



**State v Oyola & 2 others (Criminal Case E009 of 2021)  
[2022] KEHC 11241 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E009 OF 2021  
RE ABURILI, J  
JUNE 29, 2022**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**VICTOR OMONDI OYOLA ..... 1<sup>ST</sup> ACCUSED**

**ANDREW OTIENO OKOTH ..... 2<sup>ND</sup> ACCUSED**

**SAMUEL OYOLO OYOLA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons Victor Omondi Oyola, Andrew Otieno Okoth and Samuel Oyolo Oyola 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 diverse dates between 30<sup>th</sup> April 2021 and 1<sup>st</sup> May 2021 at Wakilia village, Nyangoko sub location in South Asembo location within Rarieda sub county of the Siaya County murdered one Vincent Onyango Oyolo.
2. The accused persons pleaded not guilty to the charges against them and the matter proceeded to trial with the prosecution calling a total of seven (7) witnesses in support of its case as summarised below.

**The Prosecution's Case**

3. PW2 Dr. Mervis Mbeki from Siaya County Referral Hospital, a General Medical Practitioner testified on behalf of Dr. Juma, her colleague who conducted a postmortem on the body of the deceased and whom she had worked with and was familiar with his handwriting and signature but that he was indisposed PW2 testified that the postmortem was for Vincent Onyango Oyolo and that it was dated 6/5/2021. On general observation, Dr. Juma noted that the deceased had no clothing, that it was a male body of African race aged 28 years who was of good nutrition, well-built physique and height of 1.8 cm.



4. PW2 testified that Dr. Juma noted that the time of death was more than 72 hours and that externally, there were multiple cut wounds on the head, left ear and face marks 8 cm deep to the scalp with the smallest measuring 4 cm. He further testified that the deceased had multiple bruises on the head, 3 cut wounds on the left lower limb, 2 by 4 cm long. It was his testimony that from the postmortem, there were bruises on the left chest wall but no injuries to the abdomen and back.
5. On the internal appearance, PW2 testified that there were fractures of ribs 6, 7 and 8 of the left rib cage with hemorrhagic changes below the skin and muscle. She further testified that the left lower lung lobe showed congestion (contusion) whereas the right rib cage was normal. It was her testimony that the cardiovascular, digestive, genito urinary systems were all normal. On the head, there was massive multiple subgaleal blood collection within the scalp, subdural blood collection on the right occipital parietal region of 6 x 4 cm. On the nervous system, PW2 testified that the dura matter was undergoing decomposition and that the spinal column and spinal cord were normal.
6. PW2 testified that as a result of the examination, Dr. Juma found the cause of death to be severe head injury secondary to blunt and sharp trauma to the head and chest. A death Certificate No. 1021577 was issued and the post mortem signed. PW2 produced the Postmortem Report as PEx1.
7. In cross-examination, PW2 stated that she is a general practitioner and not a pathologist. Further, that from the distribution of the injuries, she could not tell whether there was a fight or not. She stated that she was practicing at the time the postmortem report was done. She also stated that she did internship with Dr. Juma for one year at Siaya Referral Hospital in 2014, then they parted as she went to Yala while Dr. Juma went to Bondo but that they got together to Siaya Hospital.
8. PW3 Nancy Emily Auma, a female minor was taken through a voire dire examination and found understanding of the nature of an oath and telling the truth. She testified that the deceased was her brother and that the accused persons, Victor Omondi Oyolo was also his brother, Andrew Otieno was her neighbour while Samuel Oyolo was her father. She identified all the three accused persons as people well known to her.
9. It was her testimony that on the 30/4/2021 at 9 pm, she was in their homestead in Victor's house, the 1<sup>st</sup> accused, with her sisters and nieces watching television. She testified that Vincent, the deceased, called her out, held her and started beating her telling her to go to her mother's house. It was her testimony that the deceased took her to her grandmother's house and continued beating her but she managed to escape to her mother's house. PW3 testified that the deceased followed her there, took a panga and cut her on her right leg and told her to go and sleep which she could not do as she was bleeding. She testified that the deceased closed the door and left. (the witness showed the court a part of her thigh that was cut and the court observed the healing wound).
10. PW3 testified that Victor went and opened the door and Vincent, the deceased, returned wanting to cut Victor and when Victor asked him why he was cutting her, the deceased told Victor that he was looking for him to assault so Victor ran away. She further testified that in the morning, she was taken to Hospital for treatment and when she returned, Victor took her to sleep at a neighbour's house where Vincent again followed her wanting to assault her. It was her testimony that later on, they found Vincent lying on the farm and that she later learnt that he was dead. PW3 testified that she recorded her statement to the police and that the police recorded what she was saying. PW3 identified Victor as the 1<sup>st</sup> accused person.
11. In cross-examination, PW3 stated that she was not forced to give her statement on 30/4/2021 at 9 pm. She reiterated that she was in Victor's house watching television when Vincent went, called her, questioned her as to what she was doing at that time, then removed her from Victor's house, took her



- to her mother's house and cut her with a panga. She stated that he was drunk as he had taken chang'aa which was made and sold by a neighbour.
12. PW3 further stated in cross examination that Vincent also chased Victor with a panga and that Victor ran away. She testified that Vincent then started cutting/destroying maize in Victor's farm after Victor had ran away. She testified that she never saw him again. It was her testimony that she never saw her father and Andrew that night. She testified that Vincent died on 1/5/2021. It was her testimony that she was taken to hospital on the morning of 1/5/2021 by her father who took her to Bondo District Hospital and they returned at 4 pm. She further stated that they did not find Vincent at home and that he returned at night at 7 pm on 1/5/2021, found Victor and asked Victor what he was doing. It was her testimony that Victor entered his house and left with Andrew to go to a funeral. She stated that Vincent returned with a panga and she heard screams from the farm. It was her testimony that she was in their home when she heard screams. She testified that Victor went and took her to a neighbour's house to secure her from Vincent's assault. She stated that on that night when Vincent came, he was not drunk.
  13. PW4 Ruth Aloo Akonga testified that on the 30/4/2021 at 8 pm, she was in her home when she heard noises from the home of Samuel Oyolo, noises made by Victor Omondi saying "Gor, Wewe leo tunakuuwa umetusumbua kwa muda mrefu". She testified that Gor was the deceased Vincent Onyango. She testified that as the village elder, she called police officers but they were unavailable so she called the Chief Madam Benta who told her to call the Assistant Chief.
  14. It was her testimony that she took her lamp and went to the home of Samuel and found Victor's wife bathing and asked her about the noises. It was her testimony that she found Vincent lying down behind the house, facing up with his hands wide. She further testified that when she lit a lamp at him, he asked her for water. She further testified that when she walked around, saw a broken touchscreen phone and a rope with blood on it. It was her testimony that Victor went to where she was standing near Vincent saying he was sorry for disturbing her. She stated that she picked a rope nearby with blood and Victor asked her for the rope but she told him that she did not want trouble.
  15. PW4 testified that Victor told her that unless she handed over the rope to him, she would be made like 'Gor' - Vincent. She testified that she went home and called the Chief informing him of the serious state of Vincent and the Chief told her to take Vincent to hospital but she told the Chief that she could not. It was her testimony that she slept till morning when she went to the home of the stepmother of Victor to find out if she heard the noises the previous night but the step mother denied having heard them so she told her to go behind the house and see what had happened only for her to return saying Vincent was dead. PW4 testified that she called Benta the Chief and told her what had happened.
  16. PW4 testified that when the Assistant Chief arrived, she gave him the rope and a broken phone. She identified Victor as the 1<sup>st</sup> accused in court and stated that she had known him for long as he was her brother in-law's son. She stated that she never witnessed any bad blood between Vincent and his family members.
  17. In cross-examination, PW4 stated that the incident took place on 30/5/2021 at 8 pm though she never witnessed any of the accused persons assault the deceased with a panga. She stated that from her house to that of the deceased was about 200 metres. It was her testimony that she used to sell chang'aa and that she never saw the deceased go to drink chang'aa at her place on that day. She stated that she was aware that the deceased used to drink chang'aa and also used to ride boda boda. She further stated that the deceased never used to stay at home and that she heard that Vincent destroyed Victor's maize crops. She testified that she was told that the deceased cut his sister with a panga. She further testified that the deceased's wife never told her anything about what had happened. She denied covering for Vincent and



- further stated that he was not her customer. In re-examination, PW4 stated that she could remember that it was on a 30<sup>th</sup> but not sure of the month.
18. PW5 Gordon Osee Wauna the Assistant Chief Nyagogo sub location testified that on the 1/5/2021 at around 8 am, he was at his home when he received a phone call from someone at Waringa that something had happened at the home of Samuel Oyolo. He testified that he called Samuel Oyolo because he had his number and Samuel told him that his son Vincent Oyolo had died.
  19. PW5 testified that he enquired as to how his son died but Samuel was not clear so he called his colleague, the Assistant Chief who accompanied him to the scene at Samuel Oyolo's home. It was his testimony that they found Samuel Oyolo who showed him at a distance of 50 metres from his home, the body of Vincent Oyolo lying dead. He testified that he viewed the body of the deceased with bruises and wounds and a swollen head. It was his testimony that members of the public went to the scene and started wailing. He further testified that he asked Samuel Oyolo who explained to him that the previous night Vincent had issues with his brother and a case was pending at the police station.
  20. PW5 testified that members of the public demanded for an explanation from Samuel Oyolo saying he was involved and that shortly, a group of people arrived with Victor Oyolo and Andrew "(Nyaugenya)" saying the two were responsible for the death of Vincent. He testified that the two were found taking tea at a Warinda hotel. PW5 testified that the public were beating the suspects so he called for reinforcement and officers from Aram Police Station referred him to Wangaroth. He testified that the suspects were taken by Wangaroth Police. He further testified that Victor and Andrew had bruises and blood stains on their clothing. It was his testimony that the three accused were arrested and the deceased's body was escorted to Bondo Mortuary. He stated that he later recorded his statement. PW5 identified the accused persons in court.
  21. In cross-examination, PW5 stated that Victor and Samuel were his residents. He stated that Andrew lived in Bondo and was not a resident of his sub location. He testified that he was aware that the deceased was abusing alcohol. He further stated that Ruth Aronda used to sell alcohol in the village but he could not confirm if the deceased used to cause chaos whenever he was drunk. It was his testimony that Ruth did not call him at night but that she called the Chief. He stated that from Ruth's home to the deceased's home was a distance of about 200 metres.
  22. PW5 testified that he was told that the deceased had cut Nancy and the matter, had been reported to the police. He testified that he received the report on the morning of 1/5/2021. He admitted that he never saw anyone cutting the deceased. It was his testimony that he had been the Assistant Chief for 20 years. He stated that there had been many family wrangles in Oyola's home. He stated that he found the deceased lying at a newly cultivated land.
  23. PW6 John Michira Mbogo testified that he knew the deceased Vincent Oyolo who was his brother's son. It was his testimony that on the 6/5/2021 he identified the deceased's body at Bondo Hospital mortuary to the doctor who performed the postmortem. He stated that Vincent suffered severe head injuries and that the doctor explained the cause of death of the deceased.
  24. In cross-examination, PW6 stated that he knew the deceased since his childhood as he was from his family. It was his testimony that apart from his brother Samuel Oyolo, he knew Victor whom he identified as the 1<sup>st</sup> accused although he did not know the 2<sup>nd</sup> accused.
  25. PW7 No. 1200263 PC Cyrus Kimeli, the investigating officer testified that on the 1/5/2021 he was at the police station when he received a phone call from his Officer Commanding Station (OCS) Chief Inspector (CIP) Daniel Osano asking him to see him at his house and while there, the Officer Commanding Station (OCS) received a call from Assistant Chief Nyagoko Sub location. Mr. Gordon



- Ouma, informing him of a body of one Vincent Onyango Oyola who was found dead at Mzee Oyola's Shamba.
26. It was his testimony that they went to the scene immediately where they found their colleagues from Wangaroth Police Post – PC Mutunga, PC Ochieng and PC Onyango who had arrested 3 suspects - Victor Omondi, Andrew Otieno and Mzee Samuel Oyola. He testified that they removed the body to Bondo Sub County Mortuary after processing the scene and recorded statements of witnesses. He further testified that the deceased's body had visible injuries on the head.
  27. PW7 testified that on the 6/5/2021, he attended the postmortem of the deceased that was done by Dr. Juma. He stated that he prepared the police file and escorted the accused for mental assessment. It was his testimony that among the statements was one by Eric Otieno recorded on 4/5/2021, a key eye witness of what happened but who had since gone at large and could not be traced. It was his testimony that he had gone to Eric's home several times and met his father who told him that he did not know the whereabouts of his son Eric Otieno. He testified that the witness gave them his phone number when recording a statement as 0743945983 which PW7 had tried to call but it did not go through. He testified that as a result he was unable to trace the witness. He produced the statement recorded by Eric Otieno Buyu on 4/5/2021 at Aram Police Station as PEX2, with no objection from the defence.
  28. PW7 testified that according to the evidence gathered in his investigations, on 30/4/2021, the deceased made a report at Wangaroth Police Post at 11.00am that his brother Victor Omondi, the 1<sup>st</sup> Accused person, was selling chang'aa within their homestead and that their mother had been arrested, charged and fined Kshs. 30,000 at Bondo Law Courts over the same offence. He testified that the officers went to the home of the 1<sup>st</sup> accused, searched but found nothing. He further testified that at around 5pm, another report was made by Mzee Samuel Oyola accompanied by his daughter Emily Auma, that the deceased had assaulted them but that despite the report being booked, no action was taken.
  29. PW7 testified that the following day, a villager, Ruth Aloo, reported to Wangaroth Police Post that the body of Vincent Onyango was found with visible injuries. He testified that the 1<sup>st</sup> Accused was the blood brother to the deceased while the 2<sup>nd</sup> accused was a friend to the 1<sup>st</sup> accused and they worked together as miners, while the 3<sup>rd</sup> accused was the father to the 1<sup>st</sup> accused and the deceased.
  30. PW7 further testified that from his investigations, the deceased was very stubborn to the family and especially towards the father. He further testified that the deceased was always drunk which made him chase all members of the family from their home, from time to time. He identified all three accused persons who were arrested in connection with this case as the people who were in court. He further testified that Eric Otieno Buyu told him that he was present when the incident was happening and that he was in company of the 1<sup>st</sup> and 2<sup>nd</sup> accused when the deceased attacked Victor Omondi and that the 2<sup>nd</sup> accused then held the deceased and the 1<sup>st</sup> accused hit the deceased using a stick after which Eric escaped to his home and the following day on 1/5/2021 Eric got information that the deceased was found dead.
  31. PW7 testified that Eric informed him that when the 1<sup>st</sup> and 2<sup>nd</sup> accused were assaulting the deceased, the third accused was there telling the two to ensure that they assault the deceased until he does not wake up otherwise should the deceased wake up, he would kill all of them. That is also what is contained in Eric's statement.
  32. In cross-examination, PW7 stated that from the reports made, the deceased's mother used to sell alcohol to the public although he could not tell whether the deceased's mother or the 1<sup>st</sup> & 3<sup>rd</sup> Accused were alcoholic. He further testified that it was alleged that the deceased assaulted his sister on 29/4/2021



and that he died on the night of 30/4/2021 towards 1<sup>st</sup> May 2021 at an unknown time. He stated that he found that the fight begun from around 8pm until around 10pm.

33. He further testified that according to Victor's Report, his mother was arrested yet it was Vincent who was selling chang'aa. He further testified that the 1<sup>st</sup> and 2<sup>nd</sup> accused had no weapons when they were attacked by Vincent and that they only armed themselves while trying to defend themselves from the attack by the deceased. He stated that he never found any plan by the three accused persons to kill the deceased.
34. PW7 testified that according to Eric, the 3<sup>rd</sup> Accused stood at his home, 20 meters away as the deceased and the 1<sup>st</sup> & 2<sup>nd</sup> accused fought. He testified that he established that the deceased was problematic. He testified that the deceased had cut his sister on 29/4/2021 and that he had also cut an avocado tree planted by the 1<sup>st</sup> accused behind the house. He testified that the deceased used to chase his mother and father from the homestead using a panga and they could sleep outside the home out of fear. He further testified that the deceased was not married. It was his testimony that the 3<sup>rd</sup> accused instructed the 1<sup>st</sup> & 2<sup>nd</sup> accused to finish the deceased so that the deceased does not wake up to finish them.

### **The Defence Case**

35. The first accused testified as DW1 and stated that the deceased was his elder brother, the 2<sup>nd</sup> accused his friend and fellow miner and the 3<sup>rd</sup> accused his father. He testified that on the 29/4/2021 at about 7pm, he was at the home of Eric Otieno Buyu his fellow farmer, planning to go and buy seeds to plant for various crops when he heard the voice of screams from his home, screams which were by his sister Nancy Auma. He testified that he also heard the voice of Vincent Onyango. It was his testimony that Nancy was crying saying "brother unaniua" while Vincent was saying "leo utaumia" so he ran home to see what was happening and found the avocado tree he had planted at his door step cut down. He stated that he saw Nancy crying and bleeding profusely so he screamed calling on neighbors for help but they did not respond.
36. It was his testimony that Vincent heard his voice then he followed DW1 with a panga from his house. He stated that his wife told him to run away because Vincent was looking for him so he ran to Kowiny's house where he stayed until 9pm then went back home to rescue his siblings. He stated that he did not find Vincent so he took his siblings to Kowiny's home where they slept while he slept at a rental house of Eric Otieno.
37. It was his testimony that the following day on 30/4/2021 he returned home in the morning and found his siblings and father had not returned so he went and brought them home and got them food to eat since they had slept hungry. He testified that his sister's child had also been slapped with a panga and was injured too. It was his testimony that when his father returned home, he took Nancy and Letsa Auma to hospital. He further testified that at 2pm, Vincent arrived home accompanied by Police officers from Wangaroth Police Post who asked him to show them where he had kept the alcohol that his mother had left behind. He stated that he did not know anything about alcohol. He further stated that they searched and found nothing after handcuffing him and later left him free after which Vincent left with the police officers.
38. It was his testimony that he stayed home until 3.00pm then went to Aram Police Station to see his mother who had been arrested for brewing chang'aa. He stated that he explained to her what had transpired at home then returned home at 4.30pm and stayed until 6pm when Andrew the 2<sup>nd</sup> Accused visited him. He stated that Eric Otieno Buyu also arrived and they conversed. He stated that there was a funeral nearby so at 8pm, they decided to go to a funeral near Bondo Township where a motorcyclist had died and that on their way, Vincent reached them asking "Wapi huyo Victor?"



39. He testified that he feared Vincent as he had a panga. It was his testimony that Vincent started pushing Andrew around questioning him why he was walking with him-Victor and that Andrew wrestled the deceased and snatched a panga from him and threw it away. He testified that he, Andrew and Erick then took sticks and started beating the deceased because he was disturbing them and that when Andrew asked Vincent why he wanted to cut him, Vincent told Andrew to leave him alone and that he was to finish him and that is why he wrestled Vincent at that time. DW1 testified that his father was not present as he had taken Nancy his injured sister to Bondo District Hospital.
40. DW1 testified that they never intended to kill Vincent and that Vincent was drunk from his talk and behavior. He testified that Andrew and his father had no issue with Vincent. He further stated that his mother used to sell chang'aa a while ago. He further stated that PW3 also used to sell chang'aa. It was his testimony that he respected his brother and never intended to kill him though he did not know why Vincent caused terror leading to his own death.
41. In cross-examination, DW1 stated that his mother used to sell chang'aa. He further testified that she was arrested because she was found with items used to manufacture chang'aa. He further testified that he did not know if Vincent did not want chang'aa in their home. DW1 reiterated that he never used to sell chang'aa. He further testified that he used a whip to beat Vincent and that the deceased was drunk but he walked strongly. It was his testimony that Eric knew his father well and he could identify his voice but his father was not present. He testified that he never saw the deceased cut Nancy and that he was only shown her injuries.
42. The 2<sup>nd</sup> accused Andrew Otieno Okoth, testified as DW2 that on a day he went to see Victor to plan on how to go and work at around 8pm, Eric joined the two and the two said they wanted to go to a funeral near Bondo Township. He testified that as they left Victor's home, after a distance of about 200 meters, they saw someone emerge from the Maize plantation and he said 'Victor, come here I have found you'. It was his testimony that the person questioned him as to why he kept company with Victor and further told Eric Otieno that he was spoiling Victor by telling him many things.
43. DW2 testified that Vincent was drunk and wanted to cut him with a panga so he wrestled him, they fell down and Eric and Victor separated them. He stated that they had fallen on the ground and Vincent was lying on him when Erick and Victor, using whips, started disciplining the deceased. He stated that he got up and went home and that Erick went to the funeral place. He testified that he was the one who snatched the panga from Vincent and threw it aside. He testified that they left Vincent sitting on the ground and that on his part, he went to sleep. It was his testimony that he left Victor behind saying he was going his way.
44. DW2 testified that the following morning, he decided to go and meet Victor so that they could go to work and that as they were taking tea, some people approached them and informed them that "Gor" – Vincent was dead and they arrested Victor and the 2<sup>nd</sup> accused. He testified that Eric Otieno Buyu was not with them and that they were taken to the police station. He testified that on the night of 30<sup>th</sup> April and 1<sup>st</sup> May 2021 it had rained heavily. He testified that the mob beat them asking for Eric Otieno but they denied knowing his whereabouts.
45. DW2 further testified that PW3 told them that she had found Vincent at the scene that night and that he asked for water, after saying that they had killed him. It was his testimony that he did not intend to kill the deceased as he had no issue with him. He stated that he never saw the 3<sup>rd</sup> accused that day, even when they were fighting with Vincent. He stated that he had no grudge with Vincent and that he could not tell the issues that Vincent had with his siblings and father. He testified that Vincent was drunk as he emerged and that as he wrestled him, he smelt alcohol.



46. In cross-examination, DW2 stated that after the deceased attacked him with a panga, he wrestled him down, they struggled and that Eric and Victor went and started disciplining Vincent. In re-examination, DW2 stated that when they fell down, they were fighting, with Vincent on top of him. He stated that Victor and Eric told Vincent to stop the fight but he continued fighting DW2.
47. DW3 Samuel Oyolo Oyola, the 3<sup>rd</sup> accused testified that on the 29/4/2021 he was away and upon his return he found two of his children and trees that were planted in the homestead cut down. He testified that he enquired on who had cut the trees but found his children missing although he later found them at a neighbor's house. It was his testimony that he took the two children to Bondo District Hospital and stayed there for three days.
48. DW3 testified that on the 4<sup>th</sup> day, the Assistant chief called and asked him whether he knew what was happening at his home and he told him that he was at Bondo Hospital. It was his testimony that the assistant chief told him to go to his home and find a body. He testified that he went and reported to Wangaroth Police Post and later he went to Aram Police Station. He further testified that the police accompanied him to his home and arrested him saying that as the owner of the home he must say the truth of what had transpired.
49. It was his testimony that he did not know what had happened to the deceased, his elder son and further that he did not participate in the killing of his son Vincent as he was not at home contrary to Erick's allegation in his statement. He stated that he never saw Erick as he was at Bondo Hospital with the 2 children who had been cut, one of whom, Nancy, had testified in court. He stated that the hospital treatment notes for the two children were at home. He testified that the deceased had no grudge with the 1<sup>st</sup> and 2<sup>nd</sup> accused.
50. DW3 testified that Andrew was a friend to Victor and that he used to visit his son. He stated that he did not stay at home all the time. He stated that Vincent used to drink alcohol and whenever drunk, he made so much noise. He also stated that his wife used to sell alcohol but he stopped her.
51. In cross-examination, DW3 stated that his son Vincent used to be very troublesome when drunk and that at one time, Vincent chased him from home and he went and stayed in a church for four days. DW3 reiterated that the deceased used to chase him and he could go and stay in church. He reiterated that he stopped his wife from brewing chang'aa and it had been four years since she stopped. He further testified that his wife was arrested because she had Kangara, not chang'aa. He stated that Kangara is used to manufacture chang'aa. DW3 further stated that he knew Ruth Aloo who was his neighbour and who spoilt the deceased. It was his testimony that he was not at home so Ruth could not have heard his voice as he was at Bondo Hospital with Nancy Emily Auma.

### **Analysis and Determination**

52. I have considered the evidence adduced by the prosecution witnesses and the defences proffered by the three accused persons herein. The main issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of murder against the accused persons.
53. In the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the court held inter alia that the elements of the offence of murder were as follows: elements are: the fact of the death of the deceased; the cause of that death; that the death was occasioned by an unlawful act or omission; that it was the accused persons and no other person who caused the unlawful death of the deceased and finally; that the accused had malice aforethought when he unlawfully killed the deceased.



54. The fact of the deceased's death was proved beyond reasonable doubt through the testimonies of PW4, PW5, PW6 and PW7 all who saw the deceased's body. PW6 testified that he identified the deceased's body to the doctor who conducted the postmortem.
55. On the cause of death, PW2 produced PEX1, the postmortem report prepared by Dr. Juma Gabriel Wekesa who did an autopsy on the body and concluded that the cause of death was severe head injury secondary to blunt and sharp trauma to the head. Accordingly, the prosecution proved beyond reasonable doubt that indeed the deceased died and the cause thereof proved beyond reasonable doubt.
56. As to whether the deceased's death was caused by an unlawful act or omission, Article 26 (1) of the Constitution guarantees every person the right to life. The postmortem report produced by PW3 and produced as PEX1 showed that the cause of death was severe head injury secondary to blunt and sharp trauma to the head and chest. There is no lawful basis for the aforementioned cause of death. The deceased could not have inflicted such injuries on his body including the cuts on his head. In the circumstances, it is my finding that indeed the deceased's death was unlawfully caused.
57. As to whether it was the accused persons who caused the deceased's unlawful death, the prosecution placed heavy reliance on the statement of Erick Otieno Buyu who witnessed the incident but had since been untraceable, and which statement was admitted as PEX2. Erick told the police that on the 30/4/2021 at about 1500hrs he was in his farm weeding when the 1<sup>st</sup> accused visited him complaining that he wanted to sell something so that he could leave their home and get peace away from his troublesome brother.
58. Erick stated that they conversed till 1900hrs when they proceeded to the 1<sup>st</sup> accused's home and while on the way they met the 2<sup>nd</sup> accused who joined them. He further stated that they conversed with each other till 2000hrs when they decided to leave and the 1<sup>st</sup> accused escorted them but that he went ahead of the 1<sup>st</sup> and 2<sup>nd</sup> accused. Erick further stated that he suddenly heard the 1<sup>st</sup> accused call the deceased by his nickname saying, "Gor, you want to cut me what have I done to you" and upon him turning, he saw the 2<sup>nd</sup> accused and the deceased on the ground struggling.
59. Erick stated that the deceased held a panga and that the 2<sup>nd</sup> accused held the deceased on the ground and the 1<sup>st</sup> accused managed to disarm the deceased before running towards his home only to return with a rope which he used to beat the deceased. Erick stated that the 1<sup>st</sup> accused beat the deceased with a lot of anger which scared him and this made him leave for his home and that as he was leaving, he heard the 3<sup>rd</sup> accused say, "Don't go please Andrew, Don't go, this person can wake up again and kill me with the children at home." Erick told the police in his statement that the following morning, he learnt that the deceased had passed on and he sought advice from his Uncle Fredrick who advised him to go explain to the police what had happened.
60. PW4 testified that on 30/4/2021 while at her home, she heard the 1<sup>st</sup> accused say, "Gor wewe leo tunakuuwa, umetusumbua sana kwa muda mrefu." She testified that after trying to call the police who were unavailable she went to the 3<sup>rd</sup> accused's home where she found the deceased lying on the ground, facing up with hands wide open and that the deceased asked for water. She testified that she also saw a broken touch screen phone and bloody rope at the scene which she picked. It was her testimony that the 1<sup>st</sup> accused confronted her telling her that if she did not hand over the rope, she would end up like the deceased and that she gave the phone and rope to the Assistant Chief.
61. PW3 testified of how the deceased who was her brother had attacked and cut her with a panga and he continued with the said attack the following day.



62. In their defense both the 1<sup>st</sup> and 2<sup>nd</sup> accused admitted beating the deceased. DW1 however stated that they never intended to kill the deceased. Both the 1<sup>st</sup> and 2<sup>nd</sup> accused testified that the 3<sup>rd</sup> accused was not at the scene. Even the statement of Erick Otieno Buyu though it stated that he heard the 3<sup>rd</sup> accused begging the 2<sup>nd</sup> accused not leave them, it did not provide that the 3<sup>rd</sup> accused was at the scene of the crime despite the detailed statement written by Erick.
63. PW5 testified how he called the 3<sup>rd</sup> accused to inquire from him on what had happened leading to his son's death but the accused was not clear on what he was saying. Clearly, the 3<sup>rd</sup> accused must have been aloof on to what had happened occasioning his son's death. The 3<sup>rd</sup> accused testified that when the deceased died, he had taken his daughter, PW3 to hospital for treatment for injuries as a result of the deceased cutting her which was corroborative of the testimony of PW3. DW3 further testified that he was arrested on the grounds that the deceased died in his compound and that therefore he must have known what happened.
64. I note that suspicion no matter how strong, cannot be used to secure a conviction. In *Joan Chebichii Saue v Republic*, Criminal Appeal No. 2 of 2002 [2003] eKLR, (2003) KLR 364, the Court held as follows regarding suspicion:
- “The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”
65. Accordingly, it is my opinion that the prosecution failed to prove its case beyond reasonable doubt that the 3<sup>rd</sup> accused was part of those who committed the unlawful act that led to the deceased's death, considering that PW3 testified that her father had taken her to hospital for treatment following an attack by the deceased.
66. PEX2, and the testimony of PW3 clearly show that the 1<sup>st</sup> and 2<sup>nd</sup> accused were the ones who beat up the deceased. It is not lost to this court that it was the deceased who attacked them armed with a panga however, the 1<sup>st</sup> and 2<sup>nd</sup> accused managed to disarm him and proceeded to beat him. This is what DW1 and DW2 stated in their own testimonies and the statement by Erick Otieno too stated as such.
67. Erick Otieno in PEX2 stated how he got scared after seeing how the 1<sup>st</sup> accused was beating the deceased in anger. PW3 also testified that she heard the 1<sup>st</sup> accused tell the deceased that he would kill him as the deceased had disturbed them for a long time.
68. The 2<sup>nd</sup> accused testified that after disengaging from the deceased, he stood up and went home however this is contrary to the testimony of the 1<sup>st</sup> accused who clearly stated that they beat the deceased with the 2<sup>nd</sup> accused but never intended to kill him.
69. The evidence adduced by the prosecution leaves no doubt that it was the 1<sup>st</sup> and 2<sup>nd</sup> accused who committed the unlawful act that led to the deceased's death.



70. On whether the accused persons had malice aforethought when they unlawfully killed the deceased, in the case of *Rex v Tubere S/O Ochen* 1945 12 EACA 63 the Court laid down the guidelines for trial Judges in consideration of malice aforethought where the court held that:
- “To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.
71. In the cases of *Ernest Asami Bwire Abang Alias Onyango v republic Ndumbe* CACKA No. 32 of 1990, *Karani and three others v Republic* 1991 KLR 622, *Republic v Godfrey Ngotho Mutiso* 2008 eKLR and *James Masomo Mbacha v republic* 2015 eKLR, the courts sufficiently inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries to the victim.
72. In this case the accused persons motive is discernible from the PEX2 where Erick who witnessed the offence told the police that on seeing the anger with which the 1<sup>st</sup> accused was beating the deceased he got afraid and left for his home.
73. Dr. Juma Wekesa who carried out the post mortem on the deceased’s body and concluded that the cause of death was severe head injury due to blunt and sharp trauma to the head and chest noted in the postmortem form (PEX1) that the deceased suffered multiple cut wounds on the head, left ear and face, multiple bruises on the head and left chest wall and cut wounds on the left lower limb. Clearly, the deceased’s attackers intended to cause him grievous harm. The question is whether that evidence of injuries coupled with other evidence by the prosecution witnesses and the statement by Erick Otieno who could not be traced discloses malice aforethought on the part of the accused persons.
74. PW4 testified that while at her home she heard the 1<sup>st</sup> accused say, “Gor wewe leo tunakuuwa, umetusumbua sana kwa muda mrefu.” Erick Otieno in PEX2 also told the police that the 2<sup>nd</sup> accused held down the deceased as the 1<sup>st</sup> accused beat him and further, the 1<sup>st</sup> accused admitted that though they beat the deceased they did not intend to kill him.
75. Taking all the above circumstances into account, and the clear evidence that the deceased was the person who invaded the accused persons with the intention of cutting them with the panga and fought them, and that the two accused persons were only defending themselves when they disarmed the deceased and assaulted him seriously, with the cause of the fight being the manner in which the deceased had assaulted PW3 his sister by cutting her with a panga, I find that the two accused persons had no malice aforethought when they unlawfully killed the deceased.
76. The deceased was the invader and assailant. He could have killed PW3 with a panga and DW2 whom he had wrestled to the ground, while holding a panga, had DW1 not intervened. The deceased’s intention was to cut DW1, his brother who was in the company of DW2. Had he cut DW1 and DW2 as intended, he would have caused them grievous harm or even death. He also caused grievous harm to PW3.
77. In my humble view, the accused persons acted in self defence and in defence of PW3 and in the process, due to anger, they caused fatal injuries to the deceased. In other words, they used excess force in disarming him after he attacked them while armed with a lethal weapon.
78. I find and hold that malice aforethought was not proved against the two accused persons beyond reasonable doubt. For the above reason, I find that the prosecution having proved all elements of murder except malice aforethought, I invoke the provisions of section 179 of the *Criminal Procedure Code* and find the 1<sup>st</sup> and 2<sup>nd</sup> accused persons guilty of a lesser charge of manslaughter contrary to section 202 of the *Penal Code*. I convict them accordingly.



79. As against the 3<sup>rd</sup> accused person, I find that the prosecution did not establish all the elements of the offence of murder against him beyond reasonable doubt. I find him not guilty of any offence, I acquit him. Unless otherwise lawfully held, the 3<sup>rd</sup> accused Samuel Oyolo Oyola is hereby set at liberty.

80. I shall pronounce sentence against the 1<sup>st</sup> and 2<sup>nd</sup> accused persons after records and mitigation.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 29<sup>TH</sup> DAY OF JUNE, 2022**

**R.E. ABURILI**

**JUDGE**

