



**State v Omondi & another (Criminal Case E033 of 2021)  
[2023] KEHC 142 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E033 OF 2021  
RE ABURILI, J  
JANUARY 23, 2023**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**PAUL PIUS OMONDI ..... 1<sup>ST</sup> ACCUSED**

**JACKSON OKONG’O OKOTH ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons Paul Pius Omondi and Jackson Okongó Okoth are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#) Cap 63 Laws of Kenya. The particulars of the offence are that on the October 29, 2021 at Nyabera Sublocation, West Uoma Location in Rarieda Subcounty within Siaya County, the accused persons jointly murdered one Dino Odhiambo Obuya.
2. The accused persons pleaded not guilty to the charge and the matter proceeded to trial. The prosecution called a total of nine (9) witnesses in support of its case which is summarised herein below.

**The Prosecution Case**

3. PW1 Dr. Eric Okong’o, a medical officer at Bondo Sub County Hospital testified on behalf of his colleague Dr. Juma Wanjofu. It was his testimony that the postmortem was done on November 4, 2021 at Madiany Sub County Hospital on the body of Dino Odhiambo Obuya at 17.20hours. He further testified that the body was of a naked Male African aged 38 years, his physique was well built, 6 ½ ft tall. That the body was well preserved in formalin, with presence of rigor mortis with extremities and that the time of death was estimated to be more than 48 hours.
4. PW1 testified that externally, the body had pale mucosal surface on the mouth, with a sharp cut wound on the left cubical fossa (front part of the elbow joint) approximately 12cm long. The hands



were covered in blood stains bilaterally and that no other injuries were noted on the back, head, lower limbs and abdomen. He stated that internally, the respiratory system was normal while the cardiovascular system had severed left brachial vessels with a normal heart. He testified that the digestive and genitourinary systems were normal. He further testified that on the head, there was normal scalp skull and on the calveria (top of the skull) and that there was no evidence of bleeding or trauma on the head.

5. PW1 testified that in the nervous system, there was normal brain tissue, no evidence of bleeding or trauma and that the spinal column and spinal cord were normal. He testified that as a result of examination, Dr. Juma opined that the cause of death was exanguination (excess bleeding) secondary to severed brachial vessels by sharp cut wound. He further testified that Death Certificate No. 1113302 was issued and postmortem report signed with samples taken including finger nails and hair and the gauze bandage removed from the severed arm. PW1 produced the postmortem report as PEx 1.
6. In cross-examination, PW1 reiterated that the deceased died due to the excessive bleeding. He stated that Intoxication was not a factor and not documented. He further stated that the vessels severed were high volume vessels which affect the heart directly so when they are severed, the bleeding affects the heart as they release 500ml/s blood per minute.
7. PW2 Damasus Otieno, the deceased's brother testified that on October 29, 2021 at about 11.00pm, he was in his house when he heard the watchman, Samuel Nyabuor, calling him from the gate. He testified that he moved closer and the watchman asked for his phone on account that he wanted to call his boss Peres Akoth and inform her that people had cut Dino, Major's son. PW2 testified that he asked the watchman to escort him to where Dino was which he did and PW2 found Dino lying on the ground and bleeding profusely.
8. PW2 testified that he went to get his motorcycle so as to take Dino to hospital and upon raising him up, he found that he was seriously injured and could not sit alone on the motorcycle so PW2 went to look for some assistants to help him take the deceased to Hospital. He testified that he went to the home of Dino's brother and called from the gate but nobody responded so he went and woke up Dino's mother and informed her of what had happened to Dino and she was shocked.
9. It was his testimony that Dino's mother dressed up and accompanied him to the scene where Dino lay injured. He testified that they looked for a vehicle to take Dino to Hospital and escorted him to Madiany Hospital and on being placed in the emergency area, the Doctors said that they could not manage his situation so they referred him to Bondo Hospital. PW2 testified that they returned Dino to the vehicle and started the journey to Bondo Hospital but his condition worsened. PW2 then decided to go and call Michael Oluoch Obuya and Moses Odhiambo Obuya, Dino's brothers, who came and found Dino already dead.
10. PW2 testified that they went to the village elder Mary Adhiambo Oyugi and informed her of what had transpired. Mary then called the Assistant Chief who advised that they take the body to Madiany Police Station which they did, where the police saw Dino's body, recorded their statements and escorted them to Madiany Mortuary where Dino's body was preserved.
11. In cross-examination, PW2 stated that they reached Madiany Hospital with the deceased and he was bandaged on his left hand which was bleeding. He further stated that it is about a 30 minutes ride on a motorcycle from Madiany to Bondo.
12. PW3 Michael Oluoch Martin, the deceased's younger brother testified that on October 29, 2021 at about 11.00pm he was asleep in his house when Damasus Otieno woke him up saying Dino had a panga cut and needed to be escorted to Hospital. He testified that together, they got a motor vehicle



and took Dino to Madiany Hospital where the doctors only did first aid and told them to take him to Bondo Hospital albeit they never reached Bondo Hospital as Dino died and they took him to Madiany Police Station where he was removed to the mortuary at Madiany. He further testified that he was present with the deceased's mother when the postmortem was conducted on the body of the deceased and that he identified the deceased's body to the doctor.

13. PW4 Juma Rigobert Odhiambo testified that the deceased was an extended relative. He testified that on October 29, 2021, he met the deceased at the funeral of one, Anyanga at about 7 am. PW4 testified that the deceased was with 2 of his friends; Pius and Jack. He further testified that the deceased knew him so he asked if PW4 could buy him alcohol but PW4 informed him that he had no money but could organize for him.
14. PW4 testified that the deceased, Jack and Pius accompanied him to his home and PW4 gave them a hen which they sold for Kshs. 400. He testified that he gave the deceased Kshs. 100 and retained Kshs. 300 then returned to the funeral place. He testified that on the way, he bought alcohol at Kshs. 100 from the Kshs. 300 which he had and which they drank together then they proceeded to the funeral. It was his testimony that at about 12 noon, he left the three at the funeral and went to Otieno Sango's home and bought more alcohol.
15. PW4 testified that later, he went to Mama Nelson's home to take more alcohol and at 8 pm while still there, the deceased arrived in the company of Pius, Jack and Soyi and when they saw PW4, they called him out saying, "we are also here." He testified that the deceased entered the house then Jack, Pius and Soyi left without taking alcohol. He testified that he never heard them argue with anyone. PW4 testified that after he finished his drink, he left at 10.00 pm with Mama Nelson instructing Patrick Bala to escort PW4 to his home since it was late and as PW4 was sleepy.
16. It was his testimony that he went home and slept and that in the morning, his father called him saying he heard information of the death of the deceased and advised him not to leave home as he could be called upon to answer some questions. He further testified that at Mama Nelson's home, there was solar light and so he saw Jack and Pius very well when they arrived at 8 pm. He further testified that he had also stayed with them from 7 am until noon and they became known to him as Pius and Jack. He testified that he met them for the first time that day.
17. In cross-examination, PW4 stated that on October 29, 2021 he started drinking alcohol in the morning after selling the hen. He stated that he was not that drunk. He further stated that the second time he met the two accused persons was at 8 pm having first met them at the funeral place.
18. PW5 Lewis Onyango Obuya, the deceased's older brother testified that on October 29, 2021 at 4 pm, he was at Adera's home to take alcohol when he saw a motorcyclist carrying three people namely; his brother, Jack Odingo, Pius Okwaso and Otieno Oyola who was the motorcyclist. He testified that upon the passengers alighting, Otieno Oyola left. He testified that his brother was so happy to see him that he ordered alcohol worth Kshs. 300 and sat near him as the two other people, Pius and Jack, sat aside. He testified that after about 10 minutes, Jack called his brother angrily saying "give us ours, we finish, each person to keep in their pockets." He testified that he asked Jack why he was so angry.
19. PW5 testified that they stayed until 7 pm when they left Dino with his friends. He testified that he went home, showered and ate but that before he could sleep, he heard people talking outside their gate. He testified that he heard Dino's voice calling out Jack by his name 'Jaga' but that he slept and never went out to check on them.
20. It was his testimony that later at night, he heard Mama Peris' voice mourning approaching their home and on reaching their gate, she called him out. He went to where she was and she informed PW5 that



- Dino had been killed so he ran to Dino's house and found it open. He testified that the key and padlock were taken down and when he went to check on the rear gate he found it open.
21. PW5 testified that he got out through the main gate and ran to the road where he saw a Nissan on the road and on reaching there, he saw Dino lying on the seat, dead. He testified that Dino's left hand was cut. He testified that when he heard Dino call 'Jaga' as if they were arguing, he never heard Jack say anything. It was his testimony that the village elder was informed and the police arrived and escorted Dino's body to Madiany mortuary.
  22. It was his testimony that his mother who was in Nairobi called him and advised him to take possession of Dino's phone and keys. He testified that he searched Dino's pockets but never found the phone and on calling it, it was off. He testified that the deceased's keys were at his door. PW5 testified that he knew Jack very well as he was Dino's best friend. He testified that Pius also used to walk with Jack. He identified the two accused persons in court.
  23. In cross-examination, PW5 stated that it was not true that he heard of a disagreement over Kshs. 100. He further stated that they never specified any amount to be shared and that Jack only said that they wanted their money.
  24. PW6 Samuel Nyabuoro, a watchman at Konakawaka testified that on the October 29, 2021 at about 11 pm while he was on duty, he heard someone call him, "Soja soja" so he stood up and wondered who it was and what was happening. He further testified that he saw people along the road approaching him but the two people branched while one went to where he was. He testified that he hid because he did not know them or their intentions. He further testified that the person called out, 'soja soja' but PW6 hid and never responded.
  25. It was his testimony that from where he hid, there was light so he could see the person very well as he walked calling him out. He testified that he wanted to observe what was happening. He testified that the other people went and he realized that the one who came calling out PW6 was Dino who came to where PW6 used to sit but left after failing to see PW6. PW6 testified that as Dino walked away, he saw a torchlight towards the road and after about 5 minutes, he heard people quarrel on the road with one person screaming. He testified that he then saw Dino come back to where he was calling out 'soja soja' but PW6 was silent as he hid.
  26. PW6 testified that Dino said "soja' help me I am dying" but PW6 told him that he was not a doctor to help him and that he should go home as that was PW6's work place. PW6 testified that Dino insisted that he be helped so PW6 moved closer to the house and on lighting a torch on Dino, PW6 was shocked to see that Dino was in a pool of blood. PW6 testified that he ran to look for someone with a phone to assist him call his boss.
  27. PW6 testified that he got a phone from Bundu who accompanied him to the scene to see Dino. It was his testimony that Bundu had a motorcycle but Dino could not sit on a motorcycle so he called Mama Dino who called a motor vehicle that went to assist Dino to hospital. He testified that when Dino called him out, Dino was ahead while two people who were with him were at a distance and they branched and went away.
  28. PW7 Victor Onyango Radar testified that in the morning hours of the October 29, 2021, he was at Missouri Beach in the company of Jackson and Pius drinking chang'aa when they were invaded by police officers and Samuel Akello Gumo the Assistant Chief. He testified that they were arrested and taken to Missouri Police Post. He testified that the Assistant Chief told them that the previous night, an incident had taken place. He testified that they were led to their respective residences.



29. PW7 testified that Jackson had left his T-shirt at his residence before they went to Missouri. He testified that they also left a panga-slasher like in his house which Pius was carrying. It was his testimony that Jackson told him that he was to go and claim his money at Missouri. He testified that Pius had also left his red shoes in his house. He testified that they then went to Pius' house but did not recover anything.
30. PW7 testified that they were led to Madiany mortuary then escorted to Aram Police Station then to Bondo Law Courts where an order to detain them pending investigations was obtained before they were taken to Aram Police Station to record their statements. He testified that at Aram, he was released on account of the statement which he recorded. He further testified that the Assistant Chief told them that one, Dino, had been murdered. He testified that he knew Dino for a while as they used to meet and drink together and further that on the night of October 28, 2021, he had not met Dino as he was in his grandmother's house after a day's work.
31. It was PW7's testimony that Jackson wore a green T-shirt which was blood stained. He further stated that both Jackson and Pius were drunk and that Pius had a red-striped shirt torn in the armpits and was carrying a panga. He further testified that when Jackson and Pius went to his house and he opened the door, he saw blood on Jackson's T-shirt and on inquiry, Jackson told him that they had had an accident. He further testified that Jackson then said that he did not want to lie to him and so he disclosed to PW7 that they were walking with Dino when he heard Dino screaming saying Pius had cut him with a panga and when Jackson separated Pius and Dino, Jackson's clothes got stained with blood.
32. PW7 testified that the panga was a cut slasher that was sharpened and had blood on it. He testified that he had known Jackson and Pius for over one year as they used to work together as casual labourers. He further testified that he had a D-Light in his house when Jackson and Pius got in at around 10pm and slept until 5 am in the morning. He identified both accused persons in the dock and stated that the panga and the clothes and shoes were taken from his house by the police officers.
33. PW7 identified the green T-shirt stained with blood at the joint saying that it was the one that Jackson wore that material night. He further testified that Pius wore a long-sleeved checked shirt with a torn armpit. He further testified that he could see and he identified the panga which looked like a slasher which was sharpened on both sides and had blood stains. He also identified the beige trouser which he said was worn by Jackson and that it had blood all over it.
34. PW7 identified the red muddy puma sport shoes saying those are the shoes that Pius wore that material night. He testified that Pius changed a shirt whereas Jackson changed the green, beige trousers with his blue checked T-shirt and jeans, which PW7 had earlier on borrowed from Jackson to go on a journey but he had not returned it to Jackson. He further testified that Pius changed his checked torn long-sleeved shirt into his black Arsenal T-shirt and remained with his trouser and the red Puma shoes.
35. In cross-examination, PW7 stated that Jackson told him that on the night in issue, he, Pius and Dino were at a chang'aa den and that Pius and Dino quarreled over some shoes. He stated that both Pius and Jackson were in drunken state. He further testified that when he saw the torn shirt, he inquired and Jackson told him that Pius had fought with Dino.
36. PW8 No. 237084 Inspector Evans Kituyi testified that on the October 31, 2021 he was at DCI Rarieda and that this case was being investigated by Sergeant Christopher Chege who was transferred to Bungoma occasioning his take over. He testified that the suspects were already arrested and were at Aram Police Station. It was his testimony that they recorded witness statements and had the postmortem carried out on the deceased's body at Madiany Sub County Hospital then he took swabs from the suspects for DNA sampling.



37. PW8 further testified that they also took the items recovered from the suspects and from the house of PW7 to the Government Chemist for DNA analysis. They also escorted the suspects for psychiatric tests at Kisumu and they were confirmed fit to stand trial. It was his testimony that they recovered the red Puma shoes which were said to be the main source of the conflict, from the place where the suspect had hidden them.
38. He further testified that the following items were recovered from PW7's house:
- a. Green T-shirt with blood stains
  - b. Brown Trouser with blood stains
  - c. Slasher with blood stains
39. PW8 further testified that the inventory was taken and signed in the presence of Jackson R. Odhiambo the father of Victor, and the Chief West Uyoma location. PW8 produced the green T-shirt with blood stains, the brown (beige) trouser with blood stains and a sharp slasher like panga as PEx3, PEx4 and PEx5 respectively. He also produced the second inventory made by Sergeant Chege, containing the clothes allegedly worn by the suspects at the time of their arrest, as PEx 6 and the red/white/blue checked shirt with a torn sleeve from the arm pit was produced as PEx7.
40. PW8 also produced the blue checked long sleeved shirt allegedly worn by Jackson Okoth when he was placed in custody and the black Arsenal T-shirt worn by Paul Pius Omondi at the police station as PEx8 and PEx9 respectively. He further produced an orange T-shirt recovered from Victor while at the police station as PEx10, a black Trouser recovered from the deceased Dino at Madiany Mortuary as PEx11, blood stained gauze recovered on the deceased Dino as PEx12, a black shirt recovered from the deceased as PEx13 and the red Puma shoes which were recovered from a place that they were allegedly hidden at Kona Kawaka as PEx14
41. PW8 further produced samples collected from the deceased specifically; blood samples A-4 as PEx15(a), hair, nails and blood sample of Paul Pius Omondi as PEx15(b), hair, nail and blood sample of Jackson Okongo as PEx15(c) and samples of nail, hair and blood of Victor Onyango as PEx15(d).
42. He further testified that he prepared an exhibit memo on November 23, 2021 and submitted the exhibits to the Government Chemist which memo he produced as PEx16. It was his testimony that he later received a report of Analysis from the Government Analyst dated June 8, 2022 with the following findings: The DNA profiles generated from the blood stains on the shirt marked A2, trouser marked A1, T-shirt marked A2, trouser marked B3, bandage marked C2, slasher marked E1 all match the DNA profile of Dino Odhiambo Obuya the deceased.
43. PW8 further testified that the items were listed in the exhibit Memo as follows:
- i. A2 is blood stained shirt of the deceased.
  - ii. A1 is blood stained trouser of the deceased.
  - iii. B2 - Greenish Tshirt belonging to Jackson the suspects,
  - iv. B3 is blood stained trouser belonging to Jackson the suspect.
  - v. A3 is blood stained bandage from the deceased.
  - vi. C2 is checked shirt belonging to Paul Pius the suspects.
  - vii. E1 - is blood stained slasher.



44. PW8 further stated that through his investigations, he found that the red shoes were the source of the conflict. He testified that the deceased's brother also told them about the shoes that caused the conflict and that it was alleged that the suspect Paul Pius bought shoes from Dino the deceased, while Dino claimed that Pius had stolen them. PW8 identified the accused persons in court and stated that Victor was made a prosecution witness after he recorded his statement on how he came to be in the company of the two accused persons.
45. In cross-examination, PW8 stated that from the postmortem report, the deceased had a cut on his hand and left leg. He further stated that the 2<sup>nd</sup> accused's clothes were heavily stained and that they checked the two accused persons but found no injuries on them. He stated that he was not present during the recovery but that the shoes had been concealed - hidden. PW8 stated that he did not know of any altercation between the deceased and the accused and that the red shirt was torn so there was evidence of a fight although the suspect had no injury.
46. PW9 Polycarp Lutta Kweyu a Government Analyst at Kisumu Government Chemist testified that he received a request through an Exhibit Memo and Exhibits from Police Constable Mogaka of DCI Rarieda on the November 23, 2021 submitting the following items for analysis:
- a. a Black trouser marked 'A1'
  - b. A cotton bandage marked 'A3'
  - c. Finger nails and hair sample of Dino Odhiambo indicated as 'deceased' marked 'A4'.
  - d. A grey checked long sleeved shirt marked 'B1'
  - e. A green T-shirt in a brown envelope marked 'B2'.
  - f. A brown khaki trouser marked 'B3'
  - g. Finger nails and hair sample of Jackson Okong'o Okoth ( a suspect) marked as 'B4'
  - h. A navy blue short sleeved T-shirt marked 'C1'.
  - i. A multi coloured checked long sleeved shirt marked 'C2'.
  - j. Finger nail and hand sample of Paul Pius Omondi (suspect) marked 'C3'.
  - k. An orange short sleeved Tshirt marked 'D1'.
  - l. Finger nails and hair sample of Victor Onyango Randala (suspect) marked 'D2'.
  - m. Oral swab from Paul Pius Omondi marked 'C4'.
  - n. A slasher with a rubber handle marked 'E1'
  - o. A black torn shirt marked 'A2'.
47. It was his testimony that using several Analytical Techniques, he made the following findings which are contained in his report:

The trouser item 'A', the bandage item 'A3', the trouser B3 were heavily stained. The T-shirt item B2, the shirt item A2 and the slasher item 'E1' were moderately stained. The shirt item B1, the T-shirt item C1, the shirt item C2, the T-shirt item 'D1' were lightly stained and the stains were all of blood of human origin.



48. PW9 testified that he then generated DNA profiles from the blood stains and from the DNA profiles compared, he reached the following conclusion after the presumptive tests:
- i. The DNA profiles generated from the blood stains on the shirt item 'A2', trouser item 'A1', T-shirt item 'B2', trouser item 'B3' bandage item 'A3', shirt item 'C2' and the slasher item 'E1' all matches the DNA profile of DINO Odhiambo Obuya, the deceased.
  - ii. The DNA profile generated from the blood stains on the T-shirt item 'D1' was a mixed DNA profiles of Jackson Okon'go Okoth and Victor Onyango Randala, both suspects.
  - iii. The DNA profile generated from the blood stains on the T-shirt item C1, matched the DNA profile of Paul Pius Omondi.
  - iv. The DNA profile generated from the shirt item 'B1' matches the DNA profile of Jackson Okon'go Okoth the suspect.
49. Mr. Lutta testified that he prepared the report on June 8, 2022 and signed it. He produced the Government analyst report as PEx 17.
50. In cross-examination, PW9 stated that a heavily stained cloth was one that can be seen obviously without any special aid and that a moderately stained had to be seen with some light while the lightly stained one had to be seen with more light.
51. The prosecution then closed its case.

### **The Defence Case**

52. Placed on their defence, the 1<sup>st</sup> accused, Paul Pius Omondi, gave a sworn testimony that on the October 29, 2021 he went for a funeral and met Jackson Okong'o Okoth his neighbour who was also going for the same funeral. He testified that they went together and found the deceased there who told Jackson that he was to buy them alcohol first, so they went to a drinking den but Mwalimu Ahenda's son took them to his home and took chicken which they were to sell and buy alcohol.
53. He testified that they raised Kshs. 500 from the sale of the chicken and went on a drinking spree until lunch time when Dino invited them for lunch at his home. He further testified that some children went and fetched water and Dino charged them money which he said they could go and use to buy more alcohol.
54. DW1 testified that Dino also offered to sell his shoes so that they could raise more money for alcohol which shoes Jackson tried on but were too small and that when DW1 tried them on, they fitted him so he gave Dino Kshs. 100 which he had saying he would pay him the balance later. He further testified that he wore the shoes and they proceeded to the chang'aa den where they continued drinking chang'aa in the company of Dino's brother who instructed the alcohol seller to give them alcohol for Kshs. 30 each, and told Dino to accompany him to another chang'aa den.
55. He testified that they followed Dino and his brother to another chang'aa den where they took alcohol until evening then they went to Kona Kawaka Centre to take Busaa before proceeding to another drinking spree place until 9.30 pm. It was his testimony that they started their journey back home and he listened to music on his phone as he used it as torchlight.
56. He testified that Dino asked for another song as he did not like the Luo song but DW1 informed Dino that he liked Dholuo songs leading to an exchange of words with DW1 threatening to return Dino's shoes which he wore and ask for a refund of the deposit he had made to Dino. It was his testimony that Dino gave him back his shoes at his place and as they walked past the centre, the watchman saw them



- using the lights. He testified that he then heard Dino's voice calling him to stop which shocked him as they had left him in his house saying he wanted to sleep.
57. DW1 testified that Dino demanded for his shoes back and dared DW1 and DW1 told Dino to wait till the following day when he would refund the money. He testified that Dino slapped him with a panga and a struggle ensued as they held each other and he tried to disarm Dino who had a panga that he managed to snatch from Dino. He testified that Jackson came to help remove Dino from DW1 as Dino was assaulting DW1.
  58. It was his testimony that Dino got up and Jackson snatched the panga from him after which he left. DW1 testified that they called Dino but he never responded after he said that the panga had cut his vein. He testified that he did not see Jackson assault Dino as all of them were drunk. He testified that the clothes produced in court belonged to Jackson who had left his phone at his friend's place, so they went there and since they had bloodied clothes, Victor gave them the clothes they changed into.
  59. In cross-examination, DW1 stated that he never sustained injuries. He stated that he did not see if Dino was injured as it was dark. He stated that Dino said that they had injured him but they were drunk.
  60. DW2 Jackson Okongo Okoth testified that on the material date, he was going to the funeral of his motor cycle mechanic and met Pius on the way and they went together. He testified that they also met Dino his friend whom they had not met for a while and who invited DW2 for a drink. He testified that they went drinking from den to den until night.
  61. It was his testimony that on their way home that night, Paul's phone was playing songs which Dino did not like so they exchanged words and Dino demanded a shutdown of music or a return of his shoes. He testified that they went to Dino's house where Paul had left his shoes and left Dino at his father's place in a cottage but that Dino followed them to the center asking for his shoes. DW2 testified that Dino was violent as he spoke and DW2 implored him to go back home. He testified that he left Dino and Pius at some distance then DW2 heard a shout from Dino saying he had been cut. He stated that he got back to the two and saw them fighting.
  62. DW2 testified that he realized that Paul had a slasher and was looking for his shoes using a phone light asking for Dino but Dino was walking away. He testified that he did not know the extent of injury sustained by Dino. It was his testimony that the following morning, he heard that Dino was dead. He testified that the deceased held him on his knees as he tried to get up and that is how DW2's trouser got blood.
  63. He further testified that they went to Victor's place because he had left his phone with the latter. He stated that Victor saw him with blood and Paul explained to him what happened so they stayed at Victor's house and Victor gave them his clothes to change although he had his borrowed trouser which he got back and wore. It was his testimony that he never knew the intensity of the cut and he never knew that Dino was injured. He testified that he even called Dino as Dino walked to his home. It was his testimony that he could not blame alcohol although they were very intoxicated.
  64. In cross-examination, DW2 stated that he was an ordained priest before his arrest and that it was unfortunate that he was on sabbatical leave and taking alcohol. He stated that he turned back when he heard Dino saying he had been cut. He testified that Paul and Dino were wrestling/fighting so he was telling both to stop the fight. He further stated that his home was less than 50 metres from Victor's home but he was to pass through his home and when they reached Victor's house, they found alcohol and continued drinking until morning. DW2 stated that they were awoken by the hooting of a vehicle between 6 and 7 am when they were arrested. He further stated that had he known the intensity of the injury, he would have followed up on Dino.



## Analysis and Determination

65. I have considered the evidence adduced by the prosecution witnesses in support of the charge and the defence evidence. The issue for determination is whether the prosecution has proved beyond reasonable doubt all the elements of the offence of murder.
66. The burden to prove all ingredients of the offence of murder beyond reasonable doubt falls on the prosecution in all cases save in a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. See the case of *Miller v Minister of Pensions* [1947] All. E.R. 372.
67. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since the accused bears no burden to prove his innocence or to justify his alibi if proffered. For a conviction to be sustained, the court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person. Thus, the accused persons can elect to remain silent and not to give self-incriminating evidence, although they reserve their right to adduce and challenge evidence adduced by the prosecution witnesses against them. These are their guaranteed rights under Article 50(2) of the [Constitution](#).
68. The four ingredients that the prosecution is required to prove in a charge of murder beyond reasonable doubt are that there must be proof of the fact of death of a human being and that the cause of that death is proved. Further, that the death was caused by an unlawful act or omission and that the act or omission was on the part of the accused person or persons where they are jointly charged as the case herein. Finally, there must be prove beyond reasonable doubt that the accused persons caused the unlawful death of the deceased with malice aforethought.
69. On the fact of death and the cause thereof, the postmortem report on the examination of the body of the deceased has not been controverted. The doctor who carried out an autopsy on the body of the deceased formed the opinion that the cause of death was exanguination (excess bleeding) secondary to severed brachial vessels by sharp cut wound. An autopsy cannot be carried out on a live human being. These two ingredients of the offence of murder were therefore proved by the prosecution beyond reasonable doubt.
70. As to whether the death of the deceased was unlawfully caused, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See *Republic v Boniface Isawa Makodi* [2016] eKLR citing with approval the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held that:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”
71. The deceased in this case was found to have died from excessive bleeding due to severe cut wound. In my humble view, those kind of injuries could not have been self-inflicted. I therefore find that the prosecution has proved beyond reasonable doubt that the death of the deceased was unlawfully caused.
72. On whether it was the accused persons who unlawfully caused the death of the deceased, it was upon the prosecution to prove that it was the accused persons who caused the deceased’s death.



73. None of the prosecution witnesses saw the deceased being assaulted. However, what is evident from the evidence before this court is that the accused persons were in the company of the deceased throughout the material day until night and they went from den to den drinking alcohol nonstop until it was time to part ways when, Enroute to their respective homes, they engaged in a quarrel and struggle with the deceased which led to the deceased sustaining the fatal cut. In essence, the prosecution case was based on circumstantial evidence. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal held inter alia, regarding circumstantial evidence:
- “ Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence.
74. From the evidence adduced by the prosecution and the accused persons, is clear from the twin evidence that both the accused persons and deceased had been drinking chang’aa since morning and the whole of that material day until later in the night. The accused persons in their testimonies stated that they were drunk although not very drunk and that although they had a struggle with the deceased, they could not tell how he was injured. DW1 stated that the deceased emerged with a panga and slapped him with it then DW1 struggled with the deceased and they fell then he heard the deceased say that he had been cut. DW2 stated that as they walked home, after leaving the deceased at his cottage and DW1 picking his shoes from the deceased’s house, he heard from behind the two struggling and so he got back to separate them and that he heard the deceased say that he had been cut and that the deceased held DW2’s knees as he tried to rise up from the ground from where DW2 found him lying and engaged in a struggle with DW1.
75. What the above scenario reveals is that the accused persons were in a way raising the defence of intoxication and that because they were drunk, they could not tell what injured the deceased leading to his demise.
76. Section 111 of the *Evidence Act*, Cap. 80 of the Laws of Kenya, provides that in criminal cases, an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge.
77. It is trite law that the court is required to investigate all the circumstances of the case including any possible defences even though they were not fully raised by the accused for as long as there is some evidence before the court to suggest such a defence (see *Abdalla Omar Mwangeshi v R* (2019) eKLR).
78. The accused persons claimed that they had been drinking with the deceased the whole day and that a disagreement arose over music that was being played by the 1<sup>st</sup> accused which led to the deceased demanding for the shoes that he had given to the 1<sup>st</sup> accused on credit and that even after they had parted ways leaving the deceased at his home, he followed them while armed and that is how they found themselves in the situation which they are unable to satisfactorily explain what transpired after the struggle with the deceased who then claimed that he had been cut on his veins.
79. Under section 13 of The Penal Code, for intoxication to constitute a defence to a criminal offence, it must be shown that by reason of the intoxication, the accused at the time of the act or omission complained of, did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person, or that the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.



80. Since in the instant case there was no suggestion that the condition of intoxication the accused persons were labouring under was caused without their consent or by the malicious or negligent act of another person, it was necessary to adduce evidence to show that at the time of the said act, they did not know that the act was wrong or did not know what they were doing since by reason of that intoxication they were insane, temporarily or otherwise.
81. Intoxication can provide a defence for offences of specific intent but not for offences of general intent. For offences such as murder which require a particular intent or knowledge, a person who performs the act causing death while in a state of intoxication is liable to be dealt with as if he or she had the same knowledge as he or she would have had if he or she had not been intoxicated, unless it is shown that the substance which intoxicated him was administered to him without his knowledge or against his will. Alternatively, that by reason of intoxication, he was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law on intoxication was aptly summarized by the House of Lords in *Director of Public Prosecutions v Beard* [1920 AC 479] thus:
- “There is a distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man’s mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.”
82. The defence of intoxication can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about the reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him.
83. In the instant case, the accused persons bore the evidential burden of adducing some evidence creating the possibility that they were labouring under such a degree of drunkenness that they were rendered incapable of forming the specific intent essential to constitute the crime of murder.
84. Once they adduce such evidence, then the persuasive burden is on the prosecution to disprove it by showing that the evidence of intoxication adduced by the accused falls short of proving such incapacity. The onus is on the prosecution to prove that an accused person was not so drunk as to be capable of forming an intent to kill.
85. My assessment of the evidence on record is that although both accused persons adduced evidence that they had been drinking the whole day before this incident, there is no evidence that they were so drunk that they did not know what they were doing within the meaning of section 13 of The *Penal Code*. In a drunken state, the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his or her actions when he or she is in such a state and will likely have no memory of them the next day.
86. To the contrary, in their defence, the accused persons gave a detailed account of how they moved around drinking dens, consuming alcohol and a disagreement ensuing between the deceased and the



- 1<sup>st</sup> accused person over the type of music that the 1<sup>st</sup> accused was playing on his phone which annoyed the deceased prompting him to ask for return of his shoes which he had given away to the 1<sup>st</sup> accused at a thrown away price on a deposit of Kshs 100 only, how after they left the deceased at his house as the 1<sup>st</sup> accused picked his shoes which he had left there, the deceased followed them while armed with a panga and slapped the 1<sup>st</sup> accused who wrestled the deceased to the ground before the 2<sup>nd</sup> accused who was far ahead returned to separate the two and hearing screams from the deceased saying he had been cut then the deceased walked away as they also walked away with the panga and bloodied clothes to the house of PW7 Victor and changed clothes after explaining to him what had transpired then they continued drinking alcohol till morning!
87. DW2 even testified that he tried to separate the 1<sup>st</sup> accused and the deceased and how the deceased supported himself on DW2's knees as he tried to stand up.
  88. In cross examination, DW2 testified that he could not blame alcohol although they were intoxicated. Thus, he was not too drunk as he was able to walk home.
  89. The conduct of the accused persons is not consistent with persons so drunk as to have lost the capacity of moral judgment. The fact that the accused persons went to PW7's place and explained to him what had happened then changed clothing demonstrates that they in fact foresaw the consequences of what had happened immediately before and after the incident.
  90. The evidence taken as a whole clearly show that the drink the accused persons had consumed had not impaired their judgment in any way. The fact that an accused copiously took various amounts of alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental incapacity in terms of section 13 of The Penal Code. Merely drinking alcohol does not count in law otherwise many killers would get off the hook by arming themselves with alcohol before they go on their murderous missions (see Kongoro alias Athumani s/o Mrisho v R (1956) 23 EACA 532). The defence of intoxication is therefore not available to the accused persons.
  91. The accused persons admitted that following the struggle between the 1<sup>st</sup> accused and the deceased, the deceased shouted saying he had been cut and that indeed the 2<sup>nd</sup> accused went to separate the two and the deceased held himself on the knees of the 2<sup>nd</sup> accused while trying to rise up. The 1<sup>st</sup> accused also stated that he saw the deceased with a panga and that the deceased tried to slap the 1<sup>st</sup> accused with a panga that is when a struggle to disarm the deceased ensued leading to the injury as the deceased said that he had been cut. The 1<sup>st</sup> accused denied cutting the deceased. However, the panga/slasher which was used to cut the deceased was recovered from PW7 house and PW7 explained that it was the 1<sup>st</sup> accused person who took it there that night as the two accused persons went to change clothing from his house.
  92. The forensic Report of the government analyst showed that the blood on the panga and blood found on the clothing worn by the two accused persons matched the DNA profile of the deceased.
  93. However, the 1<sup>st</sup> accused exonerated the 2<sup>nd</sup> accused from blame. He stated that the 2<sup>nd</sup> accused did not cut the deceased. he also corroborated the testimony of DW2 that the latter went to separate him from the deceased who was beating DW1.
  94. Iam satisfied that the defence evidence pointed to the 1<sup>st</sup> accused person as the one who cut the deceased with the panga thereby fatally injuring him. Furthermore, the shirt which the 1<sup>st</sup> accused wore not only had blood but was badly torn in the armpit a sign of a serious struggle with the deceased.
  95. Iam unable to find any evidence that safely links the 2<sup>nd</sup> accused with the unlawful killing of the deceased. The reason being that from the conduct of the two accused persons both before, during and



after the incident, there is no evidence that the two acted in concert and or that they had a common intention to unlawfully kill the deceased.

96. Having found that it was the 1<sup>st</sup> accused person who unlawfully killed the deceased, the other question is whether he had malice aforethought. Malice aforethought is defined in section 206 of the Penal Code which provides that:

97. Section 206 of the [Penal Code](#) provides that:

206. 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 of any person who has committed or attempted to commit a felony.”

98. In Republic v Stephen Sila Wambua Matheka [2017] eKLR the Court interpreted section 206 of the [Penal Code](#) as follows:

“The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of Republic v Tubere S/O Ochen [1945] 12 EACA 63 the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. In the Ogelo v Republic [2004] 2KLR 14 the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.”

99. In interpreting the afore stated section of the law, courts have stated that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. (See the case of Republic v Stephen Sila Wambua Matheka [2017] eKLR).

100. In this case, the doctor who performed an autopsy on the deceased’s body noted that the deceased had severe cuts in his arm, on vital blood vessels, that led to excessive bleeding hence his death. The prosecution also led evidence to show that the weapon used against the deceased was a sharp panga that was like a slasher which was recovered from PW7’s house having been taken there by the 1<sup>st</sup> accused person. The said panga was produced as an exhibit.



101. However, the evidence from the two accused persons which evidence was not controverted was that the deceased was the aggressor in that after being left at his house, he followed the two accused persons and tried to slap the 1<sup>st</sup> accused with apanga, while asking him to return his shoes. DW1 was walking behind DW2 and that that is when the 1<sup>st</sup> accused confronted the deceased and they wrestled and from the nature of the injury suffered by the deceased, the 1<sup>st</sup> accused no doubt used the panga to cut the deceased as they wrestled on the ground.
102. The offence occurred at night between persons who had been drinking together and parted ways without any issue until last minute when the deceased was demanding that the 1<sup>st</sup> accused ceases playing Luo music or returns the deceased's shoes.
103. From the evidence of the 1<sup>st</sup> accused person that it was the deceased who appeared with a panga after they had left him at his home saying he wanted to sleep, which evidence was not controverted, I am inclined to believe that the deceased was the aggressor and that he wanted to subdue the 1<sup>st</sup> accused to give him back his shoes following the minor disagreement over the kind of music that the 1<sup>st</sup> accused was playing to the annoyance of the deceased.
104. I am satisfied that the 1<sup>st</sup> accused overpowered the deceased and took the panga from him and used it to cut the deceased thereby inflicting on him fatal injuries. It was at night and the injury on the hand appear to be a defensive injury. I further find that the 1<sup>st</sup> accused too was defending himself that is why his shirt produced as PEX7 was torn at the armpit, evidence of a serious struggle between the two men. However, I find that the 1<sup>st</sup> accused person used excessive force in subduing the deceased.
105. I find that the prosecution has not proved beyond reasonable doubt that the 1<sup>st</sup> accused had malice aforethought when he unlawfully killed the deceased. I say unlawful because the 1<sup>st</sup> accused having disarmed the deceased, he should have thrown that panga away into the bushes as it was at night. He did not have to aim it at the deceased who was already on the ground, an indication that the 1<sup>st</sup> accused had already overpowered the deceased.
106. I however find that the offence committed discloses manslaughter under section 202 of the [Penal Code](#). I therefore invoke the provisions of section 179 of the [Criminal Procedure Code](#) and find the 1<sup>st</sup> accused persons herein Paul Pius Omondi guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.
107. As earlier stated, on the part of the 2<sup>nd</sup> accused, I have considered the evidence as a whole and I am unable to find that there was any common intention between the two accused persons to unlawfully kill the deceased. I find that the 2<sup>nd</sup> accused person only intervened to separate the deceased and the 1<sup>st</sup> accused. Crime by association in this case is inapplicable.
108. I find no evidence of his involvement in the assault of the deceased. It would be unsafe to convict him for any offence as it is not shown that he aided or abated the commission of the offence of unlawful killing of the deceased. He is hereby acquitted of the offence. Therefore, unless otherwise lawfully held, the 2<sup>nd</sup> accused person Jackson Okongo Okoth is hereby set at liberty.
109. The 1<sup>st</sup> accused person Paul Pius Omondi is hereby found guilty of the charge of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#) and is hereby convicted of the said charge of manslaughter.
110. The Court will pronounce sentence against the 1<sup>st</sup> accused after records and mitigation.
111. I so order.



**Dated, Signed and Delivered at Siaya this 23<sup>rd</sup> Day of January, 2023**

**R.E. ABURILI**

**JUDGE**

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