



**State v Mband & another (Criminal Case E015 of 2022)  
[2022] KEHC 15771 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15771 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E015 OF 2022  
RE ABURILI, J  
NOVEMBER 22, 2022**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**MAURICE OWINO MBAND ..... 1<sup>ST</sup> ACCUSED**

**BENARD OTIENO MBAND ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons herein Maurice Owino Mband and Bernard Otieno Mband are blood brothers. They 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 14<sup>th</sup> day of April 2022 at Lolwe Village within Siaya County, the accused persons jointly murdered one George Ouma Mband. The deceased is also said to be the elder brother to the two accused persons.
2. The accused persons pleaded not guilty to the charge against them and the matter proceeded to full trial. The prosecution called seven (7) witnesses in support of its case which is summarised herein below.

**The Prosecution Case**

3. Dr Paul Oloo Medical Practitioner's No A11826 testified as PW1 and stated that he carried out an autopsy on the deceased George Ouma Mband on the April 16, 2022 at 3am at Rangala Mission Hospital, which body was stiff and at different stages of rigor mortis but was well preserved. He testified that the death was within the past 24 hours. Externally, there was a stab wound on the left shoulder measuring 5 cm deep penetrating different layers of the shoulder into the left lung space. He further testified that the left auxiliary nerves and blood vessels supplying the left upper arm were all cut and



- that there was a stab wound on the posterior part of the neck 4 cm deep penetrating the skin. The Doctor found a cut wound on the frontal scalp extending to the left, 12 cm, not penetrating.
4. Internally, the Respiratory upper airway was normal whereas the lower airway showed a penetrating wound into the left lung, collection of blood and air and that the blood collected was 600 mls.
  5. It was PW1's testimony that in the cardiovascular system, the left auxiliary artery and vein was cut just below the lateral border of the left clavicle. He further testified that the layers of the heart and main heart vessels were all normal as well as the digestive system, genitor urinary system, nervous system, spinal cord and spinal column.
  6. Dr Oloo testified that as a result of his examination, he concluded that the cause of death was multiple stab wounds. He issued a Death Certificate No 0763659 and signed the postmortem Report. He established that the deceased had three stab wounds which all contributed to his death. He further testified that the likely type of weapon used in inflicting the stab wounds was/were sharp weapons. The postmortem was witnessed by three relatives of the deceased who identified the body of the deceased to him. He produced the Postmortem Report as PEx1.
  7. In cross-examination, Dr Oloo stated that the nature of a stab wound from a knife is different from that of a pen. He further stated that the nature of wounds showed sharp objects used like of a knife but not like a pen. He stated that there were two stab wounds with the one on the shoulder on the side towards the back - post laterally.
  8. PW2 Jane Agolla Mung'oma a resident of Lolwe testified and recalled that on 14/4/2022 at about 5 pm, she was at her home as her son the deceased, George Ouma, had returned home from Nairobi that very day while she was in her farm so the two never met earlier in the day.
  9. She stated that at 5 pm, the deceased found her preparing vegetables. It was then that that Benard emerged through her maize plantation and demanded saying, "*Wewe leta hiyo tite deed au leo utaona.*" PW2 testified that she told George to keep quiet and that Benard took a stone and threw it at George who also took the stone and threw it at Benard. She testified that they continued throwing stones at each other then George entered her house.
  10. According to PW2, George had a disability so he walked using a metal bar She testified that Benard entered her house and struggled for the metal bar with George trying to snatch it from George and that it was at that moment that Maurice emerged and said: "*wapi buyu mbwa leo tutamaliza. wapi Tite Deed*". It was her testimony that Maurice entered her house and cut George on his head and that Benard suddenly used a knife and stabbed George twice on the neck and once on the ribs. She testified that George fell as he was going out to bring the Title deed and his wife told PW2 to call a boda to take him to hospital.
  11. It was her testimony that when Maurice saw her he went and abused her, took her phone and threw it onto the house wall. She further testified that Benard went to George's wife and asked for a title deed then George's wife went to George and asked him where the title Deed was and he referred her to a drawer. It was her testimony that David Omondi went and broke the drawer and took out a Title Deed of the land which belonged to PW2's late husband after which Benard and Maurice left.
  12. PW2 testified that with the help of Oduor her step son and Consolata her daughter in-law, they got a boda boda, placed George on it and took him to hospital. She testified that on the way, it rained and that the deceased died so they placed him on the ground and the police were called. PW2 further stated that the police came and removed George's body to Ugunja and the family returned home and found that Benard and Maurice had escaped with their children and wives. It was her testimony that Benard,



- Maurice and George are her sons. She testified that their mother died and she took care of them. She further testified that her home and their homesteads are separated by fences.
13. Concerning the title deed, PW2 testified that George was given the title deed as the elder son to keep it on behalf of the family. She stated that her husband had given portions of land to each of the sons but no succession was done. She reiterated that Benard used a knife to stab George and that he never went to look for the knife. She admitted that she did not know the size of the knife but that she saw Benard stab George.
  14. It was her testimony that Maurice emerged from his home and joined the fray while holding a panga and wore a cap. PW2 testified that Maurice said huyu mbwa ako wapi and cut George on his head.
  15. PW2 identified her phone in court and stated that it was a black Techno of IMEI No 357917103959262 with no battery. She stated that before Maurice snatched her phone, he hit her with a club, then threw the phone on the wall and it broke. She stated that the battery and cover got off. It was her testimony that Maurice and Benard are normal and that they usually take some alcohol but on that day they were not drunk. She identified Benard as the 2<sup>nd</sup> accused and Maurice as the 1<sup>st</sup> accused. She further testified that the deceased's son Festus witnessed the postmortem. She further stated that she saw Bernard stab George although she could not identify the knife that he used.
  16. In cross-examination, PW2 stated George had travelled from Nairobi that day and arrived home in the morning but that she arrived when she was on her farm. She stated that she saw him arrive and go to his house at about 7am and that he left for Madeya at around 11am then went to greet her at about 5pm. She stated that on that day, Bernard was at Maurice's home. She stated that George had gone to repair his car tyre at Madeya.
  17. It was her testimony that she saw the village elder going to George's home. She clarified that she could see George coming from her house and that he only had his metal walking aid. She stated that George did not carry any panga or grinder. She maintained that Bernard was at Maurice's homestead. She further stated that she had no grudge with the 2 accused persons and that they loved her and she loved them.
  18. PW2 stated that she had seen and exchanged greetings with Maurice on that day while she was at the farm and Maurice was at his home. She stated that she saw Bernard emerge from Maurice's home and that it was the title deed that created the issue. PW2 further stated that George's land had one tittle with her land. She stated that the other title covers the portion of the 2 accused and their other brothers. She stated that the 2 accused kept calling George and asking for the title deed and that George had promised to come and hand it over on 16/4/2022.
  19. PW2 further stated that she knew that Benard saw George when the latter was going to Madeya because George actually passed through Benard's homestead. She further stated that she had seen Benard at Maurice's home from where he was talking.
  20. In re-examination, PW2 stated that Maurice emerged from his homestead carrying a panga and asked, "huyu mbwa ako wapi?" then cut George on the head.
  21. PW3 Consolata Aoko Ouma, the deceased's widow testified that on the 14/4/2022 at 5am, her husband George returned from Nairobi after which she made him breakfast and that later he went to greet his mother, Nyagem. She stated that she then heard Mama screaming and so she ran there and on arrival, she met 'Riat' Maurice Owino who had a panga and had cut George on his head.
  22. It was her testimony that she fell on Maurice and held that panga as he was beating her and that she took the panga into her hand then Meshack Omondi arrived and asked her for the panga. She testified



- that she left and found George had fallen down and was bleeding a lot. PW3 testified that Benard told her that he wanted a title deed and that she responded that she did not know where George had kept it.
23. PW3 testified that Benard threatened to stab her if she did not reveal where the title deed was so she asked George where it was and he told her that it was in a cupboard. She testified that Omondi went and broke the drawer and took out the title deed. It was her testimony that she told Nyagem to call a boda boda person to come and help take George to hospital upon which she saw Maurice take the phone from Nyagem and throw it on the wall as Benard placed a knife on her neck and threatened that he could kill her so she raised her hands and knelt.
  24. It was her testimony that Omondi arrived there with a title Deed and managed to escape and that they got a bodaboda from a nearby centre to come and take George to hospital. She testified that they placed George on a bodaboda but as they left, it was raining and the road was bad so they placed him on the ground then he died. She further testified that George had a metal to aid in his walk as he had arthritis.
  25. It was the testimony of PW3 that Owino, also called Maurice, took the metal that George used to aid him in walking saying that he would use it as an exhibit to claim that George had invaded them. She further testified that she was married in March 1990. PW3 identified Maurice in court as the 1<sup>st</sup> accused and Benard Otieno as the 2<sup>nd</sup> accused. She stated that George was the elder brother to the two accused persons.
  26. PW3 testified that she went to Nyagem where she found Maurice who had a panga in his hand and that he had already cut George. She stated that she also found Benard who was abusing George calling him “*mbwa hii*” and that she ran and held Maurice because she saw him with a panga which panga she gave to Omondi. She testified that when she was snatching the panga from Owino, Benard stabbed George with a knife. She stated that he stabbed him three times - twice on the neck and on the ribs.
  27. She maintained that she knew the issue involved the title Deed of their late father’s land although she could not tell its number. She stated that George had fallen down on the ground at Nyagem’s. She further stated that she knew Nyagem’s phone which Maurice threw onto the wall. It was her testimony that the police arrived at about 9 pm from Ugunja after being called by her in-law, Samson Oduor.
  28. PW3 further testified that her house and that of Maurice and Nyagem were close. She further stated that Benard also lives nearby. It was her testimony that she saw and held the panga which Maurice had in his hand. She stated that the panga had a black handle, was not very big and not very small. She identified the panga in court. She denied knowing where Benard got the knife which he stabbed George with and further that he also threatened to stab her. She testified that the fight took place until 6pm and that it started during daylight.
  29. In cross-examination PW3 stated that after she snatched the panga from Maurice, Meshack came and asked her for the panga and she gave him. She stated that after Meshack had taken the panga, Maurice came, asked her where the panga was and she told him that she had given to Meshack Omondi.
  30. PW4 David Omondi Mband testified that on the 14/4/2022 at about 4.30 pm he had gone to chase away wild animals from his farm when he heard screams emerging from their homestead as if there was a fight. He testified that he went there and found his brother Benard and George throwing stones at each other. It was his testimony that Maurice then got a panga and cut George on his head while Benard came with a knife and stabbed George on the backside.
  31. PW4 testified that George tried to escape but fell down then Benard started stabbing him on the neck while asking him where the tittle Deed was. He testified that he went to George’s house, took a hammer and broke the cupboard, got a file and took out a title Deed and returned with it. It was his testimony



- that he ran to Maurice's house as he had ran there and found him missing so he returned to where George was and gave the title Deed to Bernard.
32. It was his testimony that before that, Mama Nyagem tried to call a boda boda to come and take George to hospital but Maurice took the phone and threw it on the wall and it broke. He testified that Maurice took a metal bar and hit Mama Nyagem and when he asked Maurice why he was assaulting her, Maurice took the same metal bar and beat him up.
  33. PW4 testified that they looked for a bodaboda which came and they placed George on it as they followed walking but on the way he met the boda boda man returning saying he had placed George on the ground. He testified that George was bleeding heavily and that he checked on him and found him dead. It was his testimony that he asked for the cattle cart from the Dairy and they placed George on it. He further testified that he received a phone call from Samson Oduor, their brother, and who told him to leave George where they were as the police were coming.
  34. PW4 testified that the rain was pounding heavily and that the police from Ugunja came and took away the body. It was his testimony that George was his step brother whereas Maurice and Benard are his brothers. He testified that from the farm to where the screams were at home, he took about ½ hour. He further testified that there was broad daylight as it was about 5 pm and that he got there and found Mama Nyagem, Consolata, Benard and George.
  35. It was his testimony that Benard Otieno had a knife that looked like Maasai knife. He identified it as the one marked (MFI 4) in court. He further testified that when he got to the scene, Maurice jumped over the fence from his place (home) and asked, "wapi huyo mbwa" then, holding the panga, cut George on the head. He testified that the fight was over their father's title Deed. PW4 testified that George used a metal bar for walking which he identified in court and that Maurice used it to hit Mama Nyagem and himself. He also identified Nyagem's phone in court. PW4 identified the 1<sup>st</sup> accused, Maurice Owino and the 2<sup>nd</sup> accused Benard Otieno in court.
  36. In cross-examination PW4 stated that the knife looked like the one in court and that he had seen it prior to the date of the incident. He further stated that the deceased's wife snatched the panga from Maurice and gave it to Meshack, his nephew.
  37. In re-examination PW4 testified that Benard removed the knife from his waist and that the knife had a leather cover.
  38. PW5 George Obiero Kodia testified that on the 15/4/2022 at 9.30 pm or thereabout he was in his house as he was to travel on 16/4/2022 when he heard his dogs barking so he got from his bedroom to his sitting room where he saw his cousin Maurice Owino Mband who apologized for coming to his house at night and asked him if he knew what had happened at their home as he and his younger brother, Benard, had problems.
  39. It was his testimony that he got out and saw Benard then Maurice Owino told him that he wanted his advice on what he should do. PW5 testified that Maurice told him that it was at night and they were wanted by a mob and that they wanted to hide and sleep. He testified that he told them that he could give them a place to sleep then they could talk in the morning after which he took keys from his house, took them into a house and gave them a bed to sleep. He testified that they agreed that he locks them therein which he did.
  40. PW5 testified that at 2 am, he went to check up on them and called the and they responded. He testified that he was carrying solar lamp and that Owino woke up but Benard was still asleep. It was his testimony that he sat Owino down and advised them that they should surrender to the police which Owino



- agreed to but told PW5 that he was not sure if Benard would accept. He testified that Benard woke up and he told him the same thing which he accepted. He testified that as they were getting out to go the police station, he saw Owino carrying a metal bar (walking aid) and a panga and that Benard had a knife. PW5 identified both the panga and knife in court. He testified that he got scared of them carrying those items in case they turned against him and on their way out so he told them that they could not go with the weapons to the police station so he requested them to leave the weapons in the house which they did after which they proceeded to Sidindi Police Station.
41. PW5 testified that when Maurice and Benard came to his house, they asked him if he had heard what had happened at their home where they had fought and George Ouma died. He testified that he had heard people saying that George Ouma had been killed. He further testified that the deceased and the accused were his cousins as their grandfathers were brothers. He testified that he knew the deceased and accused very well as he was older than them and had known them since they were young. He testified that the house he had given the accused to sleep in was his son's and though it was outside his homestead, he had the keys to that house.
  42. PW5 testified that after reaching Sidindi Police Station, he left them at the report office as there was no police officer and went and woke up a police officer from his house who came and after explaining the reasons for their visit, he left Maurice and Benard in police custody. He testified that he later recorded his statement and that the police came and took the weapons from the house where the accused had slept. PW5 identified the accused persons in court.
  43. In cross-examination PW5 stated that Maurice and Benard came to his house at night on 15/4/2022 and that Maurice was ahead and he led him to where Benard was outside PW5's homestead. PW5 stated that he took them to his son's house and locked them inside that house. He further stated that when he went to the police on 15/4/2022 he did not tell the police that he saw the 2 accused carrying the panga, knife or metal. It was his testimony that when the 1<sup>st</sup> accused came to his house, it was dark and he did not see the weapons but that he saw them after they entered his son's house when he went with the lamp. He stated that he could not tell if these were used to kill George. PW5 stated that no other person gave him the panga saying it was used to kill George.
  44. In re-examination PW5 testified that he later informed the Police that Maurice and Benard had left the weapons at his house.
  45. PW6 No 88099 Police Constable Francis Gitau from the DCI Ugunja performing general investigations testified that on the 14/4/2022, a murder accident was recorded at Sidindi Police Post vide OB 5/14/4/2022 at 1830 hours. He testified that they proceeded to the scene with Corporal Ongera and Inspector Kirui.
  46. PW6 testified that the deceased had been removed from the homestead enroute to Inuka Hospital but died on the way. He testified that they interviewed members of the public, processed the murder scene and proceeded to remove the body to Rangala Hospital. It was his testimony that on 15/4/2022, they revisited the same scene at the homestead of the deceased and recorded witness statements from family members of the accused and the deceased who were brothers. He testified that the deceased was called George Ouma Mband and that they found that there was a land dispute in the family.
  47. It was his testimony that the deceased had scheduled to have a meeting to hand over the title in his possession and that the accused demanded for the title Deed but the deceased wanted to hand it over on Sunday the 17/4/2022. He testified that the deceased had come home from Nairobi and when he went to greet his mother, the 2<sup>nd</sup> accused saw him, went and demanded the title Deed and that is how him and the 1<sup>st</sup> accused attacked the deceased. PW6 testified that the accused had fled the scene.



48. PW6 testified that Jane informed him how in her attempt to call for a bodaboda, the 1<sup>st</sup> accused grabbed her phone and threw it onto the wall and it broke. He testified that the phone was a Techno 270 Black with IMEI No 357917103959270 and 357917103959262. He produced it as PEx2. He further testified that on the 15/4/2022 he revisited the scene and interviewed witnesses and that on the night of 16/4/2022 the 2 accused were escorted to Sidindi Police Post and after which PW6 and his colleagues went and took them into custody. He testified that the accuseds' family members came to Ugunja Police Station and identified them. He further testified that a postmortem was done on the body of the deceased at Rangala Mission Hospital on 16/4/2022 where Festus Ouma and James Njoroge, family members, identified the body to the doctor for postmortem.
49. PW6 testified that they recovered the murder weapons on 21/6/2022 at 1330 hours from Masanga West village from the homestead of George Godia who informed him that the accused went to his house on 16/4/2022, that Maurice had a panga and metal bar while Benard had a knife and that he housed them in the house in his homestead which is his son's unoccupied house. PW6 testified that George Godia had removed the items - panga and knife, from the small house into his main house in its porch and that he led him to the son's house which was 70 metres away where PW6 recovered the iron metal.
50. PW6 produced the panga MFI 3 as PEx4, the knife as PEx5 and the Carmel print porch as PEx6. He testified that the exhibits were not taken for forensic examination because of time lapse and that the deceased's blood was never taken for comparison and as the items did not have blood stains. He further testified that the witness George Godia did not handle the items properly as he was using the panga in his home for his own purpose. He testified that they had not recovered the title Deed as the accused refused to surrender them into their custody. PW6 identified the accused persons in court.
51. In cross-examination PW6 stated that the metallic bar was recovered from the house where the accused slept. He further stated that the other witnesses had mentioned these weapons but that only Godia was in possession of the weapons given to him by the 2 accused persons though he was not at the scene of murder.
52. PW7 Festus Otieno Ouma testified that he was the eldest son to George Ouma Mband, the deceased and that on the 14/4/2022 while at Hurlingham Petrol Station, his aunt Penina called him informing him that his father had been stabbed by his brothers. He testified that he called the area Chief Mr. Christopher Muliro seeking help but could not reach him. PW7 testified that after an hour, he received a call from his uncle Samson saying his father had died. He testified that he drove to Racecourse at his mother's place and at his brother-in-law's place and the next day they proceeded to Lolwe Village.
53. It was his testimony that he went to the nearby Jimbo Police Post and was directed to Ugunja Police Station where he met the DCIO. He further testified that he went to the morgue at Rangala Mission Mortuary and saw his father's body.
54. PW7 testified that on the 16/5/2022 at about noon, the postmortem was conducted on his father's body and that he witnessed the postmortem in the company of Richard Ongera DCI and James Kevin Mugweri Njoroge, his brother in-law. PW7 testified that he knew Benard Otieno Mband, his father's youngest brother and the second accused in the dock. He similarly identified Maurice Owino Mband.

### **Defence Case**

55. The accused persons elected to give sworn testimony.
56. DW1, Maurice Owino Mband testified that they never planned to kill their brother George Mband. He testified that on the 14/4/2022, he was in his farm with his wife and young child planting maize



- when he heard the sound of motorcycle and on checking he saw that it was George being carried to his home. He testified that shortly he saw a village elder going to George's and that they got out together and the village elder and approached the 1<sup>st</sup> accused and told him that George had called him saying he was travelling and that on 17/4/2022 there would be a meeting of all family members at his home when he would give them a title deed for the land.
57. DW1 testified that DW2 had sold part of their father's land and wanted to do succession so that he would give title to the buyer but the title was with George. He further testified that Benard used to call George all the time to bring the title deed but George told him to wait as he would come on April 17, 2022 to avail the title Deed. He testified that he also spoke to George because Bernard was so impatient and told him to avail the title Deed and that George promised that he would have a meeting on 17/4/2022.
58. DW1 testified that when the deceased learnt that the 1<sup>st</sup> accused had supported DW2 in selling the family land, the deceased demanded that the 1<sup>st</sup> accused return the bicycle that the deceased had bought DW1's son for transport to school, his Kshs 10,000 that he had lent DW1 as well as the deceased's plastic chairs. It was his testimony that at 2pm, he saw George and their brother David Omondi leaving the homestead and that he got information that they had gone to sharpen a panga at a local market and that Benard had gone to take alcohol.
59. It was DW1's further testimony that he called David Omondi and asked him about their mission and that David Omondi told him that they had gone to sharpen the panga to use to cut trees not for any other ulterior motive. DW1 testified that he questioned David Omondi because George used to have files for sharpening so he wondered why they had gone to the market place to sharpen the panga. He testified that Benard called him and asked if the Village Elder had left George's place and whether he had told him anything to which DW1 informed Bernard the 2<sup>nd</sup> accused to return so that DW1 tells him what he had been informed. He testified that DW2 returned at 3 pm and asked him about the title deed and he told him that George had said that he would give them the title deed on 17<sup>th</sup> April and that he, DW1 had seen George going to sharpen the panga.
60. DW1 testified that DW2 who was drunk started shouting saying that all that he wanted was a title deed not a fight as he walked away. He testified that he saw George follow Benard asking Benard for a mattress and Benard said that the mattress was not there as it was old and that he would buy one and return to George. He further testified that he then saw Benard picking and throwing stones at George and George also throwing stones at Bernard.
61. He testified that he followed but was distracted by a cow which had left the place where it had been tied so he went to deal with it when he heard screams. He testified that he ran to where screams were coming from, their step mother's homestead where he found Benard lying down and George lying on him with Benard crying saying George was biting him. DW1 testified that he saw George's wife who picked a panga. It was his testimony that as he went to separate George and Benard, he saw Benard holding a knife which cut DW1 on his left hand and that both Bernard and George left running.
62. DW1 testified that George went and sat down and Benard stood holding his knife in the hand. He testified that he realized that George was bleeding and that Benard told him that he had stabbed George when George was biting him. DW1 testified that he begged DW2 to give him the knife but DW2 refused saying he wanted the title Deed. It was his testimony that George's wife came and asked George where the title deed was and George told her after which she told Omondi where the title deed was.
63. It was his testimony that he went to find out where the fight had begun and found Kshs 10,850 on the ground and a metal plank. He testified that he gave the money to George's wife and told her to



get a vehicle to take George to hospital but she refused. He further testified that as it was raining, he told George's wife to get a boda boda but she refused and started calling so he grabbed her phone and threw it onto a wall because he was angry that George's wife had refused to call a vehicle to take George to hospital.

64. DW1 testified that he saw a call from George's son who warned him of consequences if his father died as he had received information of what had transpired. It was his testimony that he went to get herbs to treat his hand and Benard followed him and in the process, their sister from Kisumu called him asking him why he had killed George. It was his testimony that Benard said that he could commit suicide by taking poison or escape to a neighbouring country but DW1 persuaded him not to escape or kill himself as that was a police case and that he told DW2 that they go together so they left together.
65. DW1 testified that Benard behaved like he was possessed of spirits. He testified that they went to Barrack's house and that he saw people lighting torches so they entered the sugarcane plantation and hid till morning as they feared being killed. He testified that they went to the home of their cousin George Obiero and told him what had happened at home. He testified that he explained to him what Bernard was contemplating and he gave them a house where they slept and locked them inside there.
66. DW1 testified that in the morning, his cousin went and led them to Sidindi Police Station. He testified that they left a metal plank in that house as they were led to Ugunja Police Station. It was his testimony that the deceased's wife picked a panga from the ground during the fight between George and Benard. He further testified that the struggle between George and Bernard took place at the gate of Bernard and that he never participated in the killing of the deceased as he never quarreled with George who was his elder brother. He testified that the land belonged to their late father who had shared the land to them but no titles had been issued as they had not done succession. He testified that their father had discouraged them from selling the land.
67. In cross-examination, DW1 stated that they had no dispute as brothers and that their late father had prevented them from selling the land. He further stated that he had also told Bernard not to sell the land but he insisted. It was his testimony that he also told Bernard to be patient and wait for George to return home. DW1 admitted that he and Bernard went to George Obiero's home but denied asking him to help them escape to Tanzania. It was his testimony that he had no dispute with Jane and Consolata and other family members who testified and that they could not have framed him with this offence although there could be some minor disagreements.
68. DW2 Bernard Mband testified that both the deceased and DW1 were his brothers. It was his testimony that on the 14/4/2022 they did not plan to kill their brother George Mband. He testified that on that morning he was in his farm ploughing when he received a phone call and on checking his homestead, he saw George his brother with a child, carrying a bag as he passed through the home of Jane Agola.
69. He testified that after sometime, a friend called him and he left his wife in the farm and went to the house where he changed clothing and went to collect his debt from a neighbour then returned to his house and told his wife that he was going out. He testified that he passed by DW1's house who informed him that George had come but he told DW1 that he would return later. DW2 testified that he went to take alcohol at a friend's place from about 11.00 am. until 3.30 pm when he returned and passed by the homestead of DW1 who narrated to him what George had sent the village elder to tell him.
70. It was his testimony that he went to his home and found his door locked so he returned to DW1's home where he was given food. DW2 testified that he inquired from DW1 of George's whereabouts and DW1 told him that George had left with David and that he should be cautious as the 2 had gone to sharpen a panga. He further testified that he started going back to his home when he saw George and



- David and that David went towards him, met him and informed him that they had gone to sharpen a panga for cutting trees. DW1 testified that he told David to go and tell George to come as all he wanted was a title Deed not a fight after which he headed to his farm to prune his maize.
71. DW2 testified that George came and demanded for a mattress he had given to DW2 to which DW2 responded that it was torn after his children urinated on it. He testified that George informed him that he would not give them a title deed until they returned to him his items. He further testified that he picked stones which were at his house and threw them at George because George was holding a metal bar in his hand and a panga in his coat. He stated that the stones got finished so he ran towards his step mother's house and then to where Maurice –DW1 was and told him of what George was doing to him.
72. It was his testimony that George followed him and they started fighting until they got to his step mother's house. He testified that he was struggling with George and that he was drunk and that in the process, he snatched the panga but it cut George on the head. He testified that George's brother came and took away the panga. It was his testimony that George was biting DW2's finger so DW2 picked his pen knife and stabbed George after which Maurice came and separated them.
73. DW2 testified that George's wife came and asked him where the title Deed was and that Consolata sent David Omondi to go and bring a title deed. He stated that he stopped the fight and they went to their late elder brother's house. It was his testimony that he was carrying the title deed and that he went towards the river and returned and kept it in the house before returning to the river where he found Maurice. He testified that he received a call from his sister who lives in Kisumu telling him that he had killed George. He testified that he was saddened so he told Maurice that Injuli Jamaa amefariki. It was his testimony that they went somewhere and the son to their sister called Maurice saying they were coming to finish them.
74. It was his testimony that he told Maurice that they should not go home so he sent a nephew to tell his and Maurice's wife not to stay in the home as people from Kisumu would come to finish them. He further testified that they went and hid in the sugarcane plantation until the following day when they left following the river and stayed in a homestead before crossing the river to the home of George Obiero where Maurice explained what had happened and asked for help. DW2 testified that George Obiero advised them to go and report to the police and gave them a house to sleep in and woke them up at 3.00 am and they agreed to go and report the matter to the police station at Sidindi.
75. It was his testimony that he was saddened because he never planned to kill his brother. He testified that he was not armed with any weapon while George had a panga and a metal bar. He further testified that he sent David to go and tell George that he did not want a fight. He testified that George came to his-DW2's home and that Maurice Mband only went to separate him from George as they were fighting. He testified that the fight was over a title deed. DW2 stated that they were 9 sons in the home and that he had his own portion of land which he had sold part of it so he wanted the title deed so he could do succession and get title deed.
76. In cross-examination, DW2 stated that he had no previous dispute with the deceased. He further stated that in December 2021 he was in Migori when George called him saying he was with the Chief and that they wanted to fix beacons on the land and that he told him that they should go ahead as he would come later but when he returned George had left. He further stated that he was not aggrieved by what George had said that he would avail the title deed on 17/4/2022. DW2 stated that when the deceased came, he asked DW2 for his mattress. He further stated that he told the deceased to wait for the meeting of 17/4/2022 so that he avails the title deed as he did not want any fight. He further stated that when the title deed was brought, they stopped fighting.



77. Upon questioning by court, DW2 stated that he only stabbed the deceased once and that the injury on the head was caused when they were snatching the panga from George.

### **Analysis and Determination**

78. 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*".

79. The burden to prove all the aforementioned ingredients of the offence beyond reasonable doubt falls on the prosecution in all save 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. *Miller v Minister of Pensions* [1947] ALLER 372. 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 he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

80. The fact of death of the deceased was proved through the testimony of PW2, PW3 and PW4 all who saw the deceased's body at the scene where it was recovered by the police. PW7, the deceased's son testified that he identified the deceased's body prior to the postmortem which he witnessed. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. The Doctor who conducted the autopsy formed the opinion that the cause of death was multiple stab wounds. Accordingly, this ingredient of the offence was duly proved by the prosecution.

81. As to the unlawful nature of the death, 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 that referred to the case of *Gusambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held :

“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.”

82. The deceased in this case was found to have died from multiple stab wounds. The findings by Dr Oloo point to the fact that the attack against the deceased was vicious as to leave no doubt that the assailants had a clear intention of snapping life out of the deceased. The evidence before court points to an unlawful act that led to the death of the deceased.

83. There is no doubt as to the identity of the 2 accused persons as the people who attacked the deceased. DW2 admits as much and even goes further to admit that he stabbed the deceased. However, the 1<sup>st</sup> accused on his part denies attacking the deceased but claims to have attempted to separate the 2<sup>nd</sup> accused and the deceased.



84. This evidence by the 1<sup>st</sup> accused is weighed against the testimony of PW2, PW3 and PW4 all whose testimonies corroborate each other to the effect that they all saw the 1<sup>st</sup> accused attack the deceased. PW2 and PW4 both testified that they saw the 1<sup>st</sup> accused cut the deceased with a panga. PW2 further testified that the 1<sup>st</sup> accused took her phone and threw it to the wall as she was trying to call for help. PW3, the deceased's wife, testified that she found the 1<sup>st</sup> accused having already cut the deceased and that she fell on the 1<sup>st</sup> accused and managed to grab the panga from him.
85. The evidence by the prosecution is overwhelming when weighed against the defence proffered by the 1<sup>st</sup> accused. I find that both accused persons were responsible for the attack on the deceased.
86. 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.
87. The 2<sup>nd</sup> accused suggested that he was intoxicated when the attack on the deceased occurred having been drinking since 11am. 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 duly 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).
88. 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.
89. Since in the instant case there was no suggestion that the condition of intoxication the 2<sup>nd</sup> accused was labouring under was caused without his consent by the malicious or negligent act of another person, it was necessary to adduce evidence to show that at the time of the act, he did not know that the act was wrong or did not know what he or she was doing since by reason of that intoxication he was insane, temporarily or otherwise.
90. 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 or her was administered to him or her without his or her knowledge or against his or her will. Alternatively, that by reason of intoxication he or she was insane, temporarily or otherwise to the extent of not knowing what he or she was doing or that it was wrong. The law 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.”

91. 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. In the instant case, the 2<sup>nd</sup> accused bore the evidential burden of adducing some evidence creating the possibility that he was labouring under such a degree of drunkenness that he was rendered incapable of forming the specific intent essential to constitute the crime of murder. Once he adduces 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.
92. Although the 2<sup>nd</sup> accused adduced evidence that he had been drinking before this incident, there is no evidence that he was so drunk that he did not know what he was doing within the meaning of section 13 of The Penal Code. In such a 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.
93. To the contrary, in his defence the 2<sup>nd</sup> accused gave a detailed account of his version. He narrated how a fight broke out and how he stabbed the deceased when the deceased bit him. That conduct is not consistent with a person so drunk as to have lost the capacity of moral judgment. He carried out purposeful actions both before and after the incident. His conduct before and after the attack on the deceased demonstrated an awareness of the consequences of what he was doing. This demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the incident.
94. The evidence taken as a whole clearly shows that the drink the 2<sup>nd</sup> accused had consumed had not impaired his judgment in any way. The fact that an accused copiously took various amounts of alcohol at different venues cannot excuse the commission of a criminal offence unless it gives rise to a mental incapacity within the terms of section 13 of The Penal Code. Merely drinking alcohol does not count in law otherwise many killers would get off 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 him.
95. As for malice aforethought, Section 206 of the [Penal Code](#) provides as follows 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

96. In *Republic v Stephen Sila Wambua Matbeka* [2017] eKLR it was held;

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.

97. The deceased died as a result of the injuries sustained in his assault. Therefore, the accused persons had the necessary malice aforethought to kill the deceased. Of relevance to the joint charge herein are the provisions of Sections 20 and 21 of the *Penal Code*. Section 20 provides in Subsection (1) that:

- “(1) “When an offence is committed, each of the following persons is “deemed to have taken part in committing the offence and to be “guilty of the offence, and may be charged with actually “committing it, that is to say-
- “(a) “every person who actually does the act or makes the omission which constitutes the offence;
  - “(b) “every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
  - “(c) “every person who aids or abets another person in committing the offence;
  - “(d) “any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”

98. Regarding common intent Section 21 provides:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”



99. In the case of *Stephen Ariga & another v Republic* [2018] eKLR the Court of Appeal considered the definition of common intent in Section 21 of the Penal Code before stating that:

“What common intention implies was set out by the predecessor of the Court in *Wanjiru d/ o Wamerio versus Republic* 22 EACA 521 as follows: -

“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”

100. The court further observed that: -

“The ingredients of common intention were enunciated in *Eunice Musenya Ndui v Republic*, Criminal Appeal No 534 of 2010 (2011) eKLR as follows: -

“(1) “There must be two or more persons;

(2) “The persons must form a common intention;

(3) “The common intention must be towards prosecuting an unlawful “” purpose in conjunction with one another;

“(4) An offence must be committed in the process;

“(5) “The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful”

101. I find that the prosecution has proven beyond reasonable doubt that the accused persons jointly formed the requisite mens rea to kill the deceased.

102. In the result it is my finding that the prosecution has proved the charge of murder contrary to section 203 as read with section 204 of the *Penal Code* against he accused beyond any reasonable doubt. I find the accused guilty of the said offence of murder and is convicted accordingly.

103. Sentence shall be pronounced after records and mitigation.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2022**

**RE ABURILI**

**JUDGE**

