



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO 71 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

VIOLET CHELAGAT ACHIGA.....1ST ACCUSED

MILICENT KAGEA MWANGI.....2ND ACCUSED

(Formerly Nakuru High Court Criminal Case No. 13 of 2015.

Republic versus Violet Chelagat Achiga & Milicent Kagea Mwangi)

JUDGMENT

Procedural history.

1. The accused are charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya; in respect of the deceased, Robert Kipkurui Chumba, which is alleged to have occurred on 21st February 2015.
2. The prosecution called eleven (11) witnesses in support of the charge.
3. Both accused made unsworn statements and called no witnesses.
4. All prosecution witnesses and both accused testified before Muriithi, J.
5. The accused after their rights under section 200 (3) as read with section 201 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, were explained to them, the accused informed the court that they wanted their trial to proceed from where it had reached; which position was confirmed by their advocate.
6. As a result of the foregoing I allowed counsel for the defence to file written submissions, which they filed.
7. Counsel for the prosecution did not file written submissions because the prosecution was not personally conducted by the Director of Public Prosecutions: see section 310 as read with section 161 of the Criminal Procedure Code.
8. Thereafter I fixed the case for judgement on 28/7/2021 which I adjourned due to work pressure to 25/8/2021.

The case for the prosecution.

9. The prosecution called Justin Komen (Pw 1); who testified as follows. On 21/2/2017 at about 5.00 pm Pw 1 was sitting outside his shop at Saigon at Eldama Ravine. While there Pw 1 saw the 1st accused talk to the deceased. He then saw the 1st accused hold the deceased and shook him and then pushed him. The deceased leaned on the wall. The 1st accused got a stick from a butchery with which she intended to hit the deceased but did not hit him. Pw 1 identified the said stick which was later produced as exhibit 1 in court. Pw 1 then saw the 2nd accused coming out of the bar and proceeded to where the deceased and 1st accused were. At that time the 2nd accused was shouting. The deceased went towards the bar first and both accused started throwing stones into the bar.

10. Furthermore, the deceased stood at the entrance door to the bar. The accused were throwing stones at him and the deceased shielded himself with the door. The 1st accused unsuccessfully tried twice to hit the deceased. Finally, the 1st accused entered the bar holding the stick. After entering the bar Pw 1 could not see what was going inside the bar. After a short while both accused came out of the bar and ran away, with the 1st accused still holding the stick. After about fifteen minutes, both accused returned to the scene of crime now in the company of an AP police officer. The three entered the bar.

11. Pw 1 further testified that he knew the 1st accused before this incident. He used to hear the 1st accused being referred to as "vio". Pw 1 continued to testify that he did not see the accused hit the deceased. Pw 1 also testified that he feared separating them as he feared being injured. When the 1st accused left the bar she threw the stick outside the bar. Later the police collected the stick. Pw 1 further testified that he was sure that it was the same firewood stick that 1st accused had that was later collected by the police.

12. Pw 1 was unable to tell whether the 1st accused was drunk. Pw 1 further testified in cross examination that he saw the stick for the first time in court and had not seen it before. Pw 1 also testified that the accused did not run away.

13. In addition to the foregoing, the prosecution called No. P9354690 AP Joseph Mengich (Pw 2), who was then attached to Sageri AP Post, at Sageri centre. Both accused went to that post and told him that as they were selling at Blue bar at Sageri centre, the deceased refused to pay his bill in the sum of shs 750/-. They told him that when they hit the deceased with a fist he fell down. He asked them as to why they had not taken him to hospital. Pw 2 in company of APC Mary Kaitani and the two ladies went to the said bar. They found that it was open.

14. There was no one in the bar; although there were many people outside that bar. Pw 2 told the accused to close the bar. A man by the name Kimutai told them that the deceased had been taken to Sageri clinic. After that they went to Sageri clinic. They found the deceased at that centre on a seat. He had blood on the nose and a cut on the head. The owner of the clinic referred him to Sageri health centre. They then went with the deceased to Sageri health centre. The nurse on duty referred them to Eldama Ravine Mercy Hospital; where the deceased was injected with medicine to reduce his intoxication.

15. The doctor at that hospital asked the accused what they had done to the deceased. The accused now changed the story and told the doctor that they pushed him and he fell on a seat and his head hit the wall. Nancy Kaita and one of the family members (Francis Kiprop) took the accused to the police station.

16. The deceased was taken to Nakuru where he died the following day.

17. Pw 2 further testified that on 23/2/2015 at 11.00 am he was at Sageri centre. While there an old man by the name Julius Arap Bonde, who lived with the accused in one compound took Pw 2 to the compound and showed Pw 2 the stick the accused used to kill the deceased. Pw 2 took the stick and handed it over to Cpl Abdi Tunga, who is the investigating officer in this case. Pw 2 also testified that the doctor who attended to the deceased at Eldama Ravine Mercy Hospital and Julius Bonde are not witnesses in this case.

18. The prosecution also called Jackline Cheruto Tanui (Pw 3), who identified the body of the deceased to the Dr Titus Ngulungu (Pw 11). Pw 11 carried out a postmortem on the body of the deceased on 28/2/2015.

19. In addition to the foregoing witnesses the prosecution called Christopher Kibet Kiptoo (Pw 4). Pw 4 testified as follows. On 21/2/2015 he went to Blue bar at Esageri centre, where he found the deceased. The deceased bought Pw 4 a spirit called "sting" while Pw 4 was drinking ordinary beer. The deceased left the bar and returned again. At another time the deceased again went out of the bar. The 2nd accused then asked Pw 4 as to who was going to pay the bill of shs 750/-. Pw 4 told the 2nd accused that the deceased was going to pay the bill.

20. The 2nd accused went out to call the deceased but returned to the bar alone. The 2nd accused told Pw 4 that the deceased and 1st accused were fighting. Pw 4 told the 2nd accused to go and bring the 1st accused and the deceased into the bar in order to sort out the issue of the bill.

21. The 2nd accused then went out and joined the 1st accused in pushing the deceased into the bar. At that time the 1st accused was armed with a stick. Pw 4 tried to separate them but the 1st accused said that she was going to teach the deceased a lesson. At that time Pw 4 told them that he was going to pay for the bill. Pw 4 did not pay for the bill. Pw 4 then went out to get transport for the deceased because he was drunk. Pw 4 returned into the bar after failing to get transport. Pw 4 found the deceased lying on the floor. He did not see any injuries on the deceased and the two accused were not in the bar at that time. The deceased was unconscious and could not sit. There were other people in the bar but in different rooms.

22. Pw 4 then went out and got a boda boda (a motor cycle) to take the deceased to hospital; but Pw 4 did not accompany the deceased to Mercy hospital. The deceased remained in a coma until Pw 4 was informed by the sister of the deceased that he had been referred to Nakuru. Pw 4 further testified that the two accused were pushing the deceased into the bar.

23. Nicky Kiprotich Chumba (Pw 5), who is the brother of the deceased testified that he identified the body of the deceased to the doctor who performed a postmortem on the body of the deceased at Nakuru Valley Hospital mortuary on 28/2/2015. Pw 5 testified that the body of the deceased had injuries on the head at the back and on the neck at the back. There were cut injuries on the neck and on the head. Additionally, there was a black mark on the skin and the neck.

24. Furthermore, the prosecution also called Job Malakwen Leina (Pw 6). Pw 6 testified as follows. On 21/2/2021 he went to a bar at Esageri centre and sat down. He went out of the bar to call a waiter to serve them. He knew one of the waiters as viola (1st accused). Pw 6 found the two waiters struggling with a man trying to get him into the bar and pay his bill. The 1st accused pushed him into the bar. The man was annoyed and he slapped the 1st accused. The 1st accused went out screaming. The 1st accused picked a stone and tried to hit the man. The other waiter went out and took a stick at the butchery. The waiter came with the stick and found the 1st accused holding the man. This

waitress hit the man with the stick on the head on the right side. Pw 6 identified the stick which was subsequently produced as exhibit 1. After hitting the man, he fell down on the floor. The man was bleeding from the nose and mouth after he was hit. The 1st accused and the other waitress ran out and went to the D.O's office. They returned with two police officers. Before the officers came there were two people who recognized the man who had been hit. They took him to hospital. The police went with the 1st accused and the waitress to the hospital. Pw 6 identified the other waitress as the 2nd accused.

25. Pw 6 further testified that when the man was pushed into the bar, he did not hit the floor; he only staggered. The man was hit on the right side of the head.

26. The prosecution also called Jane Chepkemei Tengekyon (Pw 7), who was the owner of Blue bar. She confirmed that two accused were her employees and were working in that bar on 21/2/2015.

27. In addition to the foregoing, the prosecution called Nixon Kiprop Rono (Pw 8), who is a boda boda rider. Pw 8 testified that on 21/2/2015 at about 6.30 pm he went to Blue bar and found the deceased lying on the floor inside the bar. Pw 8 is a cousin of the deceased. He took the deceased to a private clinic from where they were referred to Esageri health district hospital. Two days later he learned that the deceased had died. He did not see any injuries on the deceased.

28. No 60131 Snr Sgt Sarah Situma (Pw 9) was also called by the prosecution. She testified that on 21/2/2015 she was attached to Eldama Ravine police station. Pw 9 was called by the cells security PC Gor and was told that two suspects had been brought by an AP police officer to the station on allegations that they had assaulted someone. She went there and saw the two accused persons. She was told the deceased had been taken to Mercy Mission hospital. She proceeded there and found the deceased. Pw 9 examined the deceased. Upon examination she noted the following. He had cuts on the right temple. The back of his head was swollen. There was blood on the mouth and face. Near his bed there was a bloody vomit in a basin. The next day she went to the bar which was the scene of crime at Esageri centre. She did not see any blood at the scene. She also tried to get the stick which had been used to hit the deceased. She did not get it.

29. Dr. Titus Ngulungu (Pw 11) carried out a postmortem examination upon the body of the deceased on 27/2/2015. Pw 11 testified that he holds a bachelor's degree in medicine (MBCHB) from the University of Nairobi and a master's degree in medicine in pathology (medPath) and a diploma in forensic medicine from the College of Medicine of South Africa. He also testified that he has a work experience of ten (10) years in pathology.

30. Upon examining the body of the deceased Pw 11 made the following findings. The body was refrigerated with formication and was of good health and height of 1.92 cm. It had not decayed.

31. It had injury to the brain decerebrate posture with extension of the neck. Some parts of the brain had been injured. It had cyanosis. There was no clean air in the hemoglobin.

32. The head had lacerations and it was swollen on the right side on the temporal region.

33. After dissecting the body, the stomach was punctured and the contents were outside. There was a very big trauma tear. There was forced blood on the right side of the head.

34. There was blood between the dural matter and epidural hematoma. When evacuated it had 130/80/40. This was a lot of blood to be contained in the brain. The brain was compressed and the blood could not flow freely. There was intracranial hypertension and the person died due to low oxygen in the brain. The other parts of the body were normal.

35. Pw 11 concluded that the deceased died as a result of head injury which led blood to the brain as a result of a blunt force trauma assault. The stomach was also ruptured and contents poured into the abdominal cavity causing peritonitis, an inflammation of the body reacting to gastric acid in the content of the stomach, which could also lead to shock. Pw 11 signed and produced his report as exhibit No. 2.

36. In cross examination Pw 11 testified that in relation to the head injury, Pw 11 testified that: *"People drunk and fall every day and they do not get such injury."*

37. Finally, the prosecution called No.73438 Sgt Abdi Tulga (Pw 10), who was the investigating officer. Pw 10 testified as follows. On 22/2015 he was instructed by the DCIO Koibatek to go to the scene of crime at Esageri centre; where a person had been beaten and had died. Upon arrival there they enquired as to who was the owner. They were told that the owner was Jane. They called her. She came. She opened the bar. Upon examination they found the bar was in order as all tables and seats were all arranged. He went to Eldama Ravine police station where he took possession of the stick which was produced as exhibit 1. The stick was recovered on the day of the incident by officers from Eldama police station. When he entered the bar Pw 10 did not see any blood. It was clean.

The closing submissions of the prosecution.

38. The prosecution filed written submissions dated 23rd June 2021. I find that the prosecution was not personally conducted by the Director of Public Prosecutions (DPP) and for that reason the prosecution is not allowed by law to file a reply. See section 310 as read with section 161 of the Criminal Procedure Code. I have therefore declined to take the submissions of the prosecution into account.

The case for the 1st accused - Violet Chelagat Achiga (Dw 1)

39. The 1st accused made an unsworn statement in which he denied the charge. She testified as follows. On 21/2/2015 which was a Saturday

she opened the bar at 2.00 pm. She was at the counter while the 2nd accused was the waiter who was serving customers at the bar.

40. While there the deceased came carrying a half bottle of water. He ordered a half of Napoleon brandy. The 2nd accused told him that they do not sell half of that brandy but a full bottle. The deceased then ordered strig brandy half with a sprite soda which he mixed and started to drink it.

41. Furthermore, the 1st accused testified that after a while Kibet (Pw 4) came in and greeted the deceased. Pw 4 told the 2nd accused to bring him balozi brandy and he told the 2nd accused that the deceased could pay. Pw 4 drank four bottles of beer quickly. The 1st accused then summed up the bill and asked the 2nd accused to get the bill paid since it was becoming big. The 2nd accused gave the bill to the deceased.

42. After getting the bill the deceased angrily pushed the bill to Kibet and told Kibet he was the one to pay since he was the one who took more beer. Kibet and the deceased began arguing over the bill. The 1st accused then went to where both Kibet and the deceased were and told them that she would divide the bill between them so that each would pay for his bill.

43. The deceased then slapped the 1st accused telling her that: “*ulishinda wanaume mahali ulitoka.*”-you overcame men from where you came from. Kibet then held the deceased. The 1st accused went out of the bar leaving the deceased and Kibet holding each other. The 2nd accused then joined her outside the bar.

44. The 1st accused then told the 2nd accused that since the owner of the bar was not there to be told what was happening; they would go and report the incident to the Esageri AP camp. They went there and did not get the AP officer. They went to where the APs lived and found one man there. They told him that there were two people who had taken beer and had failed to pay. Those two people then started to fight each other. This AP male officer and an AP woman officer accompanied both accused to the scene of crime.

45. They then proceeded to the bar but they did not get the deceased and Kibet at the bar. They did not find any one at the bar.

46. They found the bill at the table and found the deceased and Kibet had gone. The AP officer enquired from a young man who told him that the deceased had been taken to hospital since he had been injured. The AP officer told the 1st accused to close the bar and they proceeded to the private hospital at Esageri. There they found the deceased but Kibet was not there. The doctor at that hospital told them the deceased who lay on the seat had not been attended to, since he was drunk and that they do not treat drunk people.

47. The AP called a boda boda operator and they carried the deceased to another hospital. Since there was no light at that hospital and there was no doctor, they left in a motor vehicle to a third hospital namely Mercy Hospital at Eldama Ravine. The deceased was treated at this hospital, and the accused were told to stay outside that hospital. As the deceased was being treated, two AP officers went to Makutano. They returned and told the two accused to get inside the car and they were then taken to Eldama Ravine police station.

48. The following day on 22/2/2015 the two accused were told they were to be charged with murder as the deceased had died.

The case for the 2nd accused –Millicent Kagea Mwangi (Dw 2)

49. The 2nd accused made an unsworn statement and called no witnesses.

50. She testified that she was a waiter at bar at Esageri centre. As they were at that bar, the deceased came carrying a bottle of water which was a half drunk. The deceased ordered for a half Napoleon wine. The 2nd accused told him that they did not serve Napoleon half as they only served a full bottle. The deceased then ordered for a sting that was available in half measure.

51. The rest of the evidence of the 2nd accused is the same as that of the 1st accused. I therefore do not find it necessary to reproduce it here. I hereby decline to do so.

The closing submissions of the defence

52. Based on the evidence and *Woolmington v DPP (1935) AC 462*, Mr Mwaita, counsel for the accused submitted that the prosecution failed to prove its case against the accused beyond reasonable doubt. He further submitted that Pw 1 only saw both accused throw stones towards the deceased, but they did not hit him. Even Pw 4 did not see who hit the deceased. Counsel further submitted that Pw 6 testified that it was the 2nd accused who hit the deceased with a stick. He also submitted that Pw 1 testified that it was the 1st accused who had the stick and who attempted but failed to hit the deceased with the stick. According to counsel the evidence of both Pw 1 and Pw 6 is contradictory on this point.

53. Furthermore, counsel submitted that the date (28th February 2015) when they witnessed the postmortem examination in respect of the body of the deceased contradicts that of Dr Titus Ngulungu (Pw 11) who testified that he carried out the said examination on 27th February 2015. According to counsel the foregoing shows that there are a lot of loop holes in the prosecution case. And for that reason the prosecution has not proved its case beyond reasonable doubt. Based on the decision of the Court of Appeal in *Mutuku Musa v Republic (2019) e-KLR*, counsel submitted that the said contradictions and inconsistencies go to the root of the case and in themselves warrant the acquittal of the accused.

54. Counsel further cited the decision of this court (Nyakundi,J) in *Republic v Ismail Hussein Ibrahim (2018) e-KLR*, in which that court observed that the prosecution has to prove malice aforethought (mens rea) before a conviction for murder is recorded against the accused,

failing which the unlawful homicide will only amount to manslaughter. He also cited section 206 of the Penal Code, which manifests the indicia of malice aforethought. Counsel further submitted that it was the conduct of the deceased which actually brought about the acts of the deceased being pushed and shaken by the accused according to the evidence of Pw 4.

55. Furthermore, the defence submitted that the slapping of the 1st accused by the deceased amounted to extreme provocation. It is this slapping that prompted the 2nd accused to run out screaming and got a stick with which she hit the deceased on the head. She did not intend to kill the deceased; as this was only meant to scare the deceased so that he would leave the 1st accused. Counsel cited *Stephen Kipkeror Cheboi v Republic (2002) e-KLR*, which in turn cited *Sungura son of Ngolilo versus Rex (1946) 13 EACA 110*, in which that court held that for the defence of provocation to succeed the basic question is this: “was the act done in the heat of passion caused by sudden provocation as defined in section 297 of the Penal Code and before was there time for the passion to cool. If the answer is yes it is manslaughter and if no it is murder...”

56. In addition to the foregoing, counsel submitted that the hitting of the deceased with a stick by the 2nd accused does not amount to an intention to kill the deceased; as this was only intended to scare the deceased from causing further harm to the 1st accused. Furthermore, counsel submitted that Pw 1 was not in a position to identify the assault stick since he was seated seventy 70 metres away. Counsel also submitted that the evidence of Pw 6 that the 2nd accused hit the deceased with a stick has not been corroborated by any witness.

57. Furthermore, counsel has submitted the evidence of Pw 6 that he saw blood oozing from the mouth and head of the deceased contradicts that of Pw 8 who testified that he did not see any blood on the deceased when he arrived at scene to assist the deceased. And for that reason Pw 6 is not credible and he only wants to fix the accused for reasons known to him.

58. Counsel has also submitted in relation to uncalled witnesses. He submitted that Julius Bonde (arap Bonde) who is mentioned by Pw 2 that he traced the assault stick (exhibit 1) was not called by the prosecution. Additionally, the doctor who interrogated the accused at Mercy hospital was also not called as a witness. Based on *Bukenya & others v Uganda (1972) EA 549*, counsel has urged the court to draw an adverse inferences for that failure to call the said potential witnesses.

59. In addition to the foregoing counsel submitted that the evidence of Pw 11 who carried a postmortem examination on the body of the deceased has absolved the accused from the charge of murder; since Pw 11 testified in cross examination that it was possible that the deceased might have fallen down and fatally injured his head from the said fall.

60. Furthermore, counsel submitted that the Investigating Officer (Pw 10) did a shoddy investigation, for he did not testify from whom he retrieved the assault stick.

61. Counsel has submitted that in view of foregoing submissions, the court should acquit the accused.

Issues for determination.

62. I have considered the totality of the evidence. Additionally, I have also borne in mind that I did not see and hear all witnesses who testified in this trial; as my role is limited to preparing the instant judgement. As a result, I find the following to be the issues for determination.

1. Whether the accused caused the death of the deceased.
2. Whether the evidence discloses murder or manslaughter or related minor and cognate offences.

Issue 1

63. I find on the evidence that the deceased's failure pay his bill in the sum of shs 750/- for the alcoholic drinks he had bought for himself and his friend (Pw 4) is what led to a fight between himself and the accused persons.

64. I find as credible the evidence of Job Malakwen Leina (Pw 6) that when the 1st accused was slapped by the deceased, the 2nd accused went out of the bar screaming; picked a stick and hit the deceased on the right side of the head. As a result, the deceased fell down and started to bleed from the mouth and nose.

65. I further find as credible the evidence of Christopher Kibet Kiptoo (Pw 4); which in many aspects supports that of Pw 6. The evidence of Pw 4 was that he told the 2nd accused to go and bring the 1st accused and the deceased into the bar in order to sort out the issue of the bill. The 2nd accused then went out and joined the 1st accused in pushing the deceased into the bar. At that time the 1st accused was armed with a stick. Pw 4 tried to separate them but the 1st accused said that she was going to teach the deceased a lesson. When the 2nd accused went out she found the 1st accused fighting with the deceased. The accused then pushed the deceased into the bar.

66. Furthermore, I find as credible the evidence of Dr. Titus Ngulungu (Pw 11) who carried out a postmortem examination upon the body of the deceased on 27/2/2015; that the deceased died as a result of head injury which led blood to the brain as a result of a blunt force trauma assault. I find that this is consistent with the evidence of Pw 6 that the 2nd accused went out of the bar screaming; picked a stick and hit the deceased on the right side of the head.

67. Furthermore, I find as credible the evidence of Pw 4 that the deceased was drunk and was lying on the floor unconscious following his being hit by the 2nd accused with a stick. Pw 4 then took the deceased to a clinic from where he was referred to Esageri dispensary. From

Esageri dispensary he was referred to Mercy hospital from where he was in turn referred to Valley hospital Nakuru; where he died while undergoing treatment.

68. I find as incredible the evidence of Justin Komen (Pw 1) who testified that he saw the 1st accused armed with the assault stick, exhibit 1 while sitting outside his shop at Saigon at Eldama Ravine on 21/2/2017 at about 5.00 pm. While there Pw 1 saw the 1st accused talk to the deceased. He then saw the 1st accused hold the deceased and shook him and then pushed him.

69. In cross examination Pw 1 testified that he had not seen the stick before the incident. He saw it for the first time in court. Furthermore, he also testified that he did not see both accused running away from inside the bar, while in chief he testified that he had seen them running away. Being an eye witness these material contradictions clearly show that he is an unreliable witness. I therefore reject his evidence for being incredible.

70. In view of the ample and credible evidence of the prosecution witnesses I find the common defence of the accused to be incredible. The defence of both accused is that the deceased and Christopher Kibet Kiptoo (Pw 4) were fighting each over the issue as to which of them should have paid the bill of shs. 750/-. And therefore it is Pw 4 who caused the death of the deceased. This is clear from the evidence of the 1st accused; who reported to the AP police camp that both Pw 4 and the deceased were fighting. It is from that Ap camp that both accused were taken to Eldama Ravine police station by the AP police officer, according to No 60131 Snr Sgt Sarah Situma (Pw 9).

71. Counsel for the accused urged the court to draw adverse inferences because of the failure of the prosecution to call potential witnesses namely Julius Bondei who traced the assault stick and the doctor who first attended to the deceased and interrogated both accused. I agree that the drawing of adverse inferences as pronounced in *Bukenya & others v Uganda, supra*, is the correct procedure, but it is not fatal in the instant case; in view of the ample and credible evidence of the prosecution.

72. Furthermore, counsel for the accused submitted that the date (on 27/2/2015) when the pathologist (Pw 11) carried out the postmortem examination, contradicts the evidence of Jackline Cheruto (Pw 3) and Nicky Kiprotich (Pw 5), who testified that they identified that they identified the body of the deceased to Pw 11 on 28/2/2015. I find that this contradiction is not material as it merely relates to the date when the postmortem was carried out. The contradiction does not go to the root of the case. I therefore reject these submissions for lacking in merit. And for that reason I find the authorities cited by counsel for the accused as unhelpful.

73. In the premises, I find that it is the accused who caused the death of the deceased.

Issue 2.

74. On the evidence I find from the credible evidence that the deceased slapped the 1st accused who wanted the deceased to pay his alcoholic drinks bill in the sum of shs 750/-. As a result, the 2nd accused armed herself with a stick being exhibit 1 and struck the deceased in the head. I find that the felonious attack upon the first accused forced the 2nd accused to go to the rescue of the 1st accused. I find that the accused used excessive force in demanding for the payment of the bill from the deceased. The doctrine of provocation as pronounced in *Stephen Kipkeror Cheboi v Republic*, which in turn cited *Sungura son of Ngolilo versus Rex, supra*, is inapplicable as this was a case of self defence in respect of both accused. I find that both accused had a common intention in terms of section 21 of the Penal Code in assaulting the deceased in their unlawful purpose of using force in demanding from the deceased the payment of the bill.

75. In the premises, I find that the evidence discloses the offence of manslaughter contrary to section 205 of the Penal Code. I therefore find the accused guilty of manslaughter and convict them accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 29TH DAY OF SEPTEMBER 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr Sitienei, Court Assistant.

Mr Abwajo for the Republic.

Mr. Chepkilot for the accused.