



**State v Odhiambo & another (Criminal Case E007 of 2022)
[2022] KEHC 17010 (KLR) (29 December 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E007 OF 2022
RE ABURILI, J
DECEMBER 29, 2022**

BETWEEN

STATE PROSECUTION

AND

FRANCIS OUMA ODHIAMBO 1ST ACCUSED

MICHAEL OYOMBRA MUYALE 2ND ACCUSED

JUDGMENT

Introduction

1. The accused persons herein are Francis Ouma Odhiambo and Michael Oyombra Muyale. 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 night of 3/2/22 at Siriwo Location, Central Gem sub-location within Siaya County, the accused persons jointly murdered one Stephen Onyango Oyier.
2. The accused persons pleaded not guilty to the charge and the matter proceeded to full trial. The prosecution called nine (9) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. Samuel Demba Ombogo testified as PW1 and recalled that on the 3/2/2022 at mid-night, he was in his house studying the Bible when he heard shouts from far calling for help and saying, "help me help me, Frank is cutting me" then his wife informed him that it was the voice of Onyango crying. PW1 in the company of his wife carried their respective D-light lamps and headed towards the gate where they saw a man, Onyango, lying down. That by that time, Onyango had stopped shouting for help and was just murmuring and had blood on his head.



4. According to PW1, the village elders had also arrived at the scene simultaneous with him and his wife. His wife and the wife of the village elder escorted Onyango to his house then PW1 went and slept for 2 hours without seeing his wife so he locked his house and went to Onyango's home where on arrival, he found Onyango being prepared to be taken to hospital. Subsequently, Onyango was taken to hospital and that PW1 and his wife and the village elder's wife left for their respective homes.
5. The following day on 4/2/2022 while PW1 was at home, a man called Onono went and told him that Onyango had died and advised PW1 to look for his workman, Michael Oyombra, who was in the company of the person who had cut Onyango. He searched for his workman who had by then left PW1's home and that he had only worked for PW1 for one month and left having asked PW1 for money on the 3/2/2022 and left in the evening. PW1 stated that his workman used to sleep in PW1's son's house and that as he searched for the said workman, he saw him walking towards PW1's home with Otiende, PW1's nephew. PW1 then escorted Michael to Onyango's home where they found another person, Frank, who was suspected to have been with Michael when Onyango was killed.
6. PW1 testified that because Frank had informed Eric that he used a panga to cut Onyango and that the panga was at Frank's house in the ceiling, Eric and other people went to Frank's house and recovered a panga which they brought to Onyango's home where PW1 and other persons were. They then tied the 2 people with ropes and that a mob arrived and started assaulting the two men - Michael and Frank, who were rescued by the police. PW1 identified Michael in court as the 2nd accused. He further testified that he saw the 1st accused, Frank, at Onyango's place for the 1st time.
7. In cross-examination, PW1 reiterated his testimony on where he was and what he was doing when he heard the shouts of the deceased and further stated that he did not know which Frank the deceased was mentioning. He further restated that he went to the scene with his wife and found the deceased just murmuring, looking a bit seriously injured. He stated that he did not hear Onyango mention Michael.
8. PW2 Rose Otieno Onyango who is also the wife of PW1 testified and reiterated the testimony of PW1 adding that on the material night as stated by PW1, she was awakened by screams from outside of a voice that she recognized as that of Onyango saying, "jameni mnisaidie, mnisaidie, Frank amenikata." She stated that they took their D-light lamps and walked towards the gate and that Onyango saw the light and walked towards their gate and fell down. It was her testimony that their village elder and his wife also arrived and that she and the village elder's wife held Onyango and led him to his home, where they woke up his brothers who started informing other family members of what had happened. She testified that Onyango's family looked for a motorcycle and took him to Yala Hospital but that later in the day, they received information that Onyango had died. PW2 testified that she did not know which Frank the deceased was referring to.
9. In cross-examination, PW2 reiterated that she and the village elder's wife led Onyango to his home where they woke up the family members to alert them of his injuries.
10. PW3 Kevin Ouma Odhiambo, the deceased's brother testified that on the 3/2/2022 at about midnight, he was asleep in his house when his grandmother woke him and told him that Onyango was injured. He got out and found Onyango with the village elder's wife and Rose and on inquiring from them, they informed him that Frank and "Omwami" had cut Onyango. The family then got means and took him to hospital but he died the following day.
11. PW3 stated that he knew Frank was Onyango's friend and that they went to his home and brought him to their home where they left him talking to Eric. PW1 testified that later, Frank told them that the panga he used was at his home so the people went and recovered the panga from Frank's home. He testified that "Omwami" was brought to their home after PW3 had already left.



12. PW3 stated that the panga was recovered from Frank's house although PW3 he did not go there to recover it. He stated that he knew that Frank and "Omwami" were friends with Onyango as they used to walk together, look for work together and drink alcohol together. He further testified that he had known Frank for a long time but had known 'Omwami' for a short period of time, in months. PW3 identified Frank and 'Omwami' in the dock as the 1st and 2nd accused, saying Frank was the 1st accused while 'Omwami' was the 2nd accused.
13. In cross-examination PW3 reiterated that he knew that Onyango and 'Omwami' were friends. He further told the court that he knew the 2nd accused as 'Omwami' and that is why he referred to him by that name.
14. PW4 Maurice Ouma Gweyo, the deceased's uncle testified that on the 4/2/2022 at 3 am, he was in his house when he was awakened by his mother who told him that Stephen had been cut. He went and lit a torch at Onyango and saw him with a cut on the head so PW4 looked for means and took Onyango to Hospital where he was admitted but that the doctor returned and informed PW4 that Stephen had died. He called home and informed the relatives of what had happened before leaving and on arrival, he found Frank and 'Omwami' arrested.
15. It was his testimony that Police from Yala arrived and rearrested the two. He testified that when they asked Frank on who cut Stephen, he said it was 'Omwami' while 'Omwami' said it was Frank who cut the deceased. He further testified that when they were asked on where the weapon used was, Frank said the panga was in his house in the ceiling so his brother, Eric Omondi, and other people went and recovered the panga from the house of Frank which panga was given to the police.
16. PW4 identified Frank as the 1st accused and 'Omwami' as the 2nd accused. He further testified that 'Omwami' worked in the village for PW1 while Frank was from their village. He further testified that the two were friends with the deceased.
17. In cross-examination, PW4 stated that when he was awakened by his mother, he went and found Onyango who never spoke a thing to him.
18. PW5 Eric Omondi Olinyo, the deceased's uncle testified that on the 4/2/2022 at 3 am he was in his house asleep when his mother woke him up and informed him that Onyango was injured and was near their home, on a path. It was his testimony that his mother and PW4 got a motorcycle and took the deceased to Yala Hospital where he was admitted but that later, PW4 called and informed them that Stephen had died. It was his testimony that when they found Onyango, he was not talking well but that he only heard him say that Frank had cut him.
19. PW5 testified that after receiving news from Yala of Onyango's death, they looked for Frank and found him at his home sitting so they brought him to their home and questioned him and he told them that the panga he used to cut Onyango was hidden in his ceiling in the mat. It was his testimony that he went and found Onyango's mother who led them to Frank's house where he, PW5 recovered a blood stained panga from the ceiling in a mat.
20. It was his testimony that he heard Onyango say that it was Frank who cut him. He further testified that the police were called and they went to the scene and took possession of the panga. PW5 identified Frank as the 1st accused and stated that he had known him for long as his village mate. PW5 also identified the panga which he recovered from the 1st accused's house and further stated that he recovered the panga with a black leather handle and that he recovered the panga in the presence of the 1st accused's mother.



21. In cross-examination, PW5 reiterated that the panga in court was the one that he recovered and gave to the police. He stated that this was so because he could identify it by the handle which was tied with black bladder on the leather handle.
22. PW6 John Tanda Manyasi a village elder testified that on 3/2/2022 as it was approaching midnight, he heard Onyango calling out for help saying “help, help” so he got out of his house with a torch. He stated that he knew it was Onyango’s voice because whenever Onyango used to drink, he could shout and as he was his village elder. He testified that he went to where Onyango was asking for help and saw him bleeding.
23. PW6 testified that as he had received the Covid-19 vaccine and was in pain, he went to sleep and his wife and his neighbour’s wife who were also present escorted Onyango to his home. He testified that the following morning, he had gone to bathe when he was called to go to Onyango’s home where he met the police and explained what he had witnessed the previous night.
24. In cross-examination, PW6 stated that Onyango loved taking chang’aa. He further stated that he was not the first to arrive at the scene where Onyango lay as Onyango’s home was slightly far but Demba’s home was nearer the place where they found Onyango. He stated that they were neighbours with PW1.
25. PW7 Dr. Bruno Okal, a Medical Superintendent at Yala Sub County Hospital testified that on 18/2/2022 he carried out an autopsy on the body of Stephen Onyango Oyier at Yala Sub County Hospital Mortuary between 11.10 am - 11.40 am. The body was naked, of a male adult African, well-built and nourished with a height of 180 cm. On postmortem changes, there was rigor mortis externally and that the left hand was bruised over the elbow joint measuring 5 cm. The left forearm had a bruise with a petechial discolouration (reddening over a skin surface). There was a bruise over the left, right knees measuring 5x2 cm and 3x15 cm respectively. The body had a sharp cut wound on the occipital bone measuring 6x1 cm and 5 cm deep.
26. Internally, the Respiratory system had no apparent changes while the Cardiovascular, digestive and genitourinary systems were all normal. The head had a sharp cut wound over the occipital bone 6x5 whereas the nervous system, spinal cord and spinal column were all normal.
27. It was his testimony that as a result of the examination, he found the cause of death to be pulmonary failure secondary to traumatic brain injury. He issued Death Certificate No. 1038351 and signed it. He extracted the right thumb nail, right index finger nail and right toe nail for DNA testing. He produced Postmortem Report as PEX 1.
28. In cross-examination, Dr. Okal stated that he was not able to determine the time of death as postmortem was done 14 days of the reported date of death which was provided as the 4/2/2022. He further testified that he did not collect any samples for chemical analysis to tell if the deceased was drunk at the time of his death although there were multiple bruises which indicated abrasions or struggles.
29. PW8 Godwin Khamala Waliama, a Government Analyst testified that on the 21/2/2022 he received an Exhibit Memo with some items from DCI Gem submitted by No. 113559 PC Collince Kemboy and that they were requested to conduct a forensic DNA analysis of 3 exhibits, namely:
 - a. A panga with a black leather handle wrapped in a brown envelope as Exhibit ‘A.’
 - b. Loose soil sample in a brown envelope marked ‘B’
 - c. Nail cutting samples of Stephen Onyango as the deceased in a clear plastic container marked as ‘C’



30. PW8 carried out a forensic DNA analysis of the given samples and found as follows:
 - i. The panga item 'A' was moderately stained with human blood.
 - ii. The soil sample was stained with blood of human origin.
31. PW8 proceeded to generate DNA profiles for comparison as per the back page of the Report and concluded that the DNA profile generated from the blood stains on the panga 'A' and blood stains on the soil 'B' both matched the DNA profile generated from the nail cuttings of Stephen Onyango the deceased person. PW8 prepared the Report on 22/6/2022, signed and sealed it. He produced the Report as PEx 2 (a) and Exhibits Memo as PEx 2 (b).
32. In cross-examination, PW8 stated that from the samples given, he did not lift any finger prints.
33. PW9 No. 113559 Police Constable Collince Kemboi, the Investigating Officer in this case testified that on the 4/2/2022 while at Yala, he was instructed by the DCIO Mr. Mbarani to accompany the OCS Yala Police Station and assist visit a scene of murder and rescue two males who had reportedly been subjected to mob injustice by members of the public at Siriwo Location, Central Gem Sub Location for allegedly being involved in the murder of Stephen Onyango Odhiambo. He proceeded to the scene and arrived at 12.00 pm and found Francis Ouma and Michael Oyombra, the suspects, had been rescued by the police and taken to Yala Police Station. He commenced investigations, recorded statements of witnesses and visited the scene. He found that the two accused persons were friends with the deceased and lived and grew up together with the deceased and did casual jobs together and that it was alleged that the three had drinks at a changaa den and the deceased got drunk and disagreed with the 2nd accused but there was no fight. It was alleged that the deceased was armed with a panga and so after drinking, they all left together and the deceased, after reaching near his home, declined to enter his house and instead followed the two accused persons for a fight. That the deceased confronted the two and a fight ensued between the deceased and the two accused persons who snatched a panga from the deceased and used it to cut the deceased leaving him for dead.
34. PW9 further testified that the deceased got up, went to a nearby homestead where the 2nd accused worked and resided and screamed for help mentioning that Francis and Michael had cut him using a panga. He further testified that the suspects went at large but were traced and arrested and the 1st accused revealed to one Maurice that he had hidden the panga used in the assault of the deceased at the 1st accused's home. PW9 produced the panga as PEx3.
35. He further testified that on the 7/2/2022 the accused were presented before Siaya CM's court vide Misc. Cr. E006/2022 where the police sought more time for investigations and to have the accused taken for mental assessment which was done and they were both found fit to stand trial.
36. It was his testimony that they also took samples from the deceased and the soil samples with blood stains and the panga to the Government Chemist. PW9 identified that two accused persons in court as the persons presented to them by members of the public and further stated that he did not know them prior to that day.
37. In cross-examination, PW9 stated that the deceased was a friend to the two accused persons. He further stated that he also established that the 3 were drinking together on the material day and that the panga belonged to the deceased and he had it in his possession and that it was the deceased who started the scuffle.



The Defence Case

38. Francis Ouma Odhiambo, the 1st accused gave a sworn testimony as DW1 and stated that on the night of 3/2/2022 at 7 pm, he went to drink alcohol as usual and found Onyango, whom he knew as a colleague and village mate, sitting on a bench and stepping on a panga. He testified that he greeted Onyango and continued with his own business. That he bought his alcohol and sat beside the deceased and that sometime between 9-10 pm, Oyombra also joined them carrying a Dasani bottle, bought alcohol for Kshs. 200, Kshs. 150 for himself and Kshs. 50 for DW1 and Onyango. He testified that Oyombra took his alcohol in a bottle saying he wanted to go and drink it from his house so they left for home and on reaching his residence, Oyombra asked DW1 to escort him to pick more money.
39. DW1 stated that Onyango stood at the fence but that as they walked towards Oyombra's residence, Onyango followed them from behind as they proceeded and passed by Onyango's home and he, Onyango, raised his panga saying that they would know who he was but they proceeded on to Oyombra's residence not knowing that Onyango was following them. He testified that on reaching Oyombra's place, they were surprised that Onyango was waiting for them ahead and that he raised the panga saying nobody should pass and that he wanted to cut Oyombra who fell on a fence and he also aimed at DW1 who in turn held Onyango's panga. He testified that Onyango was drunk but not very drunk.
40. DW1 testified that Oyombra told him to go home as Onyango had issues so they could not go to drink more. He testified that he went to his house and later his door was knocked at midnight by Onyango's uncle (Ouma) who said Onyango had been cut. It was his testimony that he got out and found Oyombra already woken up. DW1 testified that Oyombra gave Ouma Kshs. 500 but Onyango's kin decided to take Onyango back to his home instead of taking him to hospital so they left on a motorcycle and DW1 & DW2 followed them and saw them place Onyango in his grandmother's house and cover him.
41. It was his testimony that after 30 minutes, they returned to him asking for money because Oyombra had given them money so DW1's parents gave them Kshs. 550 after which they went away and left him to sleep. He testified that the following morning at 8 am, he went to find out how Onyango was doing and that he met Ouma who escorted him to Onyango's grandmother and showed him Onyango whom they said was dead so they tied DW1 and beat him saying they had killed Onyango.
42. DW1 testified that they called the police who came and arrested them and then brought to court. He stated that he never had any issue with Onyango as they had worked well with him and took chang'aa together without any issue. He further testified that he did not know why Onyango got agitated to chase them with a panga. DW1 stated that Oyombra never held the panga. He testified that he never had the intention of harming Onyango.
43. In cross-examination, DW1 stated that he and Oyombra had no issue. He further stated that after snatching the panga from Onyango, they went away. He further stated that he went away with Onyango's panga. DW1 further stated that he never saw any injuries on Onyango when Onyango's uncle came and called him out. He further stated that he did not know about the injuries as per the post mortem. It was his testimony that they were being asked to help take Onyango to hospital at midnight.
44. DW2 Michael Oyombra Muyala testified that, he worked and resided in the home of Samuel Demba and that on the night of 3/2/2022 at night, after work, he went to take chang'aa. He testified that he had a Dasani bottle with Kshs. 230 and that he found Francis Ouma and Stephen Onyango at the chang'aa den and greeted them. He stated that he bought alcohol worth Kshs. 150 for himself and worth Kshs. 50 for Francis and Stephen.



45. DW2 testified that he asked for cigarettes which were not available so Francis escorted him to buy cigarettes after which they returned and he continued taking his alcohol which he shared out to them as well. It was his testimony that he asked the two to escort him to get more money from his residence and that the three followed a path with him ahead, Francis following and Onyango behind. He further testified that Onyango was making noise so DW2 told him to speak slowly as DW2's boss did not know that DW2 was out of the home.
46. DW2 testified that he gave Onyango more alcohol which he took and that Onyango then threatened them saying that they would know who he was. He testified that Francis spoke to Onyango in Dholuo after which Onyango proceeded towards his home while drunk as they went towards his residence. It was his testimony that they then realized that Onyango had used a shortcut and got ahead of them and Onyango then raised a panga to cut him but he fell on the face and Francis held the panga and they struggled and fell down. He further testified that he told Francis that he could not go back to drink so he entered his residence.
47. DW2 testified that shortly, he heard screams and the voice of Stephen Onyango asking for help. He testified that his boss opened the door and went out with the torch and went to the gate as DW2 followed and saw Onyango bleeding. It was his testimony that his Boss's wife and they escorted Onyango to his home where his kin said they were taking him to hospital but first put him on the road. It was his testimony that he gave Onyango's uncle Kshs. 500 for treatment but Onyango's uncle said that he was to get a pickup as a motorcycle was not appropriate for Onyango.
48. DW2 further stated that later on, the uncles of Onyango refused and said Onyango should be returned home and go to hospital the following day so they placed him on a motorcycle and returned him to his home. He testified that Onyango's uncle said that Francis should also give some money since DW2 had given some money so Francis' parents gave Kshs. 550 and Onyango's uncle said they would take him to hospital.
49. It was his testimony that the following morning at 6 am, they went and saw Onyango at his grandmother's house, helped him to his house, changed his clothes and left and that later at 8am, he received information from his boss that he should go to Onyango's home which he did. He testified that Francis also joined them and the area Village Elder also came and that is when him and DW1 were tied with ropes and beaten up to the road until the Police arrived and rescued them and escorted them to the police station and later charged them with the offence herein. He stated that they had no intentions of killing Stephen Onyango.
50. In cross-examination, DW2 told the court that Stephen Onyango was drunk though he never injured DW2 but that he was injured by the mob. He stated that he fell down, stood and separated Onyango and Francis. He further stated that it was dark and he could not see if Onyango was injured. He stated that he tried to help by giving money for treatment of the deceased and that they helped the deceased to get treatment.

Analysis and Determination

51. I have considered the evidence for the prosecution and the defence. The main issue for determination is whether the prosecution has proved all the elements of murder against the two accused persons beyond reasonable doubt. The charge of murder is provided 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 persons - “*actus reus.*”
- c. That the said unlawful act of omission or commission was committed with malice aforethought - “*mens rea.*”
52. As regards the fact of the death of the deceased, there is no dispute, nor is there any dispute as to the cause of death. The deceased died of pulmonary failure secondary to traumatic brain injury. This was the testimony of PW7, Dr. Okal who carried out the postmortem on the deceased’s body.
53. 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 cause of death as stated hereinabove was pulmonary failure secondary to traumatic brain injury. It is trite that every homicide is presumed to be unlawful except where circumstances make it excusable for example in self-defence or in defence of property as was held in the case of *Gusambizi Wesanga v Republic* [1948] 15 EACA 65. The evidence before court points to an unlawful act that led to the death of the deceased as there is no evidence that the injuries sustained by the deceased were self-inflicted.
54. The question is whether it was the accused persons who unlawfully killed the deceased Stephen Onyango Oyier.
55. None of the prosecution witnesses witnessed the attack that led to the deceased’s death. In essence, the prosecution case was based on circumstantial evidence.
56. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:
- “However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
57. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:
- “Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the



guilt of the Subject; 9iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

58. In the instant case, PW1, PW2 and PW5 all testified that they heard the deceased scream saying that Frank had cut him. It is not in dispute that the Frank referred to by the deceased as per the aforementioned testimonies is the 1st accused herein.
59. The 1st accused's identity is further confirmed by the fact that PW3 testified that upon interrogation, the 1st accused revealed that the panga used in the deceased's attack was in his residence which turned out to be true as the said panga which was produced as an exhibit after forensic examination revealed that it had blood stains that matched the deceased's DNA was recovered from the house of the 1st accused. This was as per the testimonies of the testimonies of PW3, PW8 and PW9. PW8, the Government Analyst carried out examination on the said panga and found that the DNA profile extracted from the blood on the panga matched the deceased's DNA profile thus confirming that the recovered panga must have been used to cut the deceased.
60. PW7, Dr. Okal who carried out the deceased's autopsy testified that upon examination of the deceased's body, he arrived at the conclusion that the cause of death was pulmonary failure secondary to traumatic brain injury. In simpler terms, from the examination of the deceased, Dr. Okal was saying that the deceased died as a result of the sharp cut wound over the occipital bone on his head.
61. In their defence, both accused persons denied killing the deceased. The 1st accused went further and stated that the 2nd accused did not attack the deceased but that he, the 1st accused stopped the deceased from cutting him by holding the panga which the deceased wanted to attack them with.
62. It is not in doubt that the bloodied panga which had the deceased's DNA was found hidden in the home of the 1st accused who led to its recovery. It is also not in doubt that the deceased sustained a cut on the head and some bruises evidence of a struggle with his assailants.
63. With regard to the dying declaration made by the deceased that Frank was cutting him, which declaration was made to PW1, PW2 and PW5, in the case of *Philip Nzaka Watu v Republic* (2016) eKLR the Court of Appeal stated:

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

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



evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

64. I note that in his dying declaration, the deceased only mentioned the 1st accused. The 1st accused himself absolved the 2nd accused from any attack on the deceased. It is my finding that the statement made to PW1,2 & 5 by the deceased amounted to a dying declaration. In the circumstances, I find and hold that the prosecution has proved beyond reasonable doubt that the 1st accused was the one who solely unlawfully caused the deceased’s death.
65. The prosecution has failed to prove their case against the 2nd accused. I find the second accused not guilty of the offence of murder as charged. He is hereby acquitted of the charge of murder at this early stage.
66. The other question is whether the 1st accused person’s unlawful killing of the deceased was with malice aforethought. Section 206 of the *Penal code* provides that:
- “Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 harm is caused or not, or by a wish that that it may not be caused.”
67. In *Republic v Stephen Sila Wambua Matheka* [2017] eKLR it was held inter alia 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.”
68. In this case, PW7 found the cause of death to be due to be pulmonary failure secondary to traumatic brain injury. PW7 in his examination noted that the deceased had a sharp cut wound over the occipital bone measuring 6x5cm on his head.
69. The deceased died as a result of the injuries sustained in his assault. However, from the testimony of PW9 the investigating officer, and the defence proffered by the two accused persons, it is clear that it was the deceased who carried the panga to the drinking spree and it was him who attacked the two accused persons with the said panga. The two accused persons wrestled the deceased to the ground and the 1st accused overpowered the deceased and used the panga to cut the deceased thereby injuring him fatally. The accused persons’ evidence that deceased was the aggressor was not displaced by the prosecution witnesses. In addition, after the deceased was rescued and taken to his home, it is clear that his relatives did not take any mitigating steps to take him to hospital to avert a more serious situation. They dilly dallied and kept asking for money from the two accused persons and the family of the 1st accused and stayed with an injured person until the following morning when the deceased succumbed to the injuries.
70. In my humble view, the deceased provoked the two accused persons by threatening to cut them with a panga. The conduct of the 1st accused person after the incident which took place at night, where he



directed the deceased's relatives to his house where he had kept the offensive panga does not depict him as a person who had malice aforethought. The deceased received one single cut though deep and he had several bruises indicative of a struggle with the two accused persons herein to free themselves from his aggression.

71. In my humble view, the prosecution have failed to dislodge the defence evidence that the deceased was the aggressor and that he was injured when the 1st accused wrestled him to the ground as the 2nd accused tried to separate the two and in the process, the 1st accused used the panga which the deceased had and cut him on the head. The defence also testified how the deceased had threatened the two accused persons prior to the attack after a drinking spree where the second accused was buying alcohol for the trio and that evidence was not challenged at all.
72. Therefore, although the death of the deceased was unlawful, I find no evidence of malice aforethought on the part of the 1st accused who, in my humble view, acted in self defence to unarm the deceased and in the process, cut the deceased on the head thereby inflicting on him fatal injuries. The incident took place in darkness and there is no evidence that the 1st accused used excessive force in wrestling the deceased aggressor.
73. In the circumstances of this case, I am unable to find that 1st accused is guilty of a lesser charge of manslaughter considering the fact that the offence took place at night and the deceased was armed with the intention of harming the two accused persons.
74. I find both accused persons herein Francis Ouma Odhiambo and Michael Oyombra Muyale not guilty of the charge of murder of the deceased. I acquit them of the Information of murder.
75. Therefore, unless otherwise lawfully held, the two accused persons herein Francis Ouma Odhiambo and Michael Oyombra Muyale are hereby set at liberty forthwith.
76. I so order. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF DECEMBER, 2022.

R.E. ABURILI

JUDGE

