



REPUBLIC OF KENYA



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**State v Ng'ong'a (Criminal Case E017 of 2021)  
[2022] KEHC 10339 (KLR) (20 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E017 OF 2021  
RE ABURILI, J  
APRIL 20, 2022**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**GEORGE MUKOYA NG'ONG'A ..... ACCUSED**

**JUDGMENT**

1. The accused person George Mukoya Ng'ong'a is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63 of the Laws of Kenya). The particulars of the Information dated 1<sup>st</sup> July, 2021 are that on the night of 11<sup>th</sup> July 2021 at around 8:00 pm at Osumba village, Randago sub-location, in Alego-Usonga sub-county within Siaya County, the accused murdered Michael Ohanya.
2. The accused person pleaded not guilty to the charge. The prosecution called eight (8) witnesses in support of their case against the accused which evidence is summarised below.
3. PW1 Erick Owino Odipo testified that the deceased, Michael Ohanya was his brother. It was his testimony that on 11/7/2021 at about 11 pm, he received a call from his mother Patricia Amollo who informed him that Michael had been assaulted and could not walk and was near the village elder's home. He testified that he looked for a motorcycle and went to pick his brother whom he found badly beaten.
4. PW1 testified that his brother could talk but was injured seriously and when he asked him what had happened to him, his brother informed him that while he was passing by the home of George Mukoya, the latter emerged with a rungu and hit the deceased and that the accused also took the rungu which the deceased was using as a walking stick as he had a broken leg, and used it to hit the deceased further.
5. PW1 further testified that the deceased told him that the accused also used a jembe holder and a rungu. He testified that he saw his brother's ears cut, legs, knees were broken and he had injuries on the head.



- He stated that he went to George Mukoya's home to find out why he had beaten the deceased and found George who informed PW1 that the deceased used to abuse/insult the accused so the accused had simply disciplined the deceased. PW1 testified that the accused then took the Unga which his brother had and threw it at PW1 in a sack.
6. PW1 testified that he then went to call his cousin Justus Ouma to come and help him take the deceased to hospital but the deceased died on the way to hospital so they placed him on the ground and he went to Siaya Police Station to report then returned with police officers to the scene. He further testified that they went to the scene of murder and found the sticks that the accused George had used to assault the deceased after which they went to the home of the accused and found him there.
  7. It was PW1's further testimony that the accused had kept the rungus that he had used to assault the deceased and that on being questioned, the accused admitted assaulting the deceased. PW1 testified that they went with the police to where the deceased lay dead and removed the body to the mortuary. He identified the accused as a person that he had known for a long time.
  8. In cross-examination by the defence counsel, PW1 stated that he was called at 11 pm and told to go to collect his brother who was badly assaulted. He stated that when he went to the scene, he found his brother, 'Nyausia' and other young children and his mother. He stated that he went there with his motorcycle but found the deceased badly injured that he could not sit alone on a motorcycle so he sought help. He further stated that he also went to the accused person's home to find out what the deceased did to warrant such beating. He stated that his brother was not intoxicated.
  9. PW2 Juliana Akinyi testified that on 11/7/2021 at about 8 pm, she was at her home with her co-wife Patricia Mwangi who had visited her when she received a telephone call from George Mukoya the accused herein telling her that Ohanya who passes by his place every day going to her place abuses him every day and that he, George was going to beat Ohanya. PW2 testified that he told George to leave Ohanya alone.
  10. It was her testimony that later, Ohanya the deceased went to where she was whilst carrying a sack with a Thermos inside and that he told her that his mother had given him Unga in the flask to take to PW2. She testified that she inquired from Ohanya about the person he had abused on his way to her place and that he denied abusing anyone and that she told him that if he had abused anyone, he should go back with the Unga.
  11. PW2 testified that the deceased then left and a short while, he heard the deceased being beaten about 10 metres away and on following him, she found Mukoya, the accused herein beating the deceased. She testified that Ohanya fell down and that she told George Mukoya to stop assaulting Ohanya. She further testified that when she reached where Ohanya was being beaten, she saw and heard Mukoya talking and beating Ohanya whilst saying, "you dog why do you abuse me every day?"
  12. She testified that she had known Mukoya for a long time as she was married in the area when he was young and as he was her relative by virtue of her elder brother being married in the accused's person's home. It was her testimony that she questioned Mukoya why he was assaulting Ohanya but Mukoya continued beating Ohanya. PW2 testified that the assault occurred in her homestead and that the accused assaulted Ohanya throughout the time she stood there and further that the accused took the walking sticks used by the deceased and used them to beat the deceased further then he picked the sack and walking sticks which the deceased had and left. She testified that she told the accused to carry away the deceased as well but he refused. She further stated that the accused placed the jacket and walking stick of the deceased in the sacks and left with them.



13. It was the testimony of PW2 that in the company of her daughter in law, they followed the accused telling him to remove Ohanya from her home to which the accused responded by inquiring how many doors were in her home then he told PW2 that if she and her daughter in-law had strength, they could carry Ohanya and go throw him in a forest.
14. PW2 further testified that she returned and went to her co-wife's home and informed her of what had happened to Ohanya at her home and further informed her that she could not sleep with a dying person at her home. She testified that she went and woke up Ohanya's mother and told her what had happened to Ohanya after which they both proceeded with Ohanya's mother and called her son and her sister who accompanied them to the scene after which they went to Mukoya's home and collected the sacks and the flask and later PW1 arrived and took the deceased away to hospital but the deceased died en route. PW2 identified Mukoya as the accused in the dock.
15. In cross-examination, PW2 stated that the deceased was a nephew where she was married whereas the accused was a grandson in the family. She reiterated that the accused called her saying that the deceased abused/insulted him from time to time. She further testified that she heard a commotion shortly after she told the deceased to leave. It was her testimony that she was in the company of Patricia Mwangi when they went where the struggle was.
16. PW2 testified that when she arrived, she found the deceased had fallen down unconscious but moving. She testified further that the deceased was disabled as he had a metal implant in his leg after an operation. She testified that she was shocked upon seeing Mukoya beat Ohanya and that Patricia also questioned Mukoya on why he was beating Ohanya.
17. PW2 reiterated that the accused went away with the sacks and the thermos and that she told Mukoya to carry Ohanya and his belongings away. She further testified that Patricia Mwangi also left as Mukoya was leaving the scene and that she left Ohanya at the scene with her Class 3 child as she followed Mukoya at his home to tell him to carry away Ohanya from her home. PW2 testified that Ohanya lay at the spot where he fell asking her for water to drink and that she gave him milk.
18. PW3 Beatrice Aoko Ouma also known as Patricia Mwangi testified that on 11/7/2021 at about 7 pm, she went to visit Juliana Akinyi in her house where they sat with her in her veranda as they ate. She testified that Akinyi's phone rung and after Akinyi had spoken to the caller, Akinyi informed PW3 that Mukoya had called her and told her that Ohanya had gone to his home and insulted him.
19. It was her testimony that shortly thereafter, Ohanya arrived carrying a sack and told Juliana that his mother had send him to bring some Unga to Juliana but Juliana told him that she could not take anything from him since he had insulted Mukoya. She further testified that as Ohanya left, a few metres away while they sat at the Veranda, they heard two sounds and the third time she heard Mukoya say, "why do you abuse me daily?"
20. PW3 testified that they went to where Ohanya was and found him fallen on the ground, being beaten by Mukoya. She testified that she questioned Mukoya why he was beating Ohanya and Mukoya responded that Ohanya abused him all the time. It was her testimony that Mukoya took sticks which Ohanya had and beat Ohanya after which he took the sack and left. She further testified that they told Mukoya to take away the deceased as well but he left saying he would report to the Chief. PW2 stated that she did not see the other items inside the sack. She further testified that she knew Mukoya very well for a long time and that he was the accused in the dock.
21. In cross-examination, PW3 stated that she heard two sounds and upon hearing the third sound, she and Juliana stood and went to find out what was happening and on arrival, they found Mukoya beating the deceased and that he never stopped assaulting the deceased. She further stated that they found Ohanya



- badly beaten and lying down. It was her testimony in cross-examination that the deceased did not speak to her. She further stated that she thought Mukoya was only disciplining the deceased and that she did not know that he had assaulted the deceased seriously.
22. PW4 Patricia Amolo Okoth testified that the deceased was her first born child. She testified that on the 11/7/2021 at about 8.00 pm, she sent the deceased to take Unga to her sister in-law Juliana Akinyi but the deceased never returned. It was her testimony that at about 10 pm, she heard someone calling her by her bedroom window when she was asleep and the person told her to open the door so that she would tell her what had happened.
  23. PW4 testified that it was Juliana Akinyi who informed her that Mukoya had seriously assaulted PW4's son Ohanya after which she accompanied Juliana to the scene. She testified that she called her son Erick Odipo and her sister. It was her testimony that she told Erick to come and assist Michael Ohanya get to hospital as she had found him badly beaten.
  24. PW4 testified that the deceased told her "Mama, Mukoya ameniua", and on asking him why Mukoya was beating him, the deceased never responded. It was her testimony that later when Erick had placed the deceased on his motorcycle to hospital, Michael died. It was her testimony that she went to Mukoya's house, found him and asked him why he had killed her son to which the accused told her arrogantly that she could not take him-the accused anywhere.
  25. She further testified that she asked the accused to give her the Unga and walking sticks for her son which he initially surrendered only for him to retake stating that he would go and record his statement using the items. It was her testimony that she went back to where Michael lay and struggled to escort him to hospital but he died on the way to hospital. PW4 identified Mukoya in court stating that he was their village elder and as such she knew him well.
  26. PW5 Justus Ouma Owoko testified that on 11/7/2021 at about 1 am, he was asleep in his house when he heard a call on his door and opened the door to find Erick Owino who told him that Michael Ohanya had been assaulted by Mukoya at 'Nyasia's home and that he wanted PW5 to accompany him to go assist Michael go to hospital.
  27. PW5 testified that they went and he found Michael seriously injured and fractured on his knees. It was his testimony that Michael cried as they lifted him and placed him on a motorbike and that he, Michael said that Mukoya had beaten him. He further testified that on their way to hospital, Michael died and that later they took him to his mother's home and he and Eric went to report to the police at Siaya who accompanied them to the scene and removed the body of Michael to the mortuary.
  28. He testified that they went to Mukoya's home where he was arrested after which they proceeded to the scene where the accused had assaulted the deceased. PW5 identified Mukoya as the accused before the court.
  29. PW6 Dr. Gabriel Juma Wekesa, a medical officer at Siaya County Referral Hospital testified that on the 16/7/2021 he did an autopsy on the body of the deceased Michael Ohanya Omondi at their mortuary at 4 pm.
  30. It was his testimony that externally, the deceased had multiple facial and left frontal parietal area haematoma, 3 fractures with a right tibia fibula fracture, left tibia fracture and a right femur fracture with no other external injuries.
  31. He stated that internally, on the head were skull fractures on right parietal area with haematoma formation while in the brain they found multiple areas of intracranial haematoma, both intercelebral, subdural and epidural as other systems were normal. It was his testimony that he concluded that the



- cause of death was severe blunt head injury and he issued Certificate of death 1556223. He produced the postmortem as PEx1.
32. In cross-examination, PW6 stated that a Haematoma was a blood clot. He further stated that the severe blunt head injury seen could not have been caused by a fall, otherwise the neck could also have sustained an injury.
  33. PW7 No. 58242 Sgt John Nzive attached to DCI Siaya the Investigating Officer in this case testified that on 12/7/2021 in the morning at around 3 am, the Officer in charge of Crime, Inspector Kibor called to inform him of a scene of Murder within Nyadhiwa area. He stated that he went to the station and found the reportees Eric Owino and Justus Ouma who informed him that his brother the late Michael Ohanya had been killed the previous night and that he died before they could take him to hospital and they left his body at their mother's house.
  34. It was his testimony that they accompanied PW1 and PW5 to Usumba village where they found the deceased's lifeless body outside his mother's house. He testified that the body had visible injuries on the head and was in a pool of blood. He further stated that the deceased's left leg was twisted and fractured and that there was a broken jembe stick with blood stains besides him. He further stated that there was a sack and inside was a thermos with maize flour.
  35. PW7 further testified that they asked Eric and Justus if they knew who the assailant was and they were informed that it was George Mukoya, their very own village elder who was responsible. He stated that they visited the suspect's home one kilometer away where they called out to him, he opened the door and identified himself as George Mukoya after which they arrested him and got into his house, recovered a club-rungu stick which was broken into 2 parts and some pieces missing. PW7 produced the rungu as PEx 2(a) – its head and 2 (b) the broken stick with missing pieces. He further produced the jembe handle recovered at the scene as PEx3.
  36. PW7 further testified that there were blood stains on the jembe handle and rungu head and that later they prepared the exhibit Memo to Government Chemist for analysis. He further testified that the scene house was the homestead of PW2 whom they interviewed and later recorded her statement.
  37. PW7 produced the pink thermos flask recovered in a sack as PEx 4(a), the white bigger sack as PEx4(b) and the yellow sack as PEx4(c). He further testified that they arrested the accused, placed him into custody and took the body of the deceased to Siaya mortuary for investigations and postmortem.
  38. PW7 testified that after postmortem, they requested the doctor to give them samples of blood from the deceased's body and he prepared an exhibit Memo requesting for DNA sampling on whether there was any similarity in the DNA found on the rungu head and stick and the jembe handle and the blood of the deceased. It was his testimony that the exhibits were received at Kisumu Government Chemist on 12/8/2021 and that the following day, he returned to the Hospital Mortuary and requested for blood from the suspect, which request was done by Chief Inspector Victoria Owoko on 13/8/2021 at 12.35 pm. PW7 produced the DNA sampling request form and the Laboratory Request as PEx5(a) and 5(b) respectively.
  39. PW7 testified that when he recovered the exhibits from the scene and from the accused person's house at about 5 am, the accused was present. He testified that he prepared an inventory on 12/7/2021 of all the recovered items and that the accused, Inspector Kibor, David Owino the deceased's brother and PC Bowen all signed the inventory. He produced the Inventory as PEx6. All exhibits were produced without any objection from the defence.
  40. PW7 stated that after analyzing the evidence gathered and recording witness' statements, he had no doubt that the accused committed the offence. He stated that after the accused was arraigned, they



- escorted him for mental assessment where he was found fit to stand trial. He identified the accused as the person in the dock.
41. In cross-examination, PW7 stated that he was called at 3 a.m. He stated that he accompanied the reportees to their home and that after viewing the body and informing him of what had happened, the reportees led the police officers to the accused's home. He stated that he also spoke to the mother of the deceased and PW2.
  42. He further stated that from the information gathered, Eric and Justus did not witness the beatings on the deceased but that only Juliana and Beatrice also known as Patricia informed them that they witnessed the accused assault the deceased. It was his testimony that at the scene, there was blood stains although the scene had been disturbed by people who had gathered and stepped on the scene. He further stated that Juliana told them that she was a peasant farmer. PW7 stated that he could not tell if the deceased or accused were drunk at the time.
  43. PW8 Polycarp Lutta Kweyu, a Government analyst at Kisumu Government Chemist testified that on 12<sup>th</sup> August 2021 he received the following samples from DCI Siaya:
    - i. Blood sample of Michael Ohanya as the deceased
    - ii. A broken wooden club
    - iii. A broken wooden Jembe handle.
  44. He further stated that on 13/8/2021, the blood sample of George Mukoya Ng'ong'a, the accused was received and that they were requested to carry out DNA analysis and determine the presence and origin of biological evidential material.
  45. He testified that he carried out DNA analysis on those samples and generated DNA report in which his findings were that the DNA profiles from the broken wooden club and the broken jembe handle items were similar and matched the DNA profile of the deceased Michael Ohanya. PW7 prepared his report on 19/10/2021 and produced it as Exhibit 7a while the items accompanied as exhibit memos dated 12/8/2021 and 13/8/2021 were produced as exhibits 7b and 7c.

### **Defence Case**

46. Placed on his defence, the accused gave a sworn statement in which he stated that on 11/7/2021 he was at his home with his four children as they planned on what to eat for dinner when his son Kennedy heard someone talking outside their house so he alerted the accused that it was Ohanya. The accused testified that he got out and lit the phone torch at the person and saw it was Ohanya.
47. It was the accused's testimony that the deceased was at the gate and that as he approached the deceased, the deceased started saying that he wanted to know why the accused used to arrest him from time to time. The accused admitted that he used to arrest the deceased following reports made by the deceased's mother that the accused used to assault her. He further testified that as a village elder, he used to act by reporting the matter to the Area Chief.
48. The accused testified that the deceased abused him and said that the deceased was going to 'Nyausia's' house and would return to deal with the accused and weigh his strength. He further testified that the deceased was carrying a gunny bag with items inside and also held a club-rungu in his hand. He further testified that he then called 'Nyausia' to tell her that should Ohanya go to her house, she should not give him alcohol because he was to do havoc.



49. It was the accused's testimony that his phone went off so he walked to Nyausia's home where he found her in the company of PW3 as well as the deceased. The accused testified that the deceased started abusing him again and further that the deceased was taking chang'aa in a white cup. It was his testimony that Juliana Akinyi gave him the gunny bag which had a thermos inside and as he bent to check inside it, the deceased hit him with his fist until he broke the accused's teeth.
50. The accused testified that he fought with the deceased and they fell to the ground where he managed to snatch a rungu from Michael which he used to hit the deceased on the leg which was previously fractured. He further testified that Juliana and Patricia separated them and that Patricia held his hand and advised him to go home. The accused testified that Michael went back to where he had sat and continued drinking chang'aa as Patricia led the accused to his home before she also left.
51. It was his testimony that on reaching home, he called his area Chief and informed him of what had transpired. He further stated that shortly thereafter, PW4 went to his house, with Eric Owino and his mother and inquired from him as to why he had fought with Michael Ohanya after which they left. He further testified that he slept and that at around 4.30 am when he heard dogs barking and his door being knocked by people who had torches, he opened the door and saw that they were police officers who told him that he had killed Ohanya.
52. The accused testified that he was led away to the house of Juliana Akinyi the scene where he had fought with Ohanya and found that she had poured water there. It was his testimony that he never had time to go to hospital as he was arrested that morning. He testified that he was led to his house and to the police where he saw Michael's body.
53. The accused testified that he never intended to kill Michael as he could have not fought him had Michael not attacked him. It was his testimony that he never went to Juliana's house to kill or fight the deceased but to tell her not to sell chang'aa to him.
54. In cross-examination, the accused stated that he was at his house and heard Michael talking so he got out and saw him, ahead. He stated that when the deceased saw him approaching he started walking away saying he was going to 'Nyausia's' house. He testified that he called 'Nyausia' and told her not to give the deceased alcohol.
55. It was his testimony that he followed Michael to prevent Nyausia from giving the deceased alcohol. He stated that he had never disagreed with Michael before. He further stated that after Michael hit him he, the accused, took the deceased's rungu and used it to hit the deceased on his leg then he sat down. He testified that he knew Michael had an issue with his leg. He further stated that Juliana Akinyi gave him the gunny bag with a thermos inside. The accused stated that he lost his teeth and that he could not go for treatment that night. He denied that he lost his teeth earlier on.
56. In re-examination, the accused stated that he did not believe that Juliana had no chang'aa when he called her He maintained that he only went to her house to tell her not to give the deceased chang'aa. He stated that he knew that Ohanya used to take a lot of chang'aa. The accused further stated that the rungu produced in court was Michael's and that he snatched it from him.
57. DW2 Vitalis Onyango Amolo, the Senior Assistant Chief Randago sub location, South Alego location testified that he knew the deceased Michael Ohanya for more than a year and that they interacted a lot. He also testified that he knew George Mukoya since his youth and that they interacted closely as he was a part of his office as a village elder of Usumba village.



58. DW2 testified that the deceased used to have issues with his mother and she used to call the accused and report incidences especially after taking alcohol. He further stated that the accused used to get involved in resolving the disputes between the deceased and his mother.
59. It was his testimony that on 11/7/2021 at night between 7 pm at 9 a.m. the accused called him saying that the deceased had abused him outside the gate and had since left but that he had snatched some flour from Ohanya.
60. He further testified that at around 1 pm, the accused called him saying that Ohanya's mother had gone to his house saying he had assaulted Ohanya who was seriously injured and she wanted the accused to take Ohanya to hospital. It was his testimony that at around 3 - 4 am, the accused called him saying he had been arrested by the police and that he did not know why he was being arrested.
61. DW2 testified that at dawn, 2 people called him and told him that Ohanya had died and that on that morning, he went to Ohanya's mother's place where he found mourners as well as Ohanya's mother. He testified that she told him that Nyausia would brief him. It was his testimony that Nyausia narrated to him what had transpired the previous night and how George and Ohanya had a scuffle and Ohanya was injured.
62. In cross-examination, DW2 stated that Ohanya loved making jokes with him. He reiterated that the accused used to handle disputes involving Ohanya and his mother and that some disputes would be escalated to DW2. He stated that they used to mediate the disputes. It was his testimony that the accused informed him that after a scuffle, he snatched the Unga from Ohanya and went away with it.

#### **Accused person's Submissions**

63. It was submitted on behalf of the accused person by his counsel that on the question of the fact and cause of death of the deceased, there was no dispute as the death of the deceased had been proved by PW 6, Dr Juma Wekesa and by the post-mortem report.
64. As to whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused, it was submitted that none of the prosecution witnesses saw the beginning of the scuffle between the accused and the deceased whereas the accused claimed that it was the deceased who instigated the fight and he was only reacting to the deceased's aggression.
65. It was submitted further that that the prosecution had not proved that the accused had formed the necessary intention to either cause death or grievous harm on the deceased as there was no evidence that the accused harboured any ill will, motive, or guilty intent to murder the deceased and further that there was no evidence to show that the accused planned to murder the deceased.
66. Relying on the case of *Joseph Kimani Njau v Republic* (2014) eKLR cited in *Republic versus Paul Omondi Odongo* (2019) eKLR, it was submitted that the elements of actus reus, and mens rea had not been proved to the required standard that is beyond reasonable doubt.
67. The prosecution did not make or file any submissions.

#### **Analysis and Determination**

68. I have considered all the evidence adduced by the 8 prosecution witnesses, by the accused and his witness and the written submissions filed by his advocate. In my view, the issue for determination in this case is whether the prosecution have proved the guilt of the accused person beyond reasonable doubt to warrant a conviction for murder as charged. In other words, I must resolve the issue and



- question of whether the prosecution has proved beyond reasonable doubt all the elements of murder to sustain a guilty verdict.
69. To sustain a conviction on a charge of murder under section 203 of the *Penal Code*, the prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:
- a. The fact and the cause of death of the deceased.
  - b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus”.
  - c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea”.
70. The issue is whether the prosecution have proved beyond reasonable doubt all the above four elements of murder against the accused person, to warrant this court convict the accused as charged.
71. The fact of death of the deceased was proved beyond reasonable doubt by the evidence of PW1, the deceased’s brother who testified that his mother called him to the scene to take the deceased, his brother, to hospital but that unfortunately, the deceased passed on en-route to the hospital. PW1’s testimony was corroborated by that of PW5 who testified that he helped PW1 get the deceased on the motorbike as they proceeded to the hospital but the deceased passed on before they arrived at the hospital. The accused person’s counsel in her submissions concedes that there is no dispute that death of the accused occurred.
72. The cause of death was confirmed through the evidence of PW6 Dr. Gabriel Juma Wekesa who carried out an autopsy on the deceased’s body, identifying serious injuries suffered by the deceased and reached the conclusion that the deceased’s cause of death was severe blunt head injury.
73. On whether the said death was caused by unlawful act of omission or commission on the part of the accused person, the accused testified on oath and claimed that it was the deceased who first hit the accused and that the accused only reacted after being hit by the deceased. The accused person’s counsel submitted that it was the deceased who was an aggressor.
74. PW2 and PW3 both testified that they were at on PW2’s veranda when the deceased arrived with unga-flour which PW2 rejected because she learnt that the deceased had abused the accused. Both PW2 and PW3 testified that shortly after the deceased left PW2’s place, they heard him being beaten and upon arriving at the scene, they found the deceased had fallen down and the accused was beating him.
75. The accused in his sworn testimony admitted that indeed he beat the deceased but stated he did so in self defence after the deceased had attacked him and hit him on the mouth which had the effect of breaking his teeth. The accused further submitted that none of the prosecution witnesses saw the commencement of the scuffle and that therefore there was no evidence adduced by the prosecution to controvert his testimony that he acted in self defence.
76. The law on self-defense is found in section 17 of the *Penal Code* which provides that:
- “Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law.”
77. The Court of Appeal in *Abmed Mohammed Omar & 5 others v Republic* in Criminal Appeal No. 414 of 2012 reported in [2014] eKLR stated that the Common Law principles relating to self-defense referred to under section 17 of the *Penal Code* above are contained in the Privy Council decision in



Palmer v R [1971] A. C. 814 which decision was approved and followed by the Court of Appeal in R v McInnes, 55 Cr. App. R. 551 where the court stated thus:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. ...Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defense..... The defense of self-defense either succeeds so as to result in an acquittal or it is disproved, in which case as a defense it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

78. In the Republic v Joseph Macharia Waweru [2015] eKLR, the High Court cited with approval Mungai v Republic (1984) KLR 85 where it was stated that:

“No doubt this element of self-defense may, and, in most cases will in practice merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defense of person or property or as acts done under the stress of provocation. The essence of crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter.”

79. In the Joseph Macharia Waweru case cited above, the court cited with approval Mokwa v Republic [1976-80] 1KLR 1337 where the Court of Appeal stated that:

“Where self-defense is successfully raised as a defense to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self-defense is only open to the court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows which he inflicted.”

80. I have carefully considered the evidence adduced by both the prosecution witnesses and the accused person and his witness in defence. The evidence is clear that the accused and the deceased had some history. PW1, PW2 and DW2 all alluded to, in their testimonies, that the accused used to settle issues between the deceased and his mother and as a result, the deceased seemed to have a resentment towards the accused and would abuse the accused.

81. It is also clear that none of the prosecution witnesses herein saw how the scuffle between the accused and the deceased commenced.



82. The accused testified that the deceased hit him first and that he was merely defending himself. However, the testimony of PW2 and PW3 is that they found the deceased when he had already fallen down and the accused was busy hitting the deceased.
83. I also note that the deceased was at the time of the scuffle a disabled person who walked with the help of a stick and there is evidence that he had undergone an operation and that he walked with the aid of a stick. The testimonies of PW1,2 and 3 were that the accused beat the deceased with the deceased's own sticks which sticks the deceased used to aid him in his walking. PW1 testified that the deceased's knees were broken, a fact that was corroborated by the report produced by PW6, Dr. Wekesa in his post mortem report produced as PEx 1.
84. Based on the evidence adduced herein, it is my considered opinion that the attack, if any, by the deceased on the accused that allegedly led to the accused breaking his teeth, was a relatively minor attack in comparison to that which the accused meted out on the deceased, which attack was, in my view, wholly out of proportion to the necessities of the situation as is evident from the very serious and grievous injuries sustained by the deceased as revealed by the autopsy carried out by PW6, Dr. Wekesa.
85. Noting that the deceased was already disabled as he had undergone an operation leading him to walk with the aid of a stick, I find that the accused used excessive force over the deceased in exacting retaliation, revenge or punishment in a bid to settle what seemed to be an old score.
86. The nature of injuries sustained by the deceased which were of multiple limb fractures, multiple facial hematomas as well as multiple inter-cranial (brain) hematomas and fracture of the skull portray serious aggression by the accused which does not accord the accused a necessity of defense of self defence.
87. I am unable to find that the accused held a reasonable belief that his life was in danger. The nature of the injuries the deceased sustained indicates that the accused intended to harm the deceased or even to kill him.
88. In the circumstances, I find that the prosecution have proved beyond reasonable doubt that the death of the deceased was due to an unlawful act and that it was the accused who was responsible for the unlawful killing of the deceased, an unlawful act which does not offer a defence of self defence.
89. On whether the accused unlawfully killed the deceased with malice aforethought, the submissions by counsel for the accused were that there was no evidence of any intention on the part of the accused to unlawfully kill the deceased. It is now settled that motive is immaterial in proving criminal responsibility. Section 9(3) of the *Penal Code* provides that:

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.”

90. Maraga J (as he then was) in *Republic v Loobo Lenaigero* [2010] eKLR had this to say, citing the Court of Appeal decision on motive:

“Obviously with this provision in mind, in case of Joseph Wambirwa Mwanthi –vs- Republic, Criminal Appeal No 63 of 2005 (CA Nyeri), the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.”

However, as the same court said in *Lubambula vsR* [2003] KLR 683 “Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.” In *David Kipkemboi Ngetich vsRepublic, Nakuru Cr.*



Appeal No. 276 of 2006 (CA) the Court of Appeal said its relevance “is to contextualize the circumstances in which the offence charged was committed.”

Motive therefore becomes important in proving the accused’s malice aforethought. In this case, both PW1 and PW2 said they knew of reason whatsoever why the accused would have wanted to kill the deceased.”

91. On the other hand, malice aforethought is discernable from the nature of the injuries inflicted. See the case of *Republic v Tumbe s/o Ochen* [1945] 12 EACA 63. On the evidence adduced in this case showing the multiple debilitating injuries sustained by the deceased following the attack by the accused, I am persuaded that contrary to the accused person’s alleged self defence, the accused had malice aforethought to cause the deceased grievous harm.
92. In the end, I find and hold that the prosecution has proved against the accused person, all the elements of murder. I hereby find and hold the accused person George Mukoya Ng’onga Guilty of the offence of murder as charged. I convict him accordingly.
93. Sentence shall be after records, mitigation, victim impact statements and a pre-sentence report.
94. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 20<sup>TH</sup> DAY OF APRIL, 2022**

**R.E. ABURILI**  
**JUDGE**

