REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 12 OF 2014

REPUBLIC.....PROSECUTION

VERSUS

GEORGE MUNENE KAILIKIA.....ACCUSED

JUDGMENT

1. The accused person was charged jointly with another, namely Stephen Kinyua with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of offence were that:-

> ***'On the 17th day of February 2014 at Mbarangaoru Sub-Location in Tigania East District within Meru County jointly murdered Jacob Munyiri.'***

2. Both accused persons pleaded not guilty and the matter was scheduled for trial. However before the matter proceeded for hearing, the Prosecution applied to withdraw the charges against the 2nd accused, Stephen Kinyua under Article 157 (6) of the Constitution and Section 82 of the Criminal Procedure Code. The Prosecution indicated that after reviewing the witness statements, they had established that there was no evidence to warrant prosecution of the 2nd accused. The application was allowed and the Court proceeded with the hearing against the 1st accused person. The Court will hereunder reproduce the evidence of the parties.

Prosecution's Case

3. Prosecution Counsel for the State was Mr. Maina and later Mr. Namiti. In his opening statement, he stated that on 17th February 2014, the deceased was attacked on the way to Mikinduri by the accused, with a panga and left for the dead. That his wife was informed of the incident and she rushed to the scene and found that the deceased had died. The Prosecution indicated that they would be calling 7 witnesses. The proceedings were interpreted in Kimeru, the language the accused person understood.

PW1

4. PW1 was Rose Wanjira, who gave sworn testimony. She stated that she hails from Anjuki Sublocation in Mikinduri and that she is a business lady operating at Mikinduri market. That she recalls on 17th February 2014 at about 6.00am, her husband, the deceased, went to Kariga to collect material for her and that he used their motor bike. That he was supposed to take about 50 minutes for the round trip but he overstayed. That at about 8pm, Sam came and informed her that he had received a call from Mbaranga to the effect that someone had been attacked and killed and that the victim looked like her husband. That she tried to call her husband but his phone couldn't go through. That she decided to go with her son Moses Thuranira to the scene and that they took Sam's vehicle and accompanied by another neighbour, to Mbaranga. That when they arrived at the scene, they found the body of the deceased on a wheel barrow and that she confirmed that it was his (her husband's) body. That the police recovered the body and took it to the mortuary. That after 2 days, on 19th February 2014, Kaberia, his uncle came home with the deceased's ID and wallet and he told her that he had recovered them from the deceased's body. His phone was never recovered. That on 21st February 2014, they went to the police station and made their statement. That she identified the helmet belonging to the deceased. That later, postmortem was carried out and she identified the body. That when they went to Mbaranga, they found that a young man had also been arrested. She identified the helmet in Court which was marked as MFI 1. She said that she had never seen the person who was arrested and she cannot recognize him now even if she sees him. She only saw him in Court.

5. On cross-examination, she said that the police recovered the body that very night and that she does not know the police station they were from.

PW2

6. PW2 was Daniel Kibare who gave sworn testimony. He testified that he hails from Mbaranga Sublocation of Mbaranga Location in Karama Division. He said that he was the Chief of Mbaranga/Urru Location. He said that he recalls on 17th February 2014 at about 8.00pm,

he was called by a lady called Dorcas who informed her that there was someone who had been badly injured after an attack in her village. That he went with the CPL Silas Nabea and when they reached, they found a crowd of people and that there was someone who had been badly injured with his motor bike besides him. That he called Muthaara, the OCPD and people informed him that the deceased was a businessman from Mikinduri. That the police recovered the body and took it to Meru Hospital Mortuary. That he returned home thoughtfully and that people were saying that George Munene was the one who had perpetrated the killing. That he knew George. That he called Stephen Kinyua and asked him the whereabouts of his friend George Munene. That Stephen told him that it was George who had killed the deceased with an axe. That he went and arrested George from his home and brought him to the office and called the police. That he interviewed George Munene about the incident and he informed him that he and the deceased had a relationship with a girl in the home where he found the body of the deceased. That the police came and re-arrested George and he was taken to Muthaara Police Station. That George told him that he used an axe. That Stephen Kinyua went into hiding after he heard that George had been arrested but he was brought to his office and went to the police. That, he, Stephen Kinyua led the police and himself (Chief) to his home where the panga was recovered and Kinyua was arrested. He said that he thereafter made his statement. He identified George Munene and said that he was a casual labourer. He said that the village where the deceased was murdered ***abouts*** a forest and that when the panga was recovered, it did not have any blood stains. He identified the panga which was marked as MFI 2.

7. On cross-examination, he said that when he arrived, the deceased was already dead and that he never saw the accused at the scene and Stephen Kinyua was also not there. That the police from Muthaara Police Station recovered the body and he went to the scene with CPL Nabea of AP services. That it is on the following morning that he called the police to come and re-arrest the accused and that he did not accompany them. That he was there when the panga was recovered from Kinyua. That after his re-arrest, he was taken to the police station. That in his statement, he stated that upon his arrest, he led them to his sister's place where an axe was recovered and that this was on 18th February 2014 and that his sister's home is within his (Chief's) jurisdiction. He said that the sister is called Makena but he does not recall her other name. That the accused has another sister by the name Alice Kaari and that it is in Kaari's compound that they went to and that Kaumi is the name of the accused's mother. That he does not recall whether they went to the home of the accused. That the police asked for the axe that the accused had used and he led them to his sister's home, Kaari. That he could not recall the police officer he was with but he recalls that Serem was one of them. That they never told the accused to ask for an axe and neither did they tell him to borrow an axe from his sister and that they found the sister at her home and she produced the axe. That it is not true that they found an axe outside and that they told them to pick it and give it to them. That the police took the axe. That the axe was a small one.

8. He also said that he knows the home of the girl called AK and that she is the one whom the two, deceased and accused were dating that led to the death. That they found the body near the home of that girl. That after arresting the accused and recovering the axe, he did not accompany the police and he knows that A was arrested on that day and later released. That he had never seen the deceased before that day. That it was him and CPL Nabea who were the first people of authority at the scene. That they made inquiries about the incident and none said that they saw the accused assault the deceased.

9. On re-examination, he said that he went to the accused's home because he got information from Kinyua and that it is the accused who led them to his sister's house for the axe, which he saw. That later, Kinyua told him that was his panga, PMFI2 that was used to kill the deceased and not the axe that the accused had led the police to recover.

PW3

10. PW3 was Patrick Maoroe who gave sworn testimony. He said that he hails from Karama/Mbaranga Sub Location, of Mbaranga Location in Karama, Tigania East and that he is a farmer. That he recalls that on 17th February 2014, at about 7.30pm, as he was coming from Kejo Shopping Centre, he passed his brother's home called Muthae and his son, Pius told them that someone had been attacked and that when they went to the scene, about 100 metres away, they found someone who had been cut at the back of his neck. That he got a lesso and tied the wound and they put him on a wheelbarrow and he picked his helmet and motor bike which had a cut on the back and kept them at Mwika's, his brother's home. That they wanted to take him to hospital but he died and that they called the Chief and reported the incident and the police came and took the body to the mortuary. That he later heard that it was George Munene who had killed the deceased and that it was rumoured that the deceased and George were quarrelling over a woman. That he knows the two and the deceased was a cake business man and George is his neighbour. That the girl they were quarrelling over is A and that the distance between A's home and the scene of crime was 30 metres. A was a secondary school girl. He identified the helmet MFI as the one which had a cut on the back. He said that George is his neighbour and he had no grudge with him. He identified George as the accused person.

11. On cross-examination, he said that he arrived after the incident had occurred and that at that time, he did not hear anyone state that he saw the incident happen. That the incident occurred in Kejo village and that there is a hotel at Gaitho Trading Centre and that there were 2 canteens. He first said that he could not remember the owners but later said that the owners were Kailemi Mutwiri and Stephen M'mboro. He said that he does not know Joseph Kinoti. He reiterated these statement in re-examination.

PW4

12. PW4 was Dr. Maria Muthoni Mwangi who gave a sworn statement. She said that she is a medical officer in charge of Meru Teaching and Referral Hospital since July, 2016 and that she graduated with an MBChB from KIU in 2012. She had a post mortem report in respect of Jacob Munyiri undertaken on 24th February 2014 by Dr. Koome Guantai who is at the moment undertaking post graduate studies. That she worked with him until last year and she understands his hand writing and signature. She said that the body was of 5'9' and of good physique of 37 years old and of an African male. That there was a stab wound on the left clavicular area extending deep into the neck and that internally, the aortic artery carotid and subclavia was severed. That is was opined that the cause of death was exsanguination – bleeding out due to severed carotid and aortic artery. That the death certificate was No. 556181 signed and stamped by the hospital stamp. She produces it as PExh 1.

PW5

13. PW5 was SSP No, 230323 George Mutonya who gave sworn testimony. He said that he is currently attached to DCIO Kilindini,

Mombasa. That in 2014, he was the DCIO Tigania East and he participated in investigating the case and on 17th February 2014, there was a report of murder by a Chief of Mbaranga, David Kiboore. That he assigned PC Serem Kipkumi to visit the scene and brief him and that he came with the Chief and a suspect. That he also came with a helmet and a panga which he told him was the murder weapon and that it is PC Serem who investigated the case.

14. That after interrogating the suspect, George Munene, the suspect wanted to confess the offence and he could not have taken his confession alone and he asked him whom he preferred to be around. That he told him he wanted to confess in the presence of his mother. That he made the mother to be brought to the station and told her why she had been summoned and said she had no problem. That he asked the accused if he still wanted to confess and that the accused preferred Kiswahili in the confession. That he cautioned the accused that whatever he would say would be taken down in writing and would be given in evidence against him. The accused said he was ready. That before taking the confession, he read the allegation to him and he also told him the sentence following which he took the confession in Kiswahili and in writing. That the accused told him that he killed the deceased because they had a dispute over a girl by the name of AK.

15. That PC Serem took statement of several witnesses. He confirmed that it was him who had taken the statement that was before him and that he recorded it in Kiswahili and that it bears the signature of the accused and it also bears his signature. That he captured the same in the presence of the accused's mother, Susan Kaumi. He produced it as an exhibit together with a typed copy as exhibit PExh 4 (a) and (b). He said that the items that were recovered included a helmet and a panga. He identified them. He said that he established that the accused knew the deceased as a business man selling cakes and that the girl who was being fought over declined to record any statement. He said that he did not know the accused before the incident.

16. On cross-examination, he said that PExh 1 has no special marks to show that it belonged to the deceased and no one else and that it was handed over to him by PC Serem. That when Serem went to the scene, he believes he did not find the body. That the offence was committed at 7.30 pm and that the first call to Muthaara Police Station was made at 23 hours and the officers went to the site the following morning approximately 10 hours after the incident and that it is the Chief who had picked the helmet form the scene. He said that he did not see the body of the deceased. That the postmortem report states that the body of the deceased had a stab wound on the left clavicular region and if it was hit at that point, the helmet would not have been cut with the panga. He said that when the panga was brought, it had been washed and that the panga was not dusted for fingerprints as it had been interfered with. He said that he has no forensic evidence to show that the accused handled the panga. He said that he does not know where the axe mentioned in PC Serem's statement went and he was not there when the accused was re-arrested. He confirmed to be unaware of the details of the re-arrest and recovery of the axe. He confirmed that PC Serem states that he had interviewed the accomplice; and that the accused said that the deceased had kicked him when he met him with the girlfriend. He said that he recorded the confession on 25th February 2014 and that the mother to the accused did not sign the confession and she was supposed to record her own. He said that he had left for Nairobi when the accused was brought to the station and he recorded it afterwards after they got orders allowing them to hold the suspect for more time. He said that according to PC Serem's statement, he, PW5 was out of station and it took some time to record the accused's statements and that by the time of recording, they had changed their heart but through confessing, George excluded his friend from the offence. He said that he recorded the confession and he still insists that the panga was the murder weapon. He said that he does not have the axe.

17. During re-examination, he reiterated what he had already stated. That was the close of the prosecution's case. By a Ruling delivered on 12th August 2020, the accused person was placed on his defence.

Defence Case

18. George Munene Kailikia, the accused person was his only witness. The Court reproduces his evidence verbatim as follows: -

> ***"I come from Kirima in Tigania East Sub-county. I am a tea farmer. On 17th February 2014 I was at Gikomoro in Tigania. I had gone to pick AK from [particulars withheld] Day Secondary. She was a student and it was time to get out of school and go home. I picked A at about 6.00pm. We went home walking. We proceeded well but at [particulars withheld] Village we met with a motorcycle rider. The rider stopped the motorbike. We went past him. He stopped the motorbike and started following us towards A's home. We got at A's home and the motorbike rider came and parked outside the entrance. We went into the home and the rider remained at the entrance. On the back of his motorbike he had carried an axe. When we met, he never said anything to us. He stopped the motorbike. When we got into A's home, I did not sleep there. I left at 7pm. When I was leaving, the motorbike rider stopped me when he saw me. He took out the axe and started chasing me telling me that the girl was his and he intended to pay dowry. He continued to chase me and I ran away while screaming. He threw the axe at me when he could not catch up with me. The axe hit me on my back. The axe was a small one, used usually for protective weapon. It is usually carried by security guards. After hitting me with the axe, I fell down on the ground and the rider was able to catch up with me. When I got up from the ground, I took the axe while on the ground and at this time, the rider was almost reaching where I was. When the rider saw that I had taken the axe, he turned and started running away towards where he had left the motorbike. As I was feeling pain where the axe had hit me, I threw the axe at him and ran away. I knew the rider before. I had met him while I was with A before and the man told me to keep off [particulars withheld] village where A lived. He had told me A was his wife and he intended to marry her. After throwing the axe at the rider, I ran away and went home and I did not leave home until the following day at 9.00 am. At 8.00 am that morning, the area Chief had sent one Erick M'Itabare, a neighbour and told me not to leave home until the Chief came. At 9 am the Chief came and asked me to accompany him to Mbaranga Chief's Office. At Mbaranga, the Chief asked me to stay with another person, Kalwembe. I knew Kalwembe as an Assistant Chief. We met with Kalwembe up to his home and at his home, he gave me a cup of tea. We drank. While there, the Chief called him and told him to go with me to the Chief's office. At the Chief's office I was handcuffed. On inquiry form the chief I was told that I had killed. Since then, I was arrested and detained at Muthage Police Station. When the police came, we went to A's home. At A's home, the police arrested A and we went with her to my home at Kirima. They told me to produce the axe which I had and I told them that I had not killed anyone. There is no axe that was recovered at my home. They told me to go and look for an axe in the village and give it to them. They did not say why I should give them an axe. I told them that we should go to my sister's home. My sister is Alice Kaari. When we got there we did not find anyone at home. We opened the gate and we entered and found an axe, the kind that is used for cutting firewood. The police told me to take the axe and after doing so, they put me into the police vehicle and brought me to Meru Prison. A was released at the Mbaranga Chief's Office. I was then charged with this offence which had***

been charged with another Stephen Kinyua and his charge was later withdrawn. When I threw the axe at the rider, I never knew that anything had happened. When the rider had told me not to be seen at the village, I did not take it as a threat. I did not intend to kill him. I threw the axe because I felt pain when he hit me with the axe and I decided to throw the axe at him also."

19. On cross-examination, his testimony was as follows: -

"A is a girlfriend to me. She went to [particulars withheld] Day Secondary School. She was in Form 2. She was 21 years. The motorbike rider was not known to me by name. I had seen him, when he told me that he did not want to see me in the village. The person is dead now. He is the one who threw the axe at me. While I was on the ground, I took the axe and I threw it at him. I did not report the incident as I decided to save myself and report the next day. At this time, A was at the gate and when she saw me being chased by the rider, she went back into the house. A ran away from home after the incident. I did not know where she went. I know David Kibore. He is the Chief. I did not report the matter as I had been arrested and been handcuffed."

Prosecution's Submissions

20. The Prosecution filed submissions dated 15th June 2021. In their submissions, the Prosecution, relying on the case of ***Nyambura & Others vs R (2001) KLR 335*** stated that they had proved all the ingredients of the offence of murder. They submit that from the evidence tendered, it is the accused who injured the deceased, and which injury led to his demise and that PW2 also testified that the accused told him that he was the one responsible for the death of the deceased, which fact the accused also disclosed to PW5. That in addition, during his defence, the Accused did not object to the fact that he was at the crime scene together with the deceased. That the accused also confirmed that he injured the deceased and this shows that he committed the unlawful act.

21. Citing the definition of malice aforethought under Section 206 of the Penal Code, they submit that the accused person knew that the injury he inflicted upon the deceased was fatal and would have led to his death. That if the accused person saw that he was in danger, the best thing to have done was to run away. They submit that the accused stated that he was acting in self defence but based on the injuries sustained and the nature in which the accused approached the deceased without being provoked, it goes without saying that the accused did not act in self defence. They rely on the case of *Ahmed Mohammed Omar & 5 Others v Republic (2014) eKLR* and the other case of *IP Veronaica Gitahi & Another v Republic MSA CA Criminal Appeal No. 23 of 2016 (2017) eKLR*, they submit that the defence of self defence is not available to the accused since there was no imminent danger and that if at all the deceased had attacked the accused, the accused would have produced either a P3 form, treatment notes as well as an OB extract to prove the same. That additionally, the Court should take into account the serious nature of the weapon used and the manner in which it was used to inflict the injuries. They urge that the accused person is guilty of the offence of murder and should be convicted.

Defence Submissions

22. The defence filed submission dated 28th May 2021. In their submissions, the defence urge that none of the prosecution witnesses stated that they witnessed the commission of the offence and this shows that their evidence does not amount to proof beyond reasonable doubt. Concerning the confession that was introduced by PW5, he submits that this is not admissible because in his opening statement, PW5 stated that *"I am the abovenamed. I am currently the DCIO Kilindini, Mombasa. In 2014, I was the DCIO Tigania East. I participated in investigating this case…."* He cites Section 25 A (i), which provides for admissibility of confessions or PW5, having participated in the investigation of the case, was not the one to take the confession. He further urges that there was no evidence on record to show that the mother of the accused present as a third party of the accused's choice.

23. He submits that he told the Court that as he was walking with A to her homestead, they met the deceased who was on a motor bike and on seeing them, he stopped and started walking to their direction and that he (accused) went with A to her homestead and stayed there for about 30 to 50 minutes and on his way out of the homestead, he saw the deceased standing near A's gate and that is when the deceased who was wielding an axe started chasing him and he ran for his life. That the deceased drew his axe at him but unfortunately, it missed him and that the accused picked up the axe and threw it and it hit the deceased at the back of the head. He thus urges that he was acting in self defence.

24. He states that since there was no eye witness, the only evidence as to what happened at the scene is his. He states that the deceased stood outside A's gate waiting for him and this is a clear indication that he (deceased) was intent on harming him. He urges that in his evidence, the deceased had vowed to teach him a lesson if he saw him with A. Citing the case of ***Mohammed Omar & 5 Others (2014) eKLR,*** he stated that he indeed believed that he was being attacked and was in imminent danger.

25. He urges that he had no malice aforethought as none had been established. He urges that the Court acquits him. He relies on the case of *R v Simion Owuor Otieno (2017) eKLR.*

Determination

26. For the Prosecution to secure a conviction on the charge of murder, they have to prove 4 ingredients: -

a) Proof of fact of death.

b) The cause of the death of the deceased.

c) Proof that the death of deceased was a direct consequence of the unlawful act or omission of the accused i.e actus reus.

d) Proof that the said unlawful acts or omission was committed with malice aforethought i.e mens rea.

Proof of fact of death.

27. It is not is dispute that the deceased succumbed while on still at the scene of crime. PW1 the deceased's widow, among others identified his dead body at the scene. PW5, the doctor, produced a death certificate No. 556181 signed and stamped by the hospital stamp with respect to the deceased.

The cause of the death of the deceased.

28. PW5, the doctor testified that from the examination conducted during the post mortem report, the cause of death of the deceased was exsanguination – bleeding out due to severed carotid and aortic artery.

Proof that the death of deceased was a direct consequence of the unlawful act or omission of the accused i.e actus reus.

29. This Court observes that there was no eye witness at the scene of crime. All the prosecution witnesses who confirm to have been at the scene of crime arrived after the attack had already happened. It is claimed the deceased and the accused were fighting over a secondary school going lady namely A. In fact, the accused admits that he was just coming out of A's house when the incident occurred. According to PW3, the distance between A's house and the scene of crime was 30 metres. This lady, A was however not called as a witness in the proceedings, for either of the Prosecution or Defence cases. The Prosecution's evidence on the nexus between the killing and the accused is largely based on an alleged confession and hearsay which this Court will discuss hereunder.

Hearsay Evidence

30. PW2, the Chief of Mbaranga/Urra Location where the killing took place said that Stephen Kinyua had told him that it was George, the accused person who had killed the deceased with an axe. He also testified that he had a chance to interview the accused who told him about the alleged affair between the deceased and A and that he, the accused had used an axe. He stated that a panga had been recovered from Kinyua's home and that Kinyua had later on told him that it was the panga which was the murder weapon and not the axe.

31. The above is hearsay evidence which this Court finds inadmissible. This Court is alive to the fact that there are instances when hearsay evidence will be admissible, but finds that the present circumstances does not fall among those exceptions contemplated in Section 33 of the Evidence Act. The Court will therefore not rely on the said statements as they are inadmissible.

Confession

32. A confession, if taken within the confines of the law would be conclusive proof of the nexus between a crime and the accused person. PW5 herein testified to the fact of having recorded a confession by the accused. It was his testimony that he took the confession in Swahili in the presence of the accused's mother, Susan Kaumi and that before taking the confession, he had cautioned the accused on the consequences of making a confession in that the same could be used against him in evidence. He stated that the accused told him that he killed the deceased because they had a dispute over a girl by the name of AK. He produced this statement as PExh 4 together with a typed copy of the same.

33. This Court has perused a copy of the said confession and finds that it is in essence setting out the accused's defence. It does not unequivocally confirm that the accused is aware of having killed and neither does it confirm that the accused admits that the act done was unlawful. This Court reproduces the relevant part of the statements as follows: -

> ***"…Ninakumbuka vizuri ilikuwa tarehe 17 mwezi wa pili mwaka huu wa 2014 kama saa moja na nusu usiku. Nilikuwa nikitembea nikielekea nyumbai nikapitia kiinjo village ambapo nilimpata mtu akiwa anasimama na piki piki. Nilipomkuta hapo, alianza kunifukuza na shoka aliyokuwa ameishika mkononi. Alionekana nia yake ilikuwa kunishambulia na hiyo shoka. Alopikuwa akinikimbiza, alinitupia shoka na hio shoka ikaanguka mbele yangu. Hapo hapo nikaichukua ile shoka na nikamtupia ile shoka na hapo ikamkamata kwa shingo na nikakimbia nikaelekea nyumbani kwetu…"***

34. From the above section of the confession, what the accused said is that the deceased first attacked him by chasing him while holding an axe on his hand. That it appeared that the deceased's motive was to hack him with the axe. That the deceased then threw the axe at him, which axe fell on the ground and he, the accused thereafter picked it up and threw it back at the deceased and it hit him on his neck. This is essentially what he states in his defence.

35. The Defence in their submissions have urged that this confession is inadmissible for failure to comply with the provisions of Section 25 (A) of the Evidence Act. They urge that for a confession to be valid, it ought to have been done before an officer who did not participate in the investigations and it ought to have been done in the presence of a third party. The Prosecution did not address this issue in their submissions.

36. Section 25 A provides as follows: -

25. Confessions defined

> ***A confession comprises words or conduct, or a combination of words or conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may be reasonably be drawn that the person making it has committed an offence.***

25A. Confessions generally inadmissible

(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

37. It is not clear what the rank of PW5 who took the confession is. As per the aforesaid section, such officer ought to be of the rank of Inspector of Police. This was however not raised as an issue. What the accused contends is that the said officer was admittedly involved in the investigations in this case and was therefore not eligible to take the statement. In his evidence, PW5 testified that he had assigned PC Serem to work on the case. The nature of his involvement appeared to have been peripheral or rather supervisory. PC Serem was however not called as a witness and it is questionable why he was not called as a witness despite allegedly being the main investigation officer. Nonetheless, it is not in dispute that it is this PC Serem who took the statements of the other witnesses. This Court finds that the involvement of PW5 in the investigations was peripheral as he was not the main investigator. The essence of the requirement for the confession to be made before an officer who is not the investigating officer is closely tied to the right of an accused person not to be compelled to give self-incriminating evidence. The independent mind of an officer who has no special knowledge of the investigations is thus invited by this requirement. It being that there was another officer, namely PC Serem who took the lead in the investigations, this Court finds that the confession is indeed valid in this respect.

38. Concerning the presence of a third party at the time of taking the confession, PW5 testified that the confession was taken in the presence of the accused's mother whom the accused had selected as the third party of his choice. In his submissions, the defence urges that there was no evidence to prove that the mother was present at the time of making the confession. Indeed, other than the testimony of PW5, there was no other evidence to confirm this. It is however noteworthy that the accused did not raise this issue during cross-examination despite having had the chance to interrogate PW5 on the same. This reasonably infers this point to be an afterthought.

39. In any event, this Court has looked at the contents of the confession and observes that it is in essence what the accused stated in his defence. In fact, the defence gives more details encompassing what is in the confessions. This Court finds that the said confession is indeed valid and will therefore be considered as part of the Prosecution's evidence.

Self Defence

40. Having found that the confession was valid, and despite the fact that there was no eye witness, this Court finds that it can rightfully go ahead and interrogate the circumstantial evidence in the matter. The accused does not deny being at the scene of crime on the material day. His case is that he acted in self-defense after the deceased first attacked him. He states that on the material day, he was walking with A to her house when they met the deceased. He states that he went into A's house and stayed there for about 30 to 50 minutes only for him to come out and find the deceased standing near A's gate and that is when the deceased who was wielding an axe started chasing him and he ran for his life. He then states that the deceased drew his axe at him but unfortunately, it missed him and that he picked up the axe and threw it and it hit the deceased, at the back of the head. He thus urges that he was acting in self defence. According to the accused, the fact that the deceased was standing outside A's gate waiting for him means that the deceased was intent on harming him. He claims to have believed that he was in imminent danger.

41. The Prosecution on the other hand claim that the deceased was not in any danger and that he had been attacked by the deceased as he claims, he ought to have produced evidence to confirm the injuries sustained. The nature of injuries suffered by the deceased negate the defense of self-defense and that if the accused was in danger, he ought to have run away.

42. To begin with, other than the accused, there is no other eye witness who saw how the incident happened or who between the accused and the deceased was the aggressor. If the accused person was the aggressor, he could not have been acting in self defence. But if the deceased was the aggressor, then the accused person may have indeed been acting in reaction to the attack meted against him by the deceased. In criminal matters, any apparent doubt must be interpreted in the accused person's favour. For this reason, this Court finds that the accused may have been acting in reaction to the deceased's person's attack. This would invite the Court to interrogate whether the accused person's actions were within the confines of self-defense.

43. Authorities have held that self-defense will only be admitted if done within the bounds of reasonable force. This Court has previously dealt with the defense of self-defense in the case of ***R v Doris Mwari Ikiao & Another, Meru HCCRC No. 86 of 2015.*** The Court of Appeal has also dealt with the issue in the case of ***Lucy Mueni Mutava v Republic, Criminal Appeal No. 52 of 2013 [2019] eKLR*** where A. Visram, W. Karanja, JJA. and M. K . Koome JA (as she then was) held as follows when addressing the defence of self-defense: -

"…the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed, in our view, was way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. See Racho Kuno Hameso vs. R [2014] eKLR.

Our position is further fortified by the case of Victor Nthiga Kiruthu & another vs. R [2017] eKLR wherein this Court while discussing self defence stated:

"The principles that have emerged from these and other authorities are as follows:-

(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) <u>The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means</u>.

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

15. All in all, we, like the trial court are satisfied that the appellant's actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined under Section 206 of the Penal Code…"

Perceived Danger

44. The question that begs is whether the ***force used was reasonable*** to avert the ***perceived danger***, if any. On the issue of perceived danger, according to the accused, the weapon that he used to attack the deceased was one and the same with the one the deceased used to attack him. This is to say that weapon the deceased person used to mete out the alleged attack was the same weapon the accused person used to supposedly defend himself. There is a panga which was recovered and was produced in evidence but the accused person states that he used the axe and not the panga. He states this both in his confession and in his defence.

45. Other than the hearsay evidence that a man namely Kinuya had confirmed that the panga was the murder weapon, the Prosecution has not adduced any other evidence linking the accused to the panga. This notwithstanding, this Court is mindful that the confession which this Court has found to be valid and therefore rightfully forming part of the Prosecution evidence confirms that the weapon used was an axe.

46. This being the case, and it being that it was one and the same weapon used by both the accused and the deceased, it is safe to conclude that the weapon could only have been used by one person at a time. There must have therefore been a time interval between the time the deceased threw the axe to the accused and the time the accused picked it up and threw it to the deceased. This Court finds that when the axe fell on the ground after it was thrown at the accused, the perceived threat had significantly been diminished and was in fact minimal if at all it was not over.

47. The Court of Appeal, in the case of ***Ahmed Mohammed Omar & 5 others v Republic, Criminal Appeal No. 414 of 2012 (2014) eKLR*** pronounced itself on the defence of self-defense where **Githinji, J. Mohammed, JJ.A & Musinga J *(as he then was)* held as follows: -**

"What are the common law principles relating to self-defense? The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council in Palmer v R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McInnes, 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:

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

48. As the axe had already fallen on the ground, this Court finds that at that point, the attack had significantly been diminished if not over. In fact, the accused in his defence admits that once the axe fell on the ground and he picked it up, the deceased started running away. This Court reproduces the accused person's evidence as follows: -

"When we got into A's home, I did not sleep there. I left at 7pm. When I was leaving, the motorbike rider stopped me when he saw me. He took out the axe and started chasing me telling me that the girl was his and he intended to pay dowry. He continued to chase me and I ran away while screaming. He threw the axe at me when he could not catch up with me. The axe hit me on my back. The axe was a small one, used usually for protective weapon. It is usually carried by security guards. After hitting me with the axe, I fell down on the ground and the rider was able to catch up with me. <u>When I got up from the ground, I took the axe while on the ground and at this time, the rider was almost reaching where I was. When the rider saw that I had taken the axe, he turned and started running away towards where he had left the motorbike. As I was feeling pain where the axe had hit me, I threw the axe at him and ran away.</u>"

49. As pointed out by the Prosecution, the accused does not claim in his defence to have been injured in any manner. He admits that at the time he threw the axe at the deceased, the deceased was already running away from him towards his motorbike. At this point, it was in fact the deceased who was in danger and not the accused. This Court finds that the circumstances of the case do not reveal that the accused was acting in self-defence but rather out of aggression and retaliation. He claimed that he was feeling pain and this is why he decided to throw the axe at the deceased. When one is in pain, the most pressing need is to find ways of alleviating the pain. This could not be achieved by taking the axe and throwing it back at the person who threw it to one. The most prudent thing for any person in the shoes of the accused would be to

pick up the axe and run for their life.

Reasonable Force

50. Concerning the use of reasonable force, this is determined by examining the nature of weapon used, the manner in which it was used and the nature of injuries sustained. On the nature of injuries, the post mortem report revealed that the deceased was injured at the clavicular area. This is the area between the ribcage and the shoulders, around the neck. The accused in his submissions claims that the axe hit the deceased on the head, but he had earlier claimed to have hit him on the neck area. All in all, the injuries, although seemingly inflicted once, were serious and this evinced by the fact of the death which happened on the spot. Further, the accused person did not sustain any injuries contrasted with the deceased who sustained fatal injuries.

51. On the nature of weapon used, having admitted the confession, this Court observes that the weapon used was an axe. Although some of the Prosecution witnesses maintained that the murder weapon was the panga and not the axe, this was hearsay evidence. Having admitted the confession, it is safe to conclude that it is the axe which was the murder weapon. This Court is mindful that unlike in the offence of robbery with violence where the weapon used has to be specifically proven for sustenance of the charge, this is not the case for the offence of murder.

52. On the manner in which the weapon was used, this was used this was done by way of throwing the same to the deceased, in almost the same manner the deceased threw it to the accused.

53. Although there was a death, the circumstances of the case being the nature of the weapon which was one and the same and the manner in which it was used revealed the use of reasonable force, almost equal to that used by the deceased.

54. This notwithstanding, for the reason that at the time of meting out the attack against the deceased, there appeared to have been no perceived danger, this Court finds that the defense of self-defence is unavailable to the accused person. The accused appears to have been acting out of aggression and retaliation as opposed to self-defense because at the time of him meting out the attack, there was no danger.

Provocation as a defence though not expressly raised by the Accused

55. Although he has not raised it in his defence, a more plausible defence would be that of provocation. It could be argued that after the botched attempt to cut him with the axe, he was so provoked and acted out of the heat of the moment manifesting in his attack against the deceased, using the very same axe.

56. Section 207 and 208 of the Penal Code, Cap 63 provides for the defence of provocation as follows: -

> ***207. Killing on provocation***
>
> ***When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.***
>
> ***208. Provocation defined***
>
> ***(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.***
>
> ***(2) When an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.***
>
> ***(3) A lawful act is not provocation to any person for an assault.***
>
> ***(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.***
>
> ***(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.***

57. This Court finds that the circumstances of the case and the actions of the accused person indeed fit into the provisions of provocation. It being that it was the same weapon which was used by both the deceased and the accused and that the said weapon was used in almost the same manner i.e by way of throwing it to another from a distance, the defence of provocation is available. Furthermore, for provocation to be admitted, it should be that the act causing the death was done in the heat of the passion without there being time for the accused to cool down and thereby depriving him of self-control. This was indeed the case herein for the reason that the accused person acted on reflex upon being hit by the axe. This may not have been said so eloquently in the accused's submissions or in his defence but this is what is inferred when the accused said that he felt pain and threw the axe back to the deceased.

58. This Court finds that the accused person was indeed provoked by the deceased and his action which led to the death of the deceased is indeed the act contemplated in Section 208 of the Criminal procedure Code for someone who is acting upon being provoked.

Proof that the said unlawful acts or omission was committed with malice aforethought i.e mens rea.

59. Malice aforethought, otherwise known as *mens rea* is an active ingredient of the offence of murder. Malice aforethought is defined under Section 206 of the Penal Code 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;***

60. It is clear that the accused person and the deceased were fighting over a lady. This evidence was consistent all through and it was confirmed by both the Prosecution and the Defence. Indeed, their relationship was a strained one, and this Court finds that the accused person had a vendetta against the deceased.

61. Going by the provisions of Section 206 of the Penal Code *mens rea* need not be confined to the relationship of the parties prior to the incident, but it can also be inferred from the circumstances surrounding the attack that lead to the death. Malice aforethought can inferred from the nature of the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted and the conduct of the accused before, during and after the incident. See the case of ***Republic V. Tumbere S/O Ochen (1945) 12 EACA 63***.

62. This Court has already discussed above the gaps in the Prosecution's case concerning the nature of weapon used which was an axe. The same was used in the same manner that the deceased had first used it against the accused.

63. On the part of the body targeted and the manner in which the weapons were used, the postmortem report reveals that the deceased had a cut on the clavicular which is the neck area. The neck area is indeed a distinct and sensitive part of the body such that the one attacking the other on these parts will know the grievous nature of the harm likely to be inflicted. PW4, the Doctor confirmed that the post mortem revealed that the cause of death was exsanguination. This means that the cuts were indeed deep. This notwithstanding, this Court has already found that the accused was acting out of provocation. Not much was said concerning the conduct of the accused after the incident that would infer malice aforethought. In fact, his confession shows that he acted out of anger and/or provocation. This Court does not find that the accused possessed malice aforethought that would otherwise be required to secure a conviction for the offence of murder.

Conclusion

64. The deceased died of exsanguination having sustained injuries on the neck area. He died on the spot. The lady alleged to have been at the centre of the fight between the deceased and the accused was not called as a witness. None of the prosecution witnesses was an eye witness as they all arrived at the scene of crime after the attack had already happened. It is only the accused and the deceased who know how the incident commenced and who between them was the aggressor.

65. As part of the Prosecution's evidence which was admitted in the matter is the confession made by the accused. The confession points to the fact of the accused having thrown the axe back at the deceased after the said axe had hit him and fell to the ground. Although the Court gave him the benefit of the doubt that it may have been the deceased who was the aggressor, upon analysis of his defence of self defence, this Court rejects his defence of self defence for the reason that at the time of meting out the attack against the deceased, there was no perceived danger and the accused ought to have ran away. Indeed, the evidence is that it was the deceased had started running away when he saw the accused pick up the axe. It is evident from his defence that he was acting out of aggression as opposed to self defence.

66. Although he did not raise it as a defence, this Court finds that the defence of provocation is available to the accused. Any reasonable person who had been hit by an axe would have been angered by the act of being thrown at an axe because of spending time with a lady who one genuinely believed to have been his girlfriend. The manner of inflicting the harm corresponded to the manner in which the deceased had first attacked the accused notwithstanding that this resulted in a death.

67. Section 207 of the Criminal Procedure Code which provides that when a person kills another in the heat of passion, without having time to cool off, meaning when he has been provoked, he shall be guilty of manslaughter only. This is true notwithstanding that there was no alternative charge of manslaughter in the charge sheet.

68. In addition, this Court has the power to convict him, without a formal charge, for the offence of manslaughter being a minor offence which is cognate to the offence of murder, pursuant to the provisions of Section 179 (2) of the Criminal Procedure Code which provides as follows: -

> ***179. Convictions for offences other than those charged***
>
> ***(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of***

the minor offence although he was not charged with it.

(2) <u>When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.</u>

69. This Court's finding above is supported by the finding of the Court of Appeal in the case of ***Mugambi v Republic (1980) KLR*** where Law, Miller & Potter JJA held as follows: -

"The question now arises whether this Court has jurisdiction to impose a substituted conviction for a minor offence; and, if so, for what offence. The offence of robbery is constituted by two elements, stealing and the use of violence at, or immediately before, or immediately after the time of stealing; see section 295 of the Penal Code. In this case, we have held that the element of violence has not been established has not been established as against the appellant, but the element of stealing has been established.

By Section 179 (2) of the Criminal Procedure Code: -

When a person is charged with an offence, and facts are proved which reduce it to a minor offence he may be convicted for the minor offence.

The corresponding Tanganyika subsection, which is identical with Kenya's was considered by Spry J in Ali Mohamed Hassani Mpanda v The Republic (1963) EA 294. <u>The judge held, after consideration of the relevant East African authorities, that for the subsection to apply the substituted conviction must be for an offence which is both minor and cognate to the offence charged. Stealing is obviously a minor offence to robbery and in our opinion it is cognate to robbery, being one of the two constituent elements of that offence.</u> Accordingly, we are of the opinion that it is open to us to substitute a conviction for stealing."

70. For the reason that the offence of manslaughter is both minor and cognate to that of murder, in addition to the absence of proof of malice aforethought on the part of the accused, it is available for this Court to convict him for manslaughter.

71. For the above reasons, this Court finds the accused person guilty of the offence of manslaughter c/s 202 as read with 205 of the Penal Code but acquits him of the offence of murder under section 203 as read with 204 of the Penal Code.

<u>ORDERS</u>

72. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The Accused person* GEORGE MUNENE KAILIKIA *is acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal code and convicted for lesser offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.

Order accordingly.

DATED AND DELIVERED ON THIS 4TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

<u>JUDGE</u>

<u>Appearances:</u>

Ms. B. Nandwa Prosecution Counsel for the DPP.

M/S Mwenda, Mwariania, Akwalu & Co. Advocates for the Accused.