Republic v Chepkoech (Criminal Case 11 of 2019)
[2023] KEHC 1167 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1167 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE 11 OF 2019

RL KORIR, J

FEBRUARY 24, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

TABITHA CHEPKOECH ..... ACCUSED

JUDGMENT

1. Tabitha Chepkoech (Accused) was charged with the offence of murder contrary to section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the May 5, 2019 at Kapkwen market within Bomet Central Sub-County murdered one Kevin Kiptoo Bett.

The Prosecution case

2. The Prosecution called 7 witnesses and produced 4 exhibits. Vincent Kimutai (PW2) told the court that he was with the deceased Kevin Kiptoo at Jaybee hotel in Soweto at around 11 pm when Kevin requested him to accompany him to Tabitha's house. That they walked to Tabitha's house and upon their arrival they found another man who had parked his motorcycle outside Tabitha's house. That soon, a quarrel erupted between Kevin (the deceased) and Tabitha and they started fighting and shortly he heard Kevin say that he had been stabbed. PW2 called Kevin's mother (PW1) who upon arrival took Kevin first to the police station then to Longisa hospital.

3. Juliana Chelang'at Yegon (PW1) testified that she received a call from PW1 on May 4, 2019 at about 10 pm. She was informed by one Sharon Chepkirui that Kevin (deceased) had been stabbed. She rushed and found him stabbed below the neck but still alive. She said that PW2 told her that it was Chepkoech (Accused) who had stabbed the deceased. That they took him to Bomet police station then to Longisa hospital where he passed on at around 4.30 am. In cross–examination PW1 testified that the deceased said that it was Tabitha who stabbed him.

4. Leonard Kipkirui Towet (PW3) responded to screams in his neighbourhood on the night of May 4, 2019 and on setting out saw the deceased on the ground bleeding. He was requested by Kevin's mother (PW1) to get his motorbike and take Kevin to hospital. He went to get his motorbike and carried Juliana and Kevin's sister as another boda boda carried Kevin and another person who was holding him.

5. The 4th witness Mark Kipkoech Yegon (PW4) an uncle of the deceased, identified the body at Longisa hospital mortuary on May 9, 2019. Government Analyst Polycarp Lutta Kweyu (PW5) analysed various samples and produced his report Prosecution Exhibit 4(a) and the accompanying Exhibit Memo Prosecution Exhibit 4(b).

6. PW6 Dr Mutai Kiplang'at conducted the post-mortem and produced the post-mortem report (Prosecution Exhibit 5).

7. The investigating officer Richard Kipng'etich Ng'eno (PW7) who wrapped up the evidence of the witnesses and produced the murder weapon (Exhibit 3) blood stained orange pullover (Exhibit 2) blood stained vest (Exhibit 1) also testified that the Accused presented herself at the police station after the incident.

The Defence case

8. The court found a prima facie case against the Accused. Placed on his defence, the Accused elected to give sworn testimony and did not call any witnesses.

9. Tabitha Chepkoech (DW1) testified that on the material night i.e May 4, 2019 she prepared dinner for her minor children aged 5 and 3 and put them to bed before going to Michaels bar at Kapkwen. That she drunk and when the bar closed, she moved to another one and continued drinking. She boarded a boda-boda home when the last bar closed. She went to bed and then heard a knock and kicks on her door and when she woke up, she saw Kevin Kiptoo Bett (the deceased) and Vincent (PW1). That they grabbed her and pulled her out of the house. That she continued fighting with Kevin. He overpowered her and she fell on the ground.DW1 stated that the deceased pulled out a knife and tried to unzip her trouser. That she struggled to grab the knife from him and the knife pierced him. That she then left to go and make a report at the police station and she was arrested. She said that the two (deceased) and PW1 wanted to rape her. In cross examination, the Accused denied having any relationship with Kevin and also with the boda boda rider. She stated that there was no love triangle. She admitted that she is the one who held the handle of the knife and clarified to the Court that a knife cannot stab someone without a person using it. She said that the knife stabbed the deceased because she was holding it. DW1 closed her case without calling any witnesses.

10. Having set out the evidence of both the Prosecution and the defence, I now analyse the same in line with the ingredients of the charge.

11. Section 203 of the Penal Code provides that, 'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder'. The offence therefore carries, three elements being, an unlawful death and cause thereof, the unlawful acts or omission causing the death and that the action causing the act or omission was attended with malicious intent.

12. In *Johnson Njue Peter vs Republic (2015) eKLR*, the court restated the elements of murder which must be proved by the Prosecution as follows;

    i. The death of the deceased and cause of that death;

    ii. That the Accused committed the unlawful act which caused the death of the deceased; and,

iii. That the Accused had malice aforethought.

13. The burden to prove all the above elements rests with the Prosecution. (see the case of *Ajwang vs Republic [1983] KLR 337* and *Halsbury's Laws of England, 4th Edition, Volume 17*, paras 13 and 14.

Death and cause of death of the deceased.

14. It was not in dispute that the deceased died on the night of 4th or morning of May 5, 2019. The deceased's friend Vincent Kimutai (PW2) testified that he was with the deceased that evening when they visited the home of the Accused where a fight ensued and in which the deceased was stabbed. The deceased's mother found him on the ground bleeding, and he was rushed to Longisa hospital where he passed on in the early morning around 4.30 am.

15. The pathologist, Dr Mutai Kiplang'at PW6 testified that he conducted a post-mortem on the body of the deceased on May 9, 2019. He stated that the body was rigor mortis and was in the process of decomposing at the time of the post-mortem. He produced the post-mortem report as Prosecution Exhibit 5.

16. With the evidence above, this Court was satisfied that the fact of death was proven. Indeed, the fact of death was not in issue at all in the trial.

17. With respect to the cause of death, the evidence of PW1 and PW2 was that deceased was stabbed on the neck. PW2 was present at the scene and heard the deceased say that he had been stabbed. PW1 on the other hand arrived after the deceased had been stabbed and had him rushed to hospital. The Pathologist (PW6) in the post-mortem observed that there was a sharp penetrating wound below the 1st clavicle or 1st chest bone and some 2 1/2 litres of blood had accumulated in the chest. He also observed that the right lung had collapsed due to the penetrating stab wound. He found the cause of death to be haemorrhage or severe loss of blood which led to the collapse of the heart due to assault.

18. With the above evidence which was not contested at all, I find that the Prosecution proved beyond reasonable doubt both the death of the deceased and the cause of death.

19. The evidence of PW1 and PW2 that the deceased had been stabbed was clearly backed up by the autopsy report and the findings of the pathologist. The evidence showed that the death was clearly unlawful.

Whether the Accused was the person who caused the unlawful death of the deceased.

20. The positive identification of the Accused as the person who committed the unlawful act leading to the death of the deceased cannot be overemphasized. In the celebrated case of *Woolmington vs DPP (1935) AC 462, 25 CR APP Rep72, HL*, cited in *Republic vs Dwight Sagaray & 4 Others 2023, eKLR* Viscount Sankey LC held thus:-

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

21. In the present case, the defence strongly contested that it was the Accused who stabbed the deceased. In submitting on this issue, learned defence Counsel Mr Mugumya stated that the Prosecution had

not proved that the Accused was linked to the death of the deceased. Counsel submitted that there was no nexus between the murder weapon and the Accused. Secondly, Counsel submitted that the Prosecution failed to call crucial witness including the person who was at the scene who was said to be having a relationship with the Accused. Another person who was excluded was one Robert Kibet who was said to have recovered the murder weapon and had given a witness statement to the police to that effect. Counsel urged the Court to make an adverse finding on this against the Prosecution. Thirdly, the defence submitted that there was no eyewitness and the Prosecution had not proved that the exhibits produced by the investigating officer were not identified by the witnesses as belonging to the Accused.

22. On the other hand, the Prosecution submitted that they had proved the case against the Accused beyond reasonable doubt. They submitted that PW1 and PW2 were at the scene and whereas none was an eyewitness to the stabbing, PW2 witnessed the fight between the deceased and the Accused and heard the deceased say that he had been stabbed while PW1 testified that the deceased made a dying declaration that Tabitha had stabbed him.

23. Three issues arise from the submissions above as follows:-

    i. Whether the Court can make an adverse finding with respect to the witnesses not called by the Prosecution.

    ii. Whether there was a dying declaration and the weight to be given to such declaration.

    iii. Whether the Prosecution exhibits were inculpatory.

24. There was no submission by the parties with respect to circumstantial evidence. However, having considered the entire Prosecution and defence evidence, it is clear to this Court that the Prosecution case rests largely on circumstantial evidence.

25. The above observation makes it imperative for the Court to revisit the principles applicable to circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another vs Republic (2018) eKLR*, the Court of Appeal held in respect of circumstantial evidence that:-

> ' However, it is a truism that the guilt of an Accused person 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 that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr App R 21: -
>
> 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'

26. In this case PW2 told the Court that he escorted his friend (the deceased) to the house of the Accused with whom he (the deceased) had a relationship. That on arrival, they found another person in the home. That a quarrel and subsequent fight arose between the deceased and the Accused during which fight the deceased was stabbed. PW2 said that all the while, he remained outside with the man they found there and that the man ran way when the deceased was stabbed and fell. PW2 was categorical that the quarrel and fight was between the deceased and the Accused. There would be a possibility that since there were other people being PW2 and the other man who were present at the scene any of them could have stabbed the deceased. Indeed, as stated earlier the defence took issue with the fact that the

Prosecution did not investigate the other man or even call him as a witness. Further, and as already stated, the defence also took issue with the failure of the Prosecution to call the witness who collected the murder weapon from the scene.

27. I agree with the defence that the Prosecution ought to have called the two witnesses. Firstly, for the witness who was at the scene to tell the Court what he saw and heard; and secondly, for the one who collected the murder weapon to be cross-examined on the recovery.

28. There is no law however which requires the Prosecution to call a particular number of witnesses. What matters is whether the Prosecution proved its case to the required legal standard using the witnesses called. In *Bukenya and Others vs Uganda (1972) EA 549*, Lutta Ag VP held thus: -

> ' The Prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.
>
> The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. However, it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not.'

29. In this case, the testimony of PW2 that he was present at the scene and witnessed the fight between the deceased and the Accused was credible. His testimony was that, once the deceased fell, he took the action of informing the deceased's mother who showed up almost immediately and found the deceased on the ground having been stabbed. The failure of the Prosecution to call the other man who was at scene was therefore not fatal as there was sufficient corroboration in the evidence of PW1 that when she rushed to the scene, she found her son having been stabbed.

30. With respect to the murder weapon, PW7 the investigating officer testified that he took over the investigation when the murder weapon (Exhibit3) was already in the hands of the police and that he received the same from the OCS. That the Accused was also already in police custody. It was not in dispute therefore that the murder weapon (Exhibit 3) was handed over to the police.

31. The gaps in the recovery and chain of custody of the murder weapon must be seen against all other evidence and is not necessary fatal to the Prosecution case unless it was of no probative value or unless it was shown that the integrity of the exhibit had been compromised. See *Director of Public Prosecutions v Marias Pakine Tenkewa t/a Naresho Bar Restaurant [2017] eKLR*.

32. The only issue is therefore whether the evidence of the Government analysist (PW5) was of any probative value.

33. It was the evidence of PW5 that he received various samples from corporal Ng'eno of DCI Bomet with a request to determine DNA. The items listed in the Exhibit Memo (Exhibit 4 (a) were;

    i. The deceased's blood sample (Item A1)

    ii. The deceased's blood-stained vest (Item A2)

    iii. The Accused's blood stained pull over (Item B)

    iv. A blood-stained knife (Item C)

    Upon examination, Government analyst found that the DNA profile generated showed that the DNA extracted from the blood stains in the pullover (item B) and the DNA extracted from the blood stains

on the knife (UTEM C) matched that of the DNA extracted from the blood sample of the deceased Kevin Kiptoo Bett (item A1).

34. PW5 testified that he analysed the items as forwarded to him and that the blood sample of the Accused would have returned a female DNA profile if it had been submitted for analysis. He produced his findings in his report dated March 3, 2021 as Exhibit 4 (b).

35. It is clear from the Government analyst report that the knife produced (Exhibit3) was the murder weapon. It is also clear that blood stains found on the Accused's pullover (Exhibit 2) belonged to the deceased. This forensic evidence clearly links the Accused to the death of the deceased by squarely placing her at the scene. The forensic evidence corroborates the testimony of PW2 that he saw the deceased and the Accused fight and the deceased suddenly fell saying he had been stabbed. There was no explanation given by the Accused on how the blood of the deceased splashed on her pullover. She had the burden under section 111 of the *Evidence Act* of rebutting the presumption that the blood of the deceased splashed on her as a result of her stabbing him.

36. Section 111 of the *Evidence Act*, Cap 80 provides:

> 111. Burden on accused in certain cases.
>
> 1. 'When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist.
>
> Provided further that the person accused shall be entitled to be discharged if the court is satisfied that, the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence'.
>
> 2. Nothing in this section shall—
>
> a. Prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
>
> b. Impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
>
> c. Affect the burden placed upon an accused person to prove a defence of intoxication or insanity.'

37. The Application of the above law was espoused in *Boniface Okerosi Misera & another vs Republic [2021] eKLR*, by the Court of Appeal in Nairobi which cited the case of *Douglas Thiong'o Kibocha vs. Republic [2009] eKLR* in which it was held thus:-

> ' When Parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters, especially within his knowledge. Otherwise, the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111 (1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge.'

(see also *Milton Kabulit & 4 Others vs. Republic [2015] eKLR*).

38. In this case therefore, I find no other logical conclusion than that the Accused was the person who stabbed the deceased causing his unlawful death. She did the evidential burden placed on her to explain how the blood of the deceased ended up on her clothes or how the deceased dies at her house and in her presence.

Whether there was a dying declaration and the weight to be given to such declaration.

39. PW1 testified that when she received information from one Sharon Chepkirui that her son had been stabbed, she went to the scene and found him on the ground. She testified that he was still talking and he told her that he had been stabbed by Tabitha. Consequently, he stopped talking and passed on at Longisa hospital.

40. A statement made by a deceased person relating to his cause of death is admissible in evidence. The testimony of PW1 suggests that the deceased made a dying declaration. The law on dying declarations in Kenya is premised on Section 33(a) of the *Evidence Act* which provides that:-

> ' When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.'

41. The principles which guide the Court were enunciated by the Court of Appeal in the case of *Philip Nzaka Watu vs Republic [2016] eKLR* where it was held that:-

> ' Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.
>
> Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the

dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge vs Republic (1985) KLR 1:

'The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.'

42. Similarly, the Court of Appeal in Nairobi pronounced itself on the evidence of dying declaration in the case of *Musili vs Republic [1991] eKLR* as follows:-

' The law in Kenya relating to acceptance of dying declarations as evidence is clear that whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect – (U) R v Elighu s/o Odel and another (1943) 10 EACA 90.

However, it has always been stressed by the Court of Appeal that although there is no rule of law that to support a conviction there must be corroboration of a dying declaration, (but) it is generally unsafe to base a conviction solely on an uncorroborated dying declaration, and that too great weight should not be attached to dying statements which should be received in evidence with caution. (T) R vs Ramzani bin Mirandu (1934) 1 EACA 107, (T), R vs Mgundulwa s/o Jalu and others (1946) 13 EACA 169, (K) Pius Jasunga s/o Akumu vs R (1954) 21 EACA 331.

(see also the decision of the Court of Appeal in Kisumu in *David Agwata Achira vs Republic [2003] eKLR* which cited the cases of Jasunga s/o Akumu vs R (1954) 21 EACA 331, *Okale vs Republic [1965] EA 556* and *Aluta vs Republic [1985] KLR 543*).

43. It follows then that the court must treat the evidence of a dying declaration with circumspection and analyse it against other evidence adduced in order to determine its admissibility and its probative value.

44. I have considered the testimony of PW1 with respect to the declaration made by the deceased. It is my finding that the deceased's dying declaration was properly corroborated by the testimony of PW2 who was present at the scene and is therefore admissible as evidence before this Court in establishing the link between the death of the Accused and the death of the deceased.

The Accused's defence

45. I have considered the defence of the Accused. She stated in her sworn testimony that she visited various bars on the night of May 4, 2019 and returned home at around midnight. That while asleep she heard

people kick her door open and saw Kevin Kiptoo Bett and Vincent (PW1). She continued to state as follows:-

> ' I continued fighting with Kevin. He overpowered me and I fell while on the ground he held both my hands and pulled out a knife. Kevin tried to unzip my trouser I tried to grap the knife from him and the knife pierced him. I asked my neighbour take care of my children while I went to report at the police station. I was held in custody to this date.'

46. The Accused's defence makes two material admissions. Firstly, that the deceased and PW1 were in her house and, secondly that she fought with the deceased and struggled over a knife. Thirdly, that it was in the process of the struggle that the deceased was stabbed. The Accused's admissions are material in the sense that they give credence to the evidence of PW1 that a fight took place between her and the deceased and during which fight, the deceased was stabbed. I dismiss the Accused's claim that the knife of its own motion pierced the deceased without any human effort. That assertion is not born of reality. She must have stabbed the deceased using the knife. I therefore dismiss the defence as mere denial.

47. In the end, it is my finding from my analysis of the evidence that it was the Accused and no one else who caused the unlawful death of the deceased by stabbing him. PW2 placed her at the scene and saw the fight while the forensic evidence showed that her clothing had the deceased's blood. Besides this, PW7 the investigating officer testified that she presented herself at the police station immediately after the incident and was arrested.

Whether the Accused acted with malice aforethought

48. Section 206 provides the circumstances in which malice aforethought may be inferred as follows:-

> 206. Malice aforethought
>
> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

49. In *Nzuki vs Republic,Criminal Appeal No 70 of 1991 (1993) eKLR*, the Court of Appeal stated thus: -

> ' In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct

itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See Rex v Steane, [1947] 1 KB 997; and Sharmpal Singh s/o Pritam Singh v R [1960] EA 762.

50. In this case, I have considered the circumstances surrounding the unlawful death of the deceased. What is clear from the evidence is that the Accused and the deceased were not strangers. PW1 stated that the deceased and the Accused had an intimate relationship and the investigating officer PW7 pointed to a love triangle between the Accused, the deceased and another man. The Accused on the other hand while admitting that she knew PW2, and the deceased denied existence of any sexual relationship with the deceased. She also denied that the boda boda man whom she named as Moses was her boyfriend. She denied the existence of a love triangle between herself the deceased and the said Moses.

51. This Court observes that there was scanty evidence on the circumstances surrounding the stabbing of the deceased. There was no evidence showing what had transpired before the fight. What is clear however, is that the fight took place outside the Accused's house. The Prosecution did not show through evidence that the Accused planned to kill the deceased. PW2's evidence that they fought raises the possibility that the stabbing was sudden and may too have been in self-defence. There is a likelihood that the Accused had malicious intent to end the life of the Accused. There is also a likelihood that she fought back and stabbed him in self-defence. As the law stands, the benefit of such doubt must go to the Accused person.

52. I therefore find that the Prosecution has not proved the ingredient of mens rea to the required legal standard. I therefore apply the provisions of Section 179 of the *Criminal Procedure Code* and substitute the charge of murder with one of manslaughter contrary to section 202 as read with Section 205 of the Penal Code.

53. I find the Accused guilty of the offence of manslaughter. She is convicted accordingly under Section 215 of the Criminal Procedure Code.

54. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF FEBRUARY, 2023.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Accused, Mr.Kenduiwo holding brief Mr. Mugumya for the Accused, Mr. Njeru for the State and Siele (Court Assistant)