



**Republic v Kimanzi (Criminal Case E008 of 2022)  
[2024] KEHC 8069 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E008 OF 2022**

**JN ONYIEGO, J  
JUNE 28, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JULIUS KIMANZI ..... ACCUSED**

**JUDGMENT**

1. The accused person 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 offence are that on 25.03.2022 at Mororo Shopping Centre, Madogo Division within Tana River County he unlawfully murdered one Samuel Muthangya. Upon arraignment in court, he pleaded not guilty and a plea of not guilty was accordingly entered.
2. The case proceeded to full trial consequences whereof the prosecution called Eight (8) witnesses in support of its case:
3. PW1, Joshua Nyili Muthangya testified that on 25.03.2021, he was working at Bulla Mbuzi when he received a report from Jeremiah telling him that he had been beaten by a friend. That he advised him to report the matter to the police. It was his evidence that his brother reported the matter to the police where he was given a P3 form and thereafter referred to Madogo hospital from where he was advised to go to Garissa referral hospital owing to the serious injuries he had sustained. Upon visiting Garissa Hospital, he was attended to and further told to report the following day but his situation got worse at night and upon being returned to the hospital, he got admitted.
4. It was his testimony that in the morning hours, he realized that his brother's condition was deteriorating and so he returned to Madogo Police station to inform the police on the same and while on the way, he met the accused herein at the gate of the hospital as he was equally hurt and had sought



- for medical attention. He thus called the police who went to the hospital and proceeded to arrest the accused person.
5. PW2, Beth Muthui Kingangi recalled that on 26.03.2022 at around 8.30 p.m., she called her brother, Musili but only found his wife who told her that Musili had gone to bathe. She asked her if she had heard of Jeremiah who had a fight and had been admitted at Garissa Hospital with serious injuries. She visited Jeremiah at the hospital and found that he could neither speak nor breath properly. She enquired from the doctor on the nature of the injuries sustained by Jeremiah but she was told to wait for the x-ray report the following day. It was her case that she later on received information that Jeremiah had passed on.
  6. PW3, No 112442 PC Collins Kibet testified that on 25.03.2022 while at the station, an assault case was reported and therefore, he was tasked to investigate the same. In the process of following up the matter, he found that the victim was admitted at Garissa General hospital and was under the care of one Nyili, his brother. It was his evidence that the victim could not speak. That as he prepared to get out of the hospital, he got wind that the accused person herein was within the hospital premises seeking medical attention. He thus arrested the accused person and thereafter booked him at Madogo Police station.
  7. He further stated that before placing him in custody, he realized that the accused also had an injury on his lip and so he took him to Madogo health centre for treatment and thereafter escorted him back to Madogo Police station. He also arrested David Muthui and James Muteti who were also suspects. On 27.03.2022, he received a call from Nyili informing him that the deceased had succumbed to his injuries. He thus organized for post mortem to be conducted and thereafter handed over the matter to the DCI officers for further investigations.
  8. PW4, Shushe Ali Masho recalled that on the fateful day, he was doing supervision work at a construction site at a hotel known as Madina when he saw four men running after one another. He then saw three men on top of a man and that they were fighting. It was his testimony that he proceeded to order them to leave but there was a man who was bleeding from the mouth and his clothes were soaked in blood. That the three men thus left the scene as the one injured was picked by a motorcycle rider. On the following day, he heard that the injured man had succumbed to his injuries.
  9. PW5, David Muthui stated that on the material day, he left for Garissa in search of a job but in vain. He however retreated to Mororo whereby he entered in a bar where he found Kimanzi the accused herein a person well known to him. That Kimanzi joined him on his table and started abusing him. He stated that in his company was James Muteti and Sammy Mlangi.
  10. That when he excused himself to leave, the deceased started punching him and proceeded to bite his right hand. Upon people intervening, he and Muteti left. As they were leaving, they suddenly saw the accused person fighting the deceased. While on the ground Julius bit him on the mouth. Once again, people intervened. They reported the matter at Madogo Police station from where they were referred to Garissa Hospital. That considering that they did not have money, they chose to go home. On the following day, Nyili requested him, Muteti and Julius to accompany him to the police station. That while there, they got arrested on grounds that they had killed the deceased. On cross examination, he stated that he saw the accused person fight the deceased and that he bit him on his lips before people intervened.
  11. PW6, No 95518 PC Bonifac Kipatarai recalled that on 25.03.2022, Sammy Muthangya reported that he had been assaulted by somebody whom he knew well. That after booking the report in the occurrence book, one Collins Kibet was assigned the case to investigate. That while at the hospital having gone to visit the reportee, he was informed that the persons responsible for the assault of the



- reportee were within the police station and so he arrested them. He simply reiterated the evidence of PW3 and further stated that PW3 was later informed that Muthangya had succumbed to his injuries.
12. PW7, No 261328 PC Evans Onditi stated that he was the investigating officer in the matter. That after the deceased passed on, he was assigned the matter by the DCIO for investigation. That in as much as it was not easy to find witnesses, three suspects had been arrested in relation to the matter. He stated that during the process of investigations, he discovered that the deceased had reported that he was in the company of Muthui and therefore he preferred the charge herein against the accused person.
  13. PW8, Dr. Naibei Fred Abdon testified on behalf of Dr. Abdullahi who was away undertaking further studies. He stated that the autopsy was performed on the body of the deceased which revealed a missing upper lip which seemingly was bitten. That there were visible bruises on the right knee and his view on the cause of death was cardiac pulmonary arrest due to assault.
  14. At the close of the prosecution's case, this court ruled that the accused person had a case to answer and put him on his defence.
  15. The accused person in his sworn statement stated that on the material day, he was looking for a job when he met the deceased and together they proceeded to a club in Mororo where he ordered for food before they started drinking. That while there, he received a call from Jeremiah informing him to tell one Kake to go for his money and so, he left the said club to go look for him. In that club, there was David Muthui, James Mulati and the deceased and so he asked them whether they had seen Kake.
  16. That he bought James Muthui and Muthangya some drinks. He stated that David also demanded that he too be bought a drink and when he refused, David took James' beer and poured its content on him. That a fight ensued and David bit his lip and further started beating him. It was his case that upon leaving the said place, David came with five men and a fight ensued again. That someone came and started whipping them and so, everybody ran away.
  17. That on the following day, he visited a nearby health centre for treatment. That he was arrested together with David Muthui and James Muteti and later on the duo were released while he was charged with the offence herein. On cross examination, he stated that he did not know the deceased and he did not know why the three attacked him.
  18. Upon close of the defence case, the court directed parties to file their final submissions. However, parties did not file their written submissions despite being directed to do so.
  19. It is trite that for the prosecution to secure a conviction on the charge of murder, it has to prove beyond reasonable doubt the salient ingredients inter alia; that death of the deceased occurred ; that the death was caused by the accused through an unlawful act and; that there was malice aforethought. In *Johnson Njue Peter v Republic* [2015] eKLR], the elements of the offence of murder were listed as follows: -
    - (a) the death of the deceased occurred;
    - (b) that the accused committed the unlawful act which caused the death of the deceased; and
    - (c) that the accused had malice aforethought.
  20. The death of the deceased was confirmed by the testimony of PW1-pw8 who saw the deceased dead. PW3 testified that he was present when the doctor performed post mortem on the body of the deceased. PW8 upon conducting post mortem formed the opinion that the cause of death was as a result of cardiac pulmonary arrest due to assault. It therefore follows that death of the deceased was thus proved.



21. The next issue is whether the accused person committed the unlawful act. The right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. [See Daniel Nzioka Mbuti & another v Republic [2021] eKLR and Roba Galma Wario v Republic [2015] eKLR]. From the facts herein, it is clear therefore that the cause of death of the deceased was not excusable or authorized by law thus the same was unlawful.
22. On whether the accused person was responsible for the death of the deceased, PW4 stated that while at his place of work, he saw four men running after one another. He then saw three men on top of a man and that they were fighting. That three men left the scene as the one injured was picked by a motorcycle rider. The accused person on the other hand in his testimony did not deny having fought with the deceased.
23. His contention simply was that he bought James Muthui and Muthangya some drinks when David also demanded that he too be bought a drink. That the deceased took James' beer and poured on him and while there, he bit his lip and further started beating him. From the accused person's evidence, he clearly conceded that there was a fight between him and the deceased. The said injuries sustained by the deceased in the said fight later on led to his death. It therefore follows that the accused was responsible for the injuries that were sustained by the deceased which later led to his death.
24. On whether the accused person had malice aforethought, the court must determine whether accused, with malice aforethought inflicted the injuries that resulted into the death of the deceased. There is of course no requirement in the Penal Code that one must have a motive for murder which is the unlawful killing of another with malice aforethought under Section 203 of the Penal Code.
25. Malice aforethought was defined in the case of Nzuki v Republic [1993] KLR 171 where the Court of Appeal held that before an act can be referred to as murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.
  - Intention to cause death
  - Intention to cause grievous bodily harm
  - Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
26. From the above, it is clear that the fight between the accused person and the deceased was as a result of a bar brawl. The accused person stated that the deceased demanded that he be bought beer but upon refusing, a fight ensued.
27. Given the circumstances herein, it is my humble view that the injuries sustained by the deceased were simply as a result of the misunderstanding between him and the deceased in reference to the fact that he was not bought a drink. Clearly, there was no evidence to point out that the accused person had intention or plan to kill the deceased. As such, it is my view that the prosecution did not establish malice aforethought which is an integral element of the offence of murder.
28. I find and hold that the prosecution failed to establish beyond reasonable doubt the offence of murder. However, there is sufficient evidence to find that the prosecution has established and proved the ingredients of a lesser charge of manslaughter. [See Republic v Samson Eipa [2021] eKLR].



29. In reaching the above conclusion, I am guided by Section 179 of the *Criminal Procedure Code* which provides that a court may convict an accused person of a lesser offence even if not originally charged with it. For avoidance of doubt, I wish to reproduce the said section which provides that;

- 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.”

[Also see the Court of Appeal decision in the case of *Rashid Mwinyi Ngwisya & another v Republic* (1997) eKLR].

30. I therefore substitute the charge of murder with manslaughter contrary to Section 202 as read with section 205 of the *Penal Code* and consequently find the accused guilty of the same and accordingly convict him of that offence.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY JUNE 2024**

**J.N. ONYIEGO**

**JUDGE**

