



**Republic v Makokha (Criminal Case 5 of 2018)
[2024] KEHC 4402 (KLR) (26 April 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE 5 OF 2018**

**JN ONYIEGO, J
APRIL 26, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ELIZABETH NANGILA MAKOKHA ACCUSED

JUDGMENT

1. The accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge are that on 07.03.2018 at Bulla Sagare in Garissa Sub County within Garissa County she murdered Abraham Masinde Nyongesa.
2. Upon arraignment in court, he pleaded not guilty and a plea of not guilty was entered. The case proceeded to full trial wherein the prosecution called eight witnesses who testified in support of its case.
3. PW1, Sammy Nyongesa, a son to the deceased then aged 10years and who gave unsworn testimony testified that prior to the death of his father, he lived together with him and a woman he referred to as Eliza the accused person herein and another person whose name he had shared. It was his evidence that the accused person stabbed his father after which she ran away. That the other woman whom they also lived with halted a tuk tuk wherein the deceased was taken away. That he remained with the other woman whose name he did not know. It was his evidence that his father did not return home and neither was he told of what happened to him thereafter.
4. PW2, Emmanuel Nyongesa Masinde testified that he lived at Bulla Iftiin and eked a living as a tuk tuk driver. That the deceased was his brother while the accused person his sister in law. He stated that he first saw the accused person sometime in the month of October, 2017 when the deceased introduced her to him as his wife. That at one point, the deceased and his wife went to Bungoma but upon returning, the deceased came back alone. It was during that time that a certain woman sought from him a house



- help when he asked the accused person if she could help out. That the accused person identified her sister and so, he contacted the said sister to whom he organized for her travel to Garissa.
5. He stated that suddenly, the accused person informed him that she also wished to accompany her sister to Garissa. It was his case that all plans were made thus the accused together with the identified house help and Sammy Simiyu (pw1) the deceased' son travelled to Garissa. He stated that he was later phoned by Felix who informed him that the accused had visited the deceased at his place of work. That upon visiting his brother on the following day, he found that he had gone to the hospital and upon returning, his brother told him that the accused had beaten him. He testified that the accused person had previously been informed that the deceased was living with another woman.
 6. On 7-3-2018, while on duty, he received a call from Felix informing him that the deceased had been killed by his wife. He thus made his way to the police station and later to the house of the deceased where he found blood splashed all over the house including the bed sheets. Later, he got information that the accused had been arrested and was in custody at Madogo police station.
 7. PW3, Felix Wambomba Mlonde testified that he knew the deceased as they came from the same place in Bungoma besides working together as mechanics in Garissa. He stated that the accused person herein was equally his sister in law. That the accused and the deceased got married in the year 2017 when the duo left for Bungoma for the deceased only to return alone. He stated that the accused followed him shortly and the day that she arrived, she went straight to her husband's garage where she started a fight. She complained of the fact that the husband was not picking her calls whenever she called him. That they separated the duo and thereafter, they went home only for the deceased to report for work the following morning with a swollen thumb while saying that the accused had bitten him. He reiterated that from that day onwards, the deceased always complained about his wife's abusive behaviour.
 8. It was his evidence that on 3.3.2018 at 8pm, PW1 arrived at his house looking confused and upon making enquiry, he told him that his parents had fought and the mother had called for a taxi which was used to take his father to the hospital. Upon making his way to the hospital, he found the deceased in an emergency room already dead. He thus proceeded to inform PW2 of what had happened.
 9. PW4, Jane Katune Mbiti testified that on 03.03.2018 at 9pm, she was at her shop in Garissa when her customer known as Mtindi called her and asked her if she was aware that the accused had killed her husband. She stated that they tried calling the accused person's cell phone but found that the same had been switched off. She then called Mary, the accused person's friend whom she shared the bad news with before reporting the incident to the police station. Thereafter, together with some police officers, they went to the house of the deceased where they found a blood-stained knife and blood stains splashed all over the house.
 10. PW5, Elizabeth Waithera Oyiengo, a Government Chemist testified that on 26.09.2018, at the Government Chemist in Nairobi, they received a number of items from Police constable Martin Gitonga and Corporal Osunde DCIO – Garissa for analysis. The said items were escorted with a memo form to wit: item A1 - Knife in a khaki envelope; B1 - Green – red flowered bed sheet; B2 - A similar bed sheet green/red flowered; B3 - navy blue – T- shirt; B4 - Orange black dress; B1 – B4 – packed together in a Khaki envelope; C1 - A white plastic bag had marks of UNICEF; C2 - A red dress with black stripes; C3 - A lessa with cream and black lines; C4 - Another orange lessa with green flowers; Item C – C4 packed together in a khaki enclosed bag; D1 – blood samples on cotton wool and white plastic labelled Abraham Masinde.
 11. It was desired to examine the items and indicate the origin of the blood stain. According to her report, Item A1, B1 and C2 were heavily stained with human blood while item B3, B4, B2, D1 C3, C4 were all moderately stained with human blood. The analysis yielded results as follows: DNA profile on



blood stains on A1, B1, B2, B3, & B4 all matched one DNA profile generated from blood sample D1 (deceased). She therefore made a conclusion that DNA profile from blood stains in C1 and less so, C3, C4 matched DNA profile generated stains on C2 of an unknown female origin. On cross examination, she stated that some stains on the clothes were of a female as in the DNA profiling, there is a difference between male and female blood. That there could have been a possibility that in the altercation the accused who is female was injured.

12. PW6, No. 57412 Cpl. Mutiki Jira Sylvester stated that on 07.03.2018 while at work along Garissa-Mwingi Highway, together with his colleagues at the security box, they saw a light emanating from a motor-bike coming from Garissa heading towards Mwingi. Approximately 100 meters away, the motor bike stopped and turned back towards Garissa. Upon checking, they saw a woman walking towards them and so they stopped her and upon asking her where she had come from and where she was heading to, she introduced herself as Elizabeth Makokha from Garissa heading to Bangale to visit her sister.
13. Since it was dark, they used torch light to check her and while at that, they noticed that she was carrying a white paper bag. She also had fresh blood stains on her dress and some fresh cuts on her neck. It was his evidence that they desired to know what was inside the bag when they noticed clothes that were soaked in blood. He stated that upon interrogating the lady, she said that she had been injured by her husband in Garissa. Inside the paper bag, his colleague P. C. Magut saw a Safaricom sim card and so, he took it and inserted the same in his own phone.
14. At that point, someone called and upon P. C. Magut picking the call and identifying himself as an officer and that the said line belonged to a lady that was with them at the Garissa - Hola junction, the caller declined to give her name. Instead, the caller stated that she was a neighbour of the owner of the said line and that the lady had killed her husband and was being sought by the police at Garissa. He then called his OCS to give him the information and later the DCIO Garissa arrived and took away the lady.
15. PW7, No. 240052 Inspector of police Abdi Adan testified that he was attached at DCI Forensic Department in Garissa. That while at work, he was given a CD with photographic material and exhibit memo by P.C. Sang at DCIO Garissa. That he told him that the said CD had pictures of the deceased Abraham Nyongesa, a Luhya by tribe who was found lying on the floor in his house at Bulla Sagara. He said that the body had injuries on the neck which according to Sang he died on the way to the hospital. He thus took the CD to CID headquarters, photographic section and that he processed 12 pictures as follows: A – B showed the house; C showed a door; D showed the floor near the door; E showed injury – G showed injury; H showed injury; K showed blood stained sheets while L showed shoes. He then produced the photographs and the certificate as Pex 12A-L.
16. PW 8, No. 92055 P.C. Steve Sang, the investigating officer testified that on 07.03.2018 at around 10.30 am, he was summoned to report to the station where he met PC Said. While there, he met a reportee known as Said Warsame who had reported an incident that had occurred at Bulla Sagare. The same was in relation to the death of the deceased herein. He stated that he visited the said scene and upon conducting search, she found a blood-stained knife and blood splashed all over the room.
17. That he also received information that the accused person had been arrested at Hola junction and so, he organized to the accused person from Madogo police station for transfer to Garissa police station. Post mortem was conducted and the same confirmed that the deceased died of severe bleeding as a result of a stab wound. He stated that from his investigations, he discovered that the accused person herein was responsible for the death of the deceased.
18. PW9, Dr. Ahmedin Omar testified that he conducted post mortem on the body of the deceased. That he established that the deceased died from severe bleeding as a result of a stab wound on the neck region. He thus produced the post mortem report as Pex 14.



19. After the close of the prosecution's case the accused herein was placed on his defence upon the court finding that the prosecution had established a prima facie case.
20. In her defence, DW1 gave a sworn testimony stating that on the fateful day, the deceased returned home in the evening while making some noise right from the gate. That upon checking, she met the deceased who proceeded to slap her claiming that he was very sure of what he used to hear. That at that point, the deceased picked a knife from a basin and stabbed her on the neck causing her to fall down as she bled. That she punched him and managed to escape. She continued to state that, with the help of PW1, she sought for a tuk tuk which they used to rush him to the hospital. She then sought to report the matter to the police station but the rider instead took her to Hola junction where she was arrested and later charged with the offence herein.
21. After the close of the defence case, directions were given for both parties to file their submissions. The prosecution via submissions dated 27.11.2023, contended that it had proved its case beyond reasonable doubt by establishing the salient elements of the offence of murder. Mr. Kihara prosecution counsel submitted by placing reliance on the case of *Anthony Ndegwa Ngari vs Republic* [2014] eKLR to express the position that for the offence of murder to be proven, the elements to be proved are that; death occurred, the accused caused the said death and that he had malice aforethought.
22. It was urged that death was proved by PW1, PW2 and PW9 who conducted post mortem examination on the body of the deceased. On the issue that the accused person was responsible for the said death, counsel relied on the evidence of pw1 who witnessed accused stab the deceased on the neck and the accused's own admission that she fought with the deceased on the material day. That the pieces of evidence clearly corroborated each other as the same pointed to the accused person as being responsible for the death of the deceased.
23. On malice aforethought, the prosecution urged that given that the accused person aimed at the neck of the deceased thus stabbing him, it was clear that her intention was to kill him. Reliance to that end was placed on the case of *Nzuki v Republic* [1993] KLR 171 where it was held that malice aforethought in murder can be established by ascertaining the nature of weapon used and the manner in which it was executed.
24. The defense on the other hand via submissions dated 24.01.2024, submitted that for the prosecution to prove the charge of murder, it was required to prove the act and malice aforethought on the part of the accused herein. In regards to actus reus, it was conceded that all witnesses testified that there was a scuffle between the accused and the deceased and that both were injured during the said fight. That what was in contention was whether the accused person had the intention and the mens rea to commit the offence. Reliance was placed on the case of *Joseph Kimani Njau vs Republic* (2014) eKLR where it was held that in criminal trial, both actus reus and mens rea are required to complete the offence of murder. That the prosecution did not prove that the accused person had the intention to kill the deceased.
25. The defence of self defence was thus invoked as it was alleged that on the fateful evening, the accused was home when the deceased stormed into the house thus slapping the accused person. That a fight ensued that led to the deceased beating the accused person. It was urged that in the process, the accused person picked a knife and stabbed the deceased on the right side of the throat. Reliance was placed on section 17 of the *Penal Code* and the case of *Republic vs Simion Owuor Otiemo* (2017) eKLR where it was held that that criminal responsibility for the use of force in the defence of a person or property shall be determined according to the principles of the English common Law. It was thus urged the accused person acted in self defence and as such, she could not be held responsible for her actions. The court was thus urged to acquit the accused person herein.



26. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the offence. The degree/standard of proof is always that of “beyond any reasonable doubts” [See was *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373].
27. In the instant case, the accused person is facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. Murder is defined as “when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” The elements of murder and which the prosecution ought to prove are;
- a. Whether the death of the deceased occurred
 - b. Whether the death was caused by unlawful acts;
 - c. Whether the accused committed the unlawful act which caused the death of the deceased; and
 - d. whether the accused had malice aforethought.
28. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
29. As to whether the death of the deceased occurred, it is not in doubt that the deceased herein died. Generally, all the prosecution witnesses testified that the deceased herein died. PW9 who conducted post mortem on the body of the deceased formed the opinion that the cause of death was as a result of severe bleeding caused by a stab wound of the knife in the neck region. The accused does not deny either that the deceased died out of the fight between him and the deceased. As such, death was therefore proved.
30. As to whether the death of the deceased was caused by unlawful act, PW 9 testified that the death of the deceased was as a result of severe bleeding caused by a stab wound of the knife in the neck region. As such the death of the deceased herein was definitely caused by acts which are not excusable or authorized by law and thus the same was unlawful. [See art 26 of *the constitution* and *Sharm Pal Singh v R* [1962] EA 13].
31. As to whether the accused person committed the unlawful act which caused the death of the deceased, I have perused the prosecution’s evidence as presented before the court and I note that it is not contradicted that the deceased and the accused person herein were husband and wife. I specifically note PW2 and PW3’s evidence which pointed to the fact that the deceased and the accused were fond of fighting.
32. That the accused person accused the deceased of living with another woman. On the other hand, the accused did not deny that indeed she had an altercation with the deceased and the same led to the stab wounds that caused the death of the deceased; She claimed that she acted in self defence as the deceased was in the habit of beating her. It is therefore clear that the accused herein was responsible for the said unlawful act leading to the death of the deceased and as such, that limb was also proved.
33. As to whether the accused had malice aforethought, this can be discerned from the evidence adduced by the prosecution. Section 206 provides that malice aforethought means: -
- “(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.

34. This being a murder charge, the prosecution had the onus to prove mens rea and actus reus. The actus reus has been established. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the instant case, could this court infer malice aforethought on the part of the accused herein? In the case of *Joseph Kimani Njau v Republic* (2014) eKLR the Court of Appeal stated:

“In both criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ...”

In the present case,...we find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is unlawful act or omission that causes death of another.”

35. The evidence as adduced by the prosecution established beyond reasonable doubt the act of unlawful killing of the deceased by the accused person but can it be equally said that the same was done with malice aforethought? As already stated, the accused person had a fight with the deceased out of infidelity allegations against each other. In the process, the deceased got injured and thereafter succumbed to his injuries. It was confirmed that the couple had numerous fights during their marriage and that on the fateful evening, the duo were fighting when the accused person stabbed him on the neck. The accused person thus invoked the defence of self defence urging that she had received immense beating from the deceased herein hence her actions. These allegations were confirmed by the police who arrested her at a road block while fleeing and that she had an injury on the neck and had won blood stained clothes with some soaked in blood inside a bag.

36. I have no doubt that the accused person was equally injured by the deceased in the process of fighting save that her action in the alleged self defence was excessive use of force in the circumstances.

37. In the case of *Mokwa vs Republic* [1976] eKLR 1337, the Court of Appeal held that:

“Self defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force. [also see *Mungai v Republic* [1984] KLR 85].

38. Upon considering the issue of malice aforethought, it is my finding that the accused had no malice aforethought as defined under section 206 of the Penal Code. [See *Republic vs Ann Karimi* [2020] eKLR]. Her reaction was in the heat of the moment hence no proof of malice aforethought established. From the evidence on record, the only offence which is established is manslaughter contrary to section 202 as read with section 205 of the PC. Under section 179 of this CPC, a court can convict on a lesser charge although not originally charged with the same.



39. Sections 179 of the *Criminal Procedure Code* stipulates:

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

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

40. From the circumstances of this case, I constrained to reduce the charge against the accused from that of murder contrary to Section 203 as read with Section 204 of the *Penal Code* to manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. Consequently, I find the accused guilty of the lesser charge of manslaughter and do convict her accordingly.

Dated, signed and delivered this 26th day of April 2024

J.N..ONYIEGO

JUDGE

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