stained) found its way to his clothes (“D1” black jacket and blue boxer “D4”). The only inference that can be drawn is that as he stabbed the deceased with a sharp object and severed the blood



vessels on the neck of the deceased, with resultant massive bleeding. Given that the two were then fighting in close contact, the blood from deceased spilled on his jacket and other clothes. The forensic evidence in my view provided a direct link of the murder to the accused if there was any lingering doubt with what eye witnesses (PW2, PW3, PW5 and PW6) saw at the bar.

92. Circumstantial evidence at times can be much more reliable than direct evidence because of its potential accuracy like in this case. In the case of *Ahamad Abolfathi Mohammed & Anor –vs- R (2018)eKLR* the Court of Appeal made the following observations which I find quite relevant in the instant case;

“.....the guilt of an accused persons can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts to be proved. Such evidence can form a strong basis for proving the guilt of an accused person as direct evidence. Way back in 1928 Lord Hewrd, CJ stated as follows on circumstantial evidence in *R –vs- Taylor, Weaver and Donovan (1928)CR.APP R21*

“It has been said that evidence against the appellant is circumstantial. SO it is but circumstantial evidence is very often the best evidence. It is evidence surrounding circumstances which by intense examination is capable of proving a proposition with accuracy of mathematic...”

93. In this matter we have a situation where 3 people were fighting in a bar and the owner concerned that the fight may either cause destruction and damage or affect other patrons decided to throw them outside. The brawl involved the accused on one hand and the deceased and PW3 on the other. After the fight only the accused and PW3 came out with visible injuries on their foreheads. The deceased on the other hand was found lying down dead a few metres from the pub with stab wounds on the back of the head and the neck. There were no other persons involved in the brawl and there is no way one can claim that PW3 turned against his bosom buddy (the deceased) once they were outside. That certainly cannot be the case given the evidence tendered. The circumstances taken cumulatively form a chain so complete that there is no escape from drawing an inference that the accused person so infuriated by the actions of the deceased and PW3 injured PW3 and the deceased and since his centre of his anger was directed at the deceased he directed most of the attack on the deceased and fatally wounded him.
94. In *Sawe –vs- Republic (2003) KLR* the Court of Appeal also delved on the subject of cases resting on circumstantial evidence and stated;

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon...”.

95. In this case the prosecution’s case when taken cumulatively forms a strong chain of events that links the accused herein with the murder. After the brawl that only involved him, PW3 and the deceased he went to Kwanza police station to report that he had been assaulted and when he was referred to hospital he told PW10 that you know what, there is someone at the scene who was critically wounded. PW10 went to the scene and found PW2 who showed him the body of the deceased lying outside the bar. The statement of the deaf witness named Dennis was tendered by a translator (PW8) as Pexhibit 6. The statement corroborates or supports the inference of guilt. So while I agree with the defence that the statement on its own cannot be used as a basis of conviction because the witness was not availed,



the same is nevertheless useful because it corroborates and strengthens what is an obvious conclusion. The element of actus reus has been proved by the prosecution beyond any reasonable doubt. I am not persuaded by the defence submissions that PW3 might have thrown a bottle aimed at the accused but missed the target and hit the deceased. That proposition is inconsistent with the observations made by the doctor (PW9) who noted not one but 4 stab wounds at the back of the body of the deceased, one at the neck that severed the nerves and one on the forehead. The element of actus reus is well established and proved beyond any reasonable doubt.

(iii) Malice aforethought

96. The defence has submitted that the accused did not set out to harm anyone at the pub that evening and that the murder was not premeditated. It is true that there is no evidence tendered to show that the accused and the deceased had prior issues before the material date. It is also true as submitted by the defence that the accused called for help from PW5. But looking at the viciousness of the attack meted by the accused on the deceased as seen from the nature of injuries highlighted by the doctor (PW9), inference can be drawn that the person who meted those sort of injuries intended to cause maximum damage or injuries to the deceased.

97. Malice aforethought can be inferred from the acts or weapons used by an accused person. section 206 of the [Penal Code](#) provides;

“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”.

In the case of Republic –vs- Tubere s/o Ochen (1945) 12 EACA 63 the Court held that malice aforethought can be inferred by the following considerations;

- i. The nature of weapon used.
- ii. The manner in which it was used.
- iii. Part of the body targeted.
- iv. The nature of the injuries inflicted either a single stab/wound or multiple injury.
- v. Conduct of the accused before, during and after the incident.

98. While it is true that the incident occurred as a result of a brawl in a bar, it is difficult to draw any other conclusion other than the fact that the accused was really actuated by malice because how or why would a person stab another more than 4 times using a sharp object at the back and the neck region?. He must have known that with each stab, the deceased would probably suffer grievous harm if not succumb to the injuries inflicted on.



99. As a matter of fact the conduct of the accused after the incident, shows that when he reported the incident at Kwanza police station, he told PW10 that one of the “assailants” was seriously wounded. This shows that he knew very well the sort of injuries he had inflicted on the deceased.
100. This court has considered the circumstances under which the offence was committed. That the deceased may have provoked the brawl by asking the accused to pay his bills but the manner in which the accused reacted by first violently pushing the deceased at the bar counter and asking him who he was, was totally inexcusable. The accused has not stated that he was too intoxicated to have his fair judgment impaired in any way. He has not stated that he felt threatened when PW3 and deceased joined ranks to attack him. It is therefore difficult to explain reasons for his vicious attack on an unarmed person other than to infer malice on his part.
101. This court finds that the prosecution’s case against the accused has been proved beyond any reasonable doubt and all the 3 ingredients of murder have been proved and linked to the accused.
102. I hereby find him guilty as charged and accordingly convict him of the offence of murder under section 322 (i) of the *Criminal Procedure Code*.

DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF JULY, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mr Korir for the State

Mr Onyancha for the accused

Accused person

Duke/Chemosop –court assistants

