



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 52 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

GLADYS APONDI OSERO.....1ST ACCUSED

SOO.....2ND ACCUSED

JUDGMENT

1. Gladys Apondi Osero and SOO are charged with murder contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 27th December 2012 in Mumias District, within Kakamega County, they jointly murdered Fabiano Aura Wesonga, hereinafter referred to as the deceased. They pleaded not guilty to the charge on 14th February 2013. The hearing of the prosecution's case commenced on 3rd March 2014. The prosecution called eight witnesses.

2. Tabu Makokha testified as PW1. He stated that on 24th December 2012, he heard screams from the house of the deceased at night. He rushed there and found the first accused kneeling down while naked, with children screaming that SOO had killed their father. There was a solar light on, and from the door he saw the deceased lying down with a head injury, and there was an axe on the head. A crowd gathered and he was asked to get a vehicle to take the deceased to hospital. When he came back, the deceased had already been removed. He identified the second accused as the SOO that the children were referring to. However, on cross-examination he stated that he did not see SOO at the scene when he arrived.

3. JM, a child of twelve, a Standard 6 pupil at [Particulars withheld] Primary School, testified, on oath, as PW2. She a general overview of how the deceased, who was her father, and the first accused, who was her stepmother, and the wife of the deceased, spent the day. They had left home early on the morning of 12th December 2012, for Mumias to shop. They came back together at 7.00 PM. It would appear that the deceased got into the compound first and asked PW2 and the other children to check on the first accused who was still outside. The first accused came into the compound crying, and went to the grave of her late husband, and continued crying at the grave, complaining that her late husband had left her for a long time. After a while the first accused got into the house and went to where the deceased was. She told him that he had hurt her, and held him by the neck, asking him to strangle her, or else he would strangle him. Whereupon the deceased slapped her, and held her hands. The second accused then emerged from the first accused's bedroom, took an axe that was at a corner, gave it to an O, who declined it, after which the second accused struck the deceased on the head twice with it, on the back and side. The axe stuck on the head of the deceased, and he began to bleed. He collapsed and fell, then the second searched his pockets. A crowd formed, a vehicle came and the deceased, who was still alive, was removed to be taken to hospital. She recorded her statement at the Musanda Police Station.

4. During cross-examination, she stated that both her father and the first accused used to drink alcohol. She stated that she could not tell whether the deceased was drunk that day, adding that he did not appear to her to be drunk. She stated that when the deceased got home, he informed them that he had left the first accused behind crying. When she got into the compound she did not get into the house but went to the grave of her husband and began to wail. According to the witness, the first accused was drunk. After she got into the house, she found the deceased seated. She did not sit, instead she grabbed the deceased by the neck and a struggle ensued. The axe that was used belonged to the deceased. It used to be in a corner of his bedroom. The second accused had initially asked O, a stepson of the first accused, to use the axe, but he refused, after which the second accused then took the axe and cut the deceased with it. She stated that the second accused used to relate well with the deceased. She stated that the first and the deceased used to fight frequently. She conceded that the deceased had hit the first accused till she lost consciousness for some time. She stated that the second accused took the axe after the deceased held the first accused by her hands, and he held onto the axe for a while. The pair struggled till they fell down, and it was at that point that the second accused struck the deceased with the axe.

5. BM, a child in Standard 7 at [Particulars withheld] Primary School, born in 2000, testified on oath, as PW3. She stated that on 24th December 2012, the deceased, who was her father, left that morning with the first accused to do shopping at Mumias for an upcoming remembrance of the first accused late husband. She stated that they came back at 7.00 PM. It would appear that the deceased arrived first for he was said to have had asked the children to check on the first accused at the road. She was said to have come into the compound and went to wail at the grave of her late husband. She later came into the house, and held the deceased, who by then seated, by the neck, demanding

motorcycle keys. She was said to have demanded that he should strangle her, or otherwise she would strangle him. She slapped the deceased, whereupon the deceased held her hands. They struggled and he knocked her down. She was said to have called out to the second accused, wondering that she was being killed while he just sat there. The second accused then entered a bedroom, took an axe, and told O to attack the deceased with it, but O refused. The second accused then struck the deceased with it twice. She and PW1 started screaming, and a crowd formed. In the process she observed the first accused lick blood from the body of the deceased. The deceased was eventually removed, with a view to being taken to hospital. During cross-examination, she conceded that both the deceased and the first accused used to drink alcohol, and on that day both were drunk, then again at re-examination she said that he was not drunk that day. She denied that the deceased hit the first accused until she lost consciousness. She also stated that the deceased was not in the habit of fighting the first accused.

6. Gladys Akech testified as PW4. She was an in-law and neighbour of the deceased. On 24th December 2012 she heard screams from his house at 8.00 PM. She rushed there and found him lying on the floor with an axe stuck to his head. His wife, the first accused, and his children were present. The first accused was crying. She was informed that it was the second accused who had cut him. She screamed and neighbours came. They took the deceased to hospital, and the police came to the scene.

7. Pius Mukoya Wesonga was PW5. He was on transit from Nairobi on 24th December 2012. He was telephoned at 8.30 PM, and informed that a relative had been injured. When he got to the house, he found the deceased could hear but not talk. He saw the axe used to strike him. He was taken to St Mary's Hospital at Mumias and later to Moi Referral, where he died. Francis Oyula Okanga testified as PW6. He was informed at 9.30 PM on 24th December 2012 that the deceased had been cut with an axe. He informed the police and later that morning joined in tracking the second accused, who was said to have had escaped. He stated that the second accused came back home on his own, they arrested him and handed him over to the police. He visited the deceased at the St. Mary's Hospital and saw the axe still stuck on his head.

8. Sixties Omwolo Mukolwe was PW7. He was the local Assistant Chief. He stated that he was also telephoned on 24th December 2012 at about 8.30 PM by a village elder and informed about the incident. He took Administration Police (AP) officers with him to the scene. They found the deceased bleeding from his mouth and nose, and an axe stuck on his head. They were informed that it was the second accused who had cut him during a scuffle. He also had another injury at the back of the skull. The last witness was Mohamed Shiundu, who testified as PW 8. He was the village elder from the area. He stated that on 24th December 2012 at around 8 PM, he heard noises as if someone had died, He went to the direction of the noise which led him to the home of the deceased, where he found a crowd. He was informed that the parents at that home were fighting, when the second accused cut the deceased with an axe. He met the first accused, who pleaded with him to take the deceased to hospital, and offered him the keys to a motorcycle. When he entered the house he found the deceased lying face downwards, with a metal stuck in the middle of his head. He telephoned PW7 and arranged for transport for the deceased to be removed to hospital.

9. After PW8 testified no other witness was availed by the prosecution, despite the matter coming up several times. The matter came up on 3rd March 2014, 17th September 2014, 3rd November 2014, 13th July 2015, 7th October 2015, 10th February 2016, 11th May 2016, 29th November 2016, 23rd December 2016, 22nd May 2017, , 27th June 2017, 24th July 2017, 31st July 2017, 4th October 2017, 6th June 2018, 19th April 2018, 28th June 2018 and 9th October 2018, when the prosecution closed its case, citing lack of cooperation from the Officer Commanding the Mumias Police Station with respect to availing the police file and bonding witnesses. The accused persons were put on their defence.

10. The defence case commenced on 15th October 2019. Both accused persons testified, they gave sworn statements. The first accused, Gladys Apondi Osero, was the first on the stand. She described the deceased as her second husband, who she married after her husband, a brother of the deceased, died. He was a brother-in-law who inherited her after her own husband died. She described the second accused as her brother. She stated that on 24th December 2012, she and the deceased had travelled together to Mumias, and went back home together. They had gone to shop for her late husband's remembrance. When they got home, she took a baby to breastfeed, and began to disagree with the deceased over the memorial. At 8,00 PM, he began to beat her. He gave her a sharp slap, she fainted, and when she came to she found the deceased lying next to her. She did not know what had happened to him. He was on his back with his face up, and was asking why he was beaten, she found many people in the house, and heard that it was the second accused who had beaten him. The deceased had a small axe on his head. She stated that the same belonged to the deceased, and that she had seen him go into the house and get it. She said that he used to carry it around with him, especially when he was coming to her house. She stated that his house was three kilometres from hers. She looked PW8 within the crowd and asked him to take the deceased to hospital. PW8 called the police, who came and took the deceased away. He was still alive and talking as he was being taken to St. Mary's Hospital at Mumias. She was arrested at the St. Mumias Hospital. She stated that she had had no problems with the deceased, and they had no fights. She said that the deceased was drunk that day, while she was not. She said that she did not participate in causing injury to him. She had no grudge against him, and she had not conspired with the second accused to cause him harm.

11. During cross-examination, she stated that had not had a previous dispute with the deceased, and even that day they did not have a dispute. She stated that he beat her for the first time that day, saying that he did not have a habit of beating her. She stated further that he was injured by an axe, which belonged to him, and which he always had. She said that she lost consciousness after the deceased hit her, for about one hour, and during that period of consciousness she did not know what happened. When she regained consciousness, she found the deceased lying next to her with his axe on his head. She stated that when they began to quarrel the children, including the second accused, were in the kitchen and could hear the quarrel. She stated that the deceased and the second accused had been on good terms. When she regained consciousness, the deceased was still talking, although he did not say what happened to him. At the hospital at St. Mary's, he informed the police who were arresting her that she had not hit him. She said that except for the axe on his head, he was otherwise healthy, and she could not explain what had caused his death. She said that she never got to know or hear what had caused his death, she did not see the second accused after she regained consciousness.

12. The second accused, SOO, followed the first accused to the witness stand. He explained that when the deceased and the first accused went to shop at Mumias, it was him who was left behind with the smaller children. He said that the two came back at 6.00PM. the deceased arrived first, and the first accused followed later and began to breastfeed a child. The deceased brought kales, then left. He was asked to cook *ugali*, and was with the other children in the kitchen. Later he heard the deceased and the first accused, who were in another house, quarrelling. He went there and found the first accused on the floor, she had screamed and fell after fainting. The baby was taken away by one

of the children. When he enquired as to what had happened, the deceased made as if to beat him, telling him and the other children to get out. He saw an axe, which he took and hit the deceased with it on the head. He said that the deceased had held him by his clothes. After that he fled to his parents' home, and he was subsequently arrested the following day. He said that he had no grudges against the accused.

13. During cross-examination, he said that he was about twelve years when the incident happened. He said that he had not heard the two preciously quarrel. When he got to the sitting room after the y quarrelled, he found that she had fainted, but had no injuries. The deceased asked him to get out. They got out, but the small child got back to the sitting room. It would appear he went back to the sitting room, for he said that he met the deceased coming from the bedroom, the first accused was still lying on the floor, and nobody was coming to her aid, so he took the axe and hit the deceased with it. He said that he hit him with the sharp side as he was angry with him after seeing his sister injured. He said that he saw him leaving the bedroom, and he saw an axe and he took it and hit him with it. He said that he cut him only once, and did not check what happened to him thereafter, he just turned around and fled. He left the first accused still lying unconscious on the floor. He said that he had gone to the scene to assist the first accused, his sister, the deceased chased him away, and he hit him. He confirmed that the deceased was in good health before he hit him.

14. At the close of the oral hearing the parties agreed to make written submissions. On the date appointed to confirm the filing of written submissions, it transpired that the parties had not filed any. The matter was then given a date for judgement.

15. The elements of the offence of murder as defined in section 203 of the Penal Code are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. Section 203 of the Penal Code states as follows:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

16. The court in *Republic vs. Andrew Mueche Omwenga* [2009] eKLR, interpreted the provision as follows:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. there are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. they are:

(a) The death of the deceased and the cause of it;

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had the malice aforethought.”

17. In this case medical evidence was not tendered, for the prosecution closed its case before calling the pathologist who conducted autopsy on the remains of the deceased. There is, therefore, no medical evidence certifying the fact of the death. That then leaves me with the oral testimonies of the witnesses who gave evidence. PW1 and PW2 said nothing about the death of the deceased. PW5, the brother of the deceased, he was among those that took the deceased to hospital, initially at St. Mary's Hospital and alter to Moi Referral Hospital Eldoret, where he died. He stated that at Moi Referral Hospital the doctors told them that if they operated on him he would die, and therefore he died without being operated on. He confirmed that he died a day after they took him to the Moi Referral Hospital, after which they organised to have the axe removed from his head. A post-mortem was conducted thereafter., and he said that he identified the body to the doctor for that purpose. He was the only witness who testified on the time when the deceased dead, he was a brother of the deceased, and I believe that he was with the deceased in hospital, and could confirm that the deceased in fact died. I therefore find that the prosecution had, despite lack of medical evidence proved that the deceased died at Moi Referral Hospital.

18. On the second aspect of the crime, on the cause of the death, medical evidence was not provided as I have stated above. No pathologist testified, and, therefore, there is on record no scientific evidence of what might have caused the death of the deceased. Cause of death is usually proved through a post-mortem report after an autopsy examination of the body had been done. No such evidence was presented. What then I need to consider is whether the failure to furnish the court with that evidence struck a fatal blow to the prosecution's case.

19. Case law suggests that cause of death may be proved by other means, where medical evidence is unavailable. In *Republic vs. Cheya and another* [1973] EA 500, it was held that the fact of death and the cause of it could be established otherwise than by medical evidence. the court relied on the evidence of eyewitnesses to determine cause of death. In *Benson Ngunyi Nundu vs. Republic Nairobi* CACRA No. 171 of 1984, reported as *Ndungu vs. Republic* [1985] KLR 487, the Court of Appeal mentioned circumstances where cause of death could be established without medical evidence, such as where the deceased was stabbed through the heart or his head crushed or where the cause of death was obvious. It, however, cautioned that even in such cases medical evidence of the effect of such seemingly obvious and grave injuries should be adduced by experts as supporting evidence of the cause of death in the circumstances. See also *Kishonto ole Siololo vs. Republic Nakuru* CACRA No. 70 of 1995.

20. The judicial authorities that I have cited above, appear to state the position that where there is no medical evidence as to the cause of death, evidence from the other witnesses could be useful, with the caution that such evidence would only be reliable if it pointed to an obvious or patent cause of death, such a stab at the heart, or decapitation or crushing of the head. That is to say that even where the cause death appears somewhat obvious from the circumstances of the assault, medical evidence would still be required to explain the effect the injury inflicted would have had on the deceased, a contributing factor to his death. My understanding of it then is that the trial court ought not convict of murder where medical evidence is lacking, but perhaps, consider convicting of some other offence following the principle stated in section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya.

21. From the material before me, what emerges is that the appellant was hit with an axe on his head. The axe stuck on the skull, and even when he died a day or so later, the axe had not yet been removed. PW2 and PW3 testified that they were present when the second accused

struck the deceased with the axe on the head. According to them, he hit him twice with the axe, and the axe got lodged on the head. The second accused, who gave a sworn statement, said as much, save that he said that he had hit the deceased only once. Both accused persons, in their defence statements, confirmed that the deceased was in good health prior to that.

22. Can it safely be concluded that the deceased died of the cut wound inflicted on his head upon being struck with the axe by the second accused? It would appear that the cause of death was obvious, going by the nature of the assault. Indeed, PW5 had testified that the doctors at Moi Referral Hospital had informed him and other relatives that dislodging the axe from the head would have killed the deceased, and apparently no attempt was made to remove it, until after he had died. However, can a lay person conclusively assert that the cause of death was the injury inflicted by the axe?

23. In criminal cases, the burden on proof is cast on the prosecutor, and the standard of proof is beyond reasonable doubt. On the burden of proof in criminal matters, the court in *Republic vs. Ismail Hussein Ibrahim* [2018] eKLR, stated:

“In Kenya the doctrine on criminal justice is that an accused person under Article 50(2)(a) of the Constitution has the presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proved by the state beyond reasonable doubt. That burden of proof is well settled that it’s the state that bears the responsibility at all times.”

24. Of course, inherited the doctrine from the English Common Law. In *Miller vs. Minister of Pensions* [1942] All ER 372, Lord Denning said, concerning burden of proof in criminal cases:

“It need not reach certainty but it must carry a high degree of probability. proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflate the cause of justice. If the evidence is strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

25. Applying the principle of burden of proof to the matter of medical evidence, the effect would be that where no such evidence is adduced, but there is evidence of a grave assault, which suggests an obvious cause of death, it would prudent in this case to conclude that the cause of death was directly linked to that assault. The burden of proof was on the prosecution to prove the cause of death of the deceased. I believe that the prosecution discharged that burden when it presented witnesses who were at the scene when the attack on the deceased happened, who witnessed the deceased being struck on the head with an axe, which lodged on the head, and remained so lodged until he died a day later.

26. The third element of the offence of murder, is the role of the accused in the possible causation of the death of the deceased. The cause of death in this case was not proved scientifically, but the material on record would suggest that it flowed naturally from the act of the second accused of hitting the deceased on the head with an axe, so hard that the axe got lodged on the head and remained lodged there from the time of the attack until he died the next day at Moi Referral Hospital. The fact that it was the second accused who strike that blow, which turned out to be fatal, is not disputed. He was seen in the act by PW2 and PW3. He himself said, in his sworn statement in court, that he did it.

27. The fourth factor relates to malice aforethought. malice aforethought is defined in section 206 of the Penal Code, Cap 63, Laws of Kenya, 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, where 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 from custody of any person who has committed or attempted to commit a felony.”

28. Malice aforethought is the intention to be inferred from either some conduct or facts. Malice aforethought is linked to the third factor, the role of the accused in the causation of the death of the deceased. In this case, the act or conduct leading to the death of the deceased was attributable to the second accused, as concluded in the foregoing paragraph. What needs to be done at this stage is to look at that conduct against the provisions of section 206 of the Penal Code. Malice aforethought is the *mens rea*, or mental element, required for murder. Under section 206, it takes the form of either an intention or knowledge. The elements relevant to the instant case are those stated in section 206(a) (b) and (c), that an intention to cause death or do grievous harm or to commit a felony, and knowledge that the act or conduct that the accused person was engaging could cause death or grievous, accompanied by an indifference whether death or grievous bodily harm happens.

29. The deceased was struck with a small axe that got lodged on his head, leading eventually to his death. The head houses the brain, which controls the functions of the body, such as thought, memory, feelings and activity. It is therefore a critical body component, without which the body cannot function, leading to death. An injury to that part of the human anatomy can therefore have fatal consequences. An assault targeting the head, can be construed to be an attempt to cause injury to the brain, and it can be inferred that a person who attacks the head of

another with such an object as an axe has an intention to injure that person's brain, in order cause him to die or suffer grievous harm. It can also be inferred that a person who attacks another on the head with an axe is expected to know that such an attack could lead to death or grievous, and it can further be inferred that such an attack can only be carried out by a person who is indifferent to the consequences of his conduct.

30. How is malice aforethought to be determined? The court in *Rex vs. Tubere s/o Ochen* [1945] EACA 63, while giving guidelines on how courts should deal with situations where a stick was the weapon used to cause death, made the following remark on how to assess whether there was malice aforethought with respect to the use of certain weapons. It said:

“With regard to the use of a stick in cases of homicide, tis Court has not attempted to lay down any hard and fast rule. It has a duty to perform in considering the weapon used, the manner in which it is used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the use, say of a spear or a knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has, of course, to be judged on its own facts.”

31. What were the circumstances of the assault in this case? Although there is common ground that it was the second accused who hit the deceased on the head with an axe, there is divergence on the circumstances under which that happened. There are two versions, one by the prosecution and the other by the defence. The version by the prosecution was presented by PW2 and PW3. It is that the first accused and the deceased had a disagreement about a forthcoming memorial for the late husband of the first accused. She confronted the deceased, held him by the neck, inviting him to strangle her otherwise she would strangle him instead. It is not clear who hit the other after that, but there was a scuffle or struggle between them, which ended with both falling down, and it was while they were on the ground, with the deceased on top, that the second accused merged with an axe and struck the deceased with it.

32. The version by the defence, as narrated by the second accused, was that he and the other children, including PW2 and PW3, were at the kitchen preparing dinner, while the first accused and the deceased were in a separate house. He heard them quarrelling, and then he and the other children rushed to where they were. He found the first accused on the ground or floor, with the deceased hovering around, who then tried to shoo them away. In examination-in-chief, he said that it was at that stage that he grabbed an axe and attacked him as he wanted to beat him. during cross-examination, he said that after the deceased chased them, the children away, they went to the kitchen, but he went back to assist his sister, the first appellant. As he got into the main house, he saw the deceased emerge from the bedroom, and he, the second accused, was upset that his sister was lying on the ground unconscious and no one was assisting her, so he took the axe and struck the deceased with it and then fled.

33. Of the two versions, I find that by the prosecution more plausible. The injuries inflicted on the deceased were on his head. The physical statutes of both the deceased and the second accused were not given. However, the deceased was a full grown man, while the second accused was a twelve-year-old at the time, according to his testimony. The presumption that one may draw from that or the inferences one may make would be that the deceased was probably taller than the second accused. It is not plausible that the second accused could have struck the deceased on the middle of his head, while he was standing erect. The plausible version is that the deceased was at a lower level than the second accused when the attack happened, and that would explain his ability to strike him at the crown of his head. That would tally with the evidence of PW2 and PW3 that the deceased was attacked at the time he and the first were on the ground. Secondly, it would be unlikely that the second accused would have attacked the deceased while the deceased was standing erect, without the deceased striking back in self-defence or defending himself by shielding himself with his hands or other part of his body. The fact that the deceased was hit smack at the centre of the head.

34. The weapon used in this case was an axe. Axes are ordinarily used to split wood, and it is, therefore, capable of causing grievous harm. Any one employing it as a weapon against another can only be construed to intended to cause grievous harm, and malice can be inferred from its use. Secondly, the part of the body on which the injuries were inflicted. I mentioned earlier about the head and the brain, and emphasised on the sensitivity of that part of the body. An assault directed at the head can only be construed to be intended to cause death or grievous injury, for the head is a vital part of the body, for it houses the brain, which, in turns control vital functions of the body. A person who targets the head of another with intent to injure, can be said to have acted with malice. With regard to the manner the weapon was used. It hit the crown of the head, smack at the point where the brain resides. Secondly, the axe stuck on the head, presumably on the skull, denoting the force that was employed in the process. The other consideration is of course that the attack happened at a time when the deceased could not offer any defence, as he was then struggling with the first accused, and it was for that reason that the second accused was able to so easily access his head. I am persuaded that there was malice on the part of the second accused.

35. It may be argued that the second accused had no motive to kill or injure the deceased. The evidence placed before me pointed to a cordial existence between the deceased and the first accused on the occasions that the second accused visited or came to stay with the deceased and the first accused. It may be argued, therefore, that there could have been no motive at all for him to kill the deceased. Motive was said, in *Libambula vs. Republic* [2003] KLR 683, to be what makes a person do a particular cat in a particular way. However, motive is immaterial in criminal liability. That is stated in section 9(3) of the Penal Code, and has been pronounced to be so in several cases, including *Libambula vs. Republic*, but it is relevant where the prosecution's case is built around circumstantial evidence. See *Kabiru vs. Republic* [2007] 1 EA 107. The instant case is not founded on circumstantial evidence, and therefore the need to find the motive for the second accused person's conduct should not arise. What emerges though is that he was driven to act in the manner he did by the assault on his sister, the second accused person, by the deceased. That however is neither here nor there.

36. Although I have mentioned this while talking about motive, but it would appear that the second accused is raising the defence of defence. This is what he said in his oral testimony in court during examination-in-chief:

“The deceased wanted to beat me. He was telling me and the other children to go out. The small children were crying. I saw a small axe. I took the axe and I hit the deceased with it. I hit him on the head. The deceased had held me by my clothes”

And during cross-examination, he said:

“I and the small child went to the back to the sitting room. I found the deceased coming from the bedroom. My sister was still lying down. There was no one around to help my sister. I took an axe and hit the deceased with it. I hit him with the sharp side. I was angry after I had seen my sister injured. I saw him leaving the bedroom, and I saw an axe and hit him once I did not check what happened to him. I just turned around and ran away.”

37. The second accused appears to be relying on the two aspects of the defence of defence, self-defence and defence of another. With respect to self-defence, he said that the deceased wanted to beat him, while in respect of defence of another, he was angry that his sister was injured and got angry and attacked the deceased with the axe. The two do not, with respect, appear to sit well together. The first accused was not under attack when the second accused alleges he got into the house, depending on which of his two versions one believes, she had already fainted and was lying on the ground unconscious. At that point the deceased was not said to be doing anything to her to warrant any one to attack him in defence of the first accused. With respect to the alleged self-defence, the second did not give any reasons as to why the deceased would have wanted to beat him. The dispute that was there was between the deceased and the first accused, and it would appear that it did not touch on him at all for the deceased to want to beat him. In any event, the first accused said that he wanted to beat him at the stage when he, the deceased, was asking the children to get out of the main house. I am not persuaded, from the facts presented, that the deceased wanted to beat the second accused to warrant his being attacked so savagely with an axe. It would appear that the second accused was reacting, spontaneously, to the situation at hand, but it would appear that he overacted. His conduct can be classified as a defence of both self and of another, but the force used was excessive, as it was not commensurate to the danger that he faced or that faced by the first accused.

38. Guided by the decision of the Court of Appeal in *Wycliff Oluoch Odhiambo vs. Republic* Criminal Appeal No. 27 of 1998, where it had been established that the appellant had indeed stabbed the deceased and caused his death, but there was doubt as to whether he had malice aforethought, and his conviction was substituted with manslaughter, I do find herein that it was on account of the act carried out by the second accused that the deceased met his death, but there is doubt as to whether the second accused had malice aforethought. I am persuaded that the offence committed in this case was not murder but manslaughter, and I, accordingly, under section 179 of the Criminal Procedure Code, Cap 75, Laws of Kenya, find the second accused guilty of manslaughter, under section 202, as read with section 205, of the Penal Code, and hereby convict him accordingly under section 215 of the Criminal Procedure Code. Regarding the first accused, there is evidence that when the second accused struck the fatal blow, she had fainted or was unconscious. She did not appear to have had played any role at all in the killing, either by aiding the second accused in the assault or encouraging him. There is also no evidence that there was any conspiracy or collusion with the second accused. Accordingly, she is acquitted of the charge of murder under section 215 of the Criminal procedure Code.

39. To facilitate sentencing, I hereby cancel the bond given to the second accused, and direct that the relevant probation officer assesses him and his circumstances for the purposes of a pre-sentencing report, which should be filed in court within fourteen (14) days. The Deputy Registrar shall furnish the Kakamega County probation office with a copy of this order.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF JANUARY 2021

W MUSYOKA

JUDGE