



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL CASE NO. 13 OF 2018[MURDER]**

**STATE.....PROSECUTION**

**VERSUS**

**DAVID ONYANGO OKELLO.....ACCUSED**

**JUDGMENT**

1. The accused person **DAVID ONYANGO OKELLO** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. Particulars of the Information dated 4<sup>th</sup> June 2018 signed by Maurine Odumba Prosecution Counsel are that the accused person **DAVID ONYANGO OKELLO**, on the 27<sup>th</sup> Day of September, 2017 at around 19.30 hours at Kinyamaji estate, Ratuoro Market, Kadenge Sub location within Siaya County murdered one Charles Oduor Onyango.

2. Plea of not guilty was entered on 25/7/2018 and the trial commenced. The accused person was ably represented by Counsel Mr. Mirembe.

3. The prosecution called a total of five witnesses who established a prima facie case against the accused person warranting him being placed on his defence. The accused person gave sworn testimony and called no witness.

4. The prosecution's case as opened by PW1 Lucy Achieng Aminga was that she was a business lady selling sugar cane and chips at Ratuoro Market. The witness recalled that on the 27<sup>th</sup> day of September 2017 at about 8.30 pm she was on the market at Ratuoro and that before she could leave the market, a certain boy whom she identified in court in the dock as the accused and whom she used to see passing by her business place from time to time went to her and asked her if she had seen Maureen. The witness answered in the negative.

5. She stated that the accused called her by her name and that as she had a tin lamp which was illuminating the area, she was able to see the person very well.

6. She stated that she knew Maureen was the wife to the accused person. She stated that the accused person then showed her his hand and told her that he **'had been hunting them and that on that day he had found them.'** She stated that **the accused person** was saying that he had found Maureen ready handed. That he showed the witness his right hand and she saw blood in the said hand. That she then told him not to show her blood because she was not with him, and that he then left.

7. According to PW1, she knew that the accused and Maureen were a couple but that they had been separated shortly and that Maureen had rented her own house. PW1 stated that after the accused person had left, Maureen went to where PW1 was and PW1 asked her what had transpired at her house. That Maureen asked her (PW1) shockingly **"nini kimetendeka?!"**, (*what has happened?!*), and that PW1 narrated to Maureen what the accused person had told PW1 a few minutes earlier. PW1 stated that she told Maureen that her husband had gone to where PW1 was with blood in his hand and that Maureen asked, **"kwani wamepigana?"**, (*did they fight?*).

8. The two women then went home together conversing about the happening and on their way home, with Maureen's house was closer so she entered her house and PW1 proceeded to hers then PW1 heard people saying, **"ameuawa,"** (*he has been killed*). PW1 stated that she went outside to check and saw many people gathered outside Maureen's house which she had rented separately after she disagreed with the accused person.

9. In cross examination by Mr. Mirembe Advocate for the accused person, PW1 reiterated her testimony in chief and added that when the accused person went to her at the market, it was not very dark and that she had a small tin lamp. That he showed her his bloodied hand and told her that he had found 'them'. That he told her that he had found Maureen red-handed. She stated that the accused person had a paper bag with something in it like tomatoes. She stated that after the accused had left is when Maureen emerged saying she had come from the shop.

10. PW2 **Rose Akinyi Onyango** testified and recalled that on 27/9/2017 she was at her house at about 7.30 pm when she received information that her son the deceased person had been killed at Ratuoro Centre. She proceeded to the scene and found his body lying in the house of a woman she did not know. Later she identified the deceased's body to the doctor who performed post mortem on 12/10/2017.

11. In cross examination by Mr. Mirembe Advocate, the witness confirmed that Steven her younger son is the one who conveyed to her the information that her son Oduor was killed at Ratuoro. She stated that when she arrived at Ratuoro, she did not see the accused person and that although she inquired on what had happened, she was not given the name of the person who had killed her son.

12. **PW3 Dr. Biko Opidi** a Medical Officer at Siaya County Referral Hospital testified that he has a Bachelor of Medicine and Bachelor of Surgery Degree and had been in medical practice for 4 years. He testified that he performed an autopsy on the body of Charles Oduor Onyango, that the body was identified by Rose Akinyi Onyango and that the autopsy was done at Siaya County Referral Hospital on 13/10/2017 at 12.25 pm.

13. The findings were as follows: General observations: Body of a male African race, naked, apparent age of 30 - 40 years, of good nutritional status and average physique. Body was preserved in formalin. External appearance: the body had a 5cm wound inflicted by a sharp object on the front left side of the chest. Internally: the body had the following: Fracture at the 5<sup>th</sup> and 6<sup>th</sup> junctions of the ribs, there was mottle interference indicative of a chronic lung disease. In cardiovascular system; there was a pericardial haematoma - blood around the heart. The descending aorta was punctured. The heart itself was normal. In the digestive system, there was pale appearance of the muscular layers of abdomen indicating severe hemorrhage. Genito urinary system was normal, the head, nervous system, spinal column were all normal.

14. As a result of his examination, he concluded that the cause of death was due to hemorrhagic shock due to injury to the descending aorta and pericardial haematoma caused by penetrating trauma. He signed the Postmortem form and issued death certificate No. 0756484 and signed it on 13/10/2017. He stated that the injuries were inflicted by a sharp object. He produced the Postmortem report as PEx1.

15. In cross examination by Mr. Mirembe advocate, the Doctor stated that he did not measure the deceased's height, and that he only saw one stab wound. Further, that the sharp object went through the joint of the breast bone and pierced the aorta and pericardial. There was bleeding. He reiterated that the injury was caused by a sharp object.

16. **PW4 Jacob Onyango Ouma**, Assistant Chief Kadenge sub-location, South Central Alego location, Siaya County recalled that on 27/9/2017 at about 7.30 pm, he was at his home when he received a phone call from a village elder of Kanyamaji village, Mr. Alex Ochieng Nyanga who informed PW4 that someone had been stabbed with a knife at a plot near his home. PW4 went to the scene and found the person already dead and lying down on the floor inside the house in a single room. PW4 called the Area Chief and the OCS Siaya Police Station and notified them of what had transpired. Three CID Officers from Siaya Police Station went to the scene at about 8.30 pm. They interviewed Maureen who was renting the house where the deceased was found dead, carried the body to the Siaya Mortuary and left with Maureen for investigations.

17. **The witness stated that he remained behind and undertook his own private investigations. He stated that on 28/9/2017 he met** a lady called Lucy who informed him that the accused David Onyango had on the previous night gone to buy chips at the market where Lucy was and she saw a cut on his hand and the accused told her that he had met Oduor the deceased and that he had "managed" the deceased Oduor. That the said Lucy told PW4 that after a short while, she heard screams and she rushed to the scene and found the deceased dead.

18. **PW4 further stated that on 27/5/2018** he received a phone call from a police officer John Lesan who told him that they had arrested the accused. He then called the CID to go for the accused at Bar Olengo. He also went there and confirmed that the accused (identified in the dock) was under arrest and he was escorted to Siaya Police Station. He stated that he had known the accused for a short period. Further, that the accused had rented a house opposite PW4's home at Ratuoro Centre near Dominion Farms. He stated that witnesses were called to record statements and some were followed up after they failed to turn up at Siaya.

19. **PW4 stated that** when he went to the scene, he found the deceased lying down and that he also found the knife stuck in his chest. He identified in court the knife which he found in the chest of the deceased. It has a loose metallic handle as seen by the court. He later recorded his statement at Siaya Police Station.

20. **In cross examination by Mr. Mirembe Advocate for the accused person, PW4 reiterated his testimony in chief and stated that when he went** to the house/scene, he learnt that Maureen was the owner of the rented house. He stated that he did not find the accused person at the scene. He stated that he did not handle the knife which was stuck in the deceased's chest.

21. **PW5 No. 236998 IP Sammy Ndungu** attached to CID Headquarters testified that he was the Investigating Officer in this matter. Previously, he was attached to DCIO Siaya until May 2018. He recalled that on 27/9/2017, a murder incident was reported vide OB No. 33/27/9/2017 at Kadenge Ratuoro Market, Siaya County. The report was made by Area Assistant Chief Jacob Onyango. PW5 went to the scene, in an isolated plot and inside a tenanted house, he found a body of a male African lying with head facing up. he observed the body and saw a stab wound on the chest and a kitchen knife was protruding into the chest. He was with other officers including the scene of crime personnel who processed, photographed the scene and he took possession of the knife. He stated that the deceased's relatives identified him as Charles Oduor Onyango and that the accused was at large. They then removed the deceased's body to the mortuary at Siaya Referral for preservation and autopsy and were accompanied by one Maureen who owned the house for interrogation. The following morning, he recorded her statement and she told him that she was a casual labourer and when she returned she found the deceased inside her house. That they spoke and she left to get some foodstuff but when she returned she met Lucy her friend who told her that her husband had passed by Lucy's stall and told Lucy that he had killed someone. That Lucy and Maureen went to the latter's house and found the deceased.

22. PW5 stated that he later established that the suspect was formerly married to Maureen but they had separated so he threatened to kill Maureen and her suitors.

23. That on 28/9/2017, PW5 revisited the scene at Ratuoro and with the help of the Assistant Chief, he traced Lucy Achieng and recorded her statement. She told PW5 that on the material evening, the accused person had passed by her stall and he was looking for Maureen Chwenge and that when Lucy asked what was wrong, the suspect told her that he had completed the task of killing the person who had an affair with his wife. That Lucy stated that the suspect had an injury on the left palm which had blood stains. On 13/10/2017, they arranged for a Postmortem on the deceased's body to establish the cause of death.

24. According to PW5, the case remained pending under investigations and on 27/5/2018, the suspect was arrested in connection with stealing when the Assistant Chief informed the police who went and re-arrested him and recorded a statement under inquiry from him. That the accused did not deny killing the deceased. The witness identified the accused before the court. He also produced as PEx 2 the knife which they recovered from the deceased's body.

25. In cross examination by Mr. Mirembe Advocate, PW5 stated that he found the knife at the deceased's side. It was broken. He stated that they did not dust it for fingerprints and that he could not tell who the owner of the knife was. He stated that he questioned Maureen and she told him that she was married to the accused and separated and the accused threatened to kill her and her suitors. He also stated that Lucy told him that the suspect found her at the Market and told her he had stabbed the deceased. He reiterated that they found the deceased arrested and held at the AP Camp.

26. Despite witness summons being issued to Maureen Atieno Chwenge to testify in this case as she was mentioned to be at the center of the issues giving rise to the alleged murder, she was not traced. The prosecution therefore closed their case on 15/10/2019.

27. The accused person on being placed on his defence gave sworn statement of defence and called no witness. He stated that he was David Onyango Okello from Bar Olengo Sub Location, Siaya County. He stated that he was a fisherman and knew why he was before the court, charged with the murder of Charles Onyango Oduor.

28. The accused person denied committing the offence and stated that on 27/9/2017 at about 7 pm he saw the deceased Charles during the day as they were neighbours but that he did not see him in the evening. He stated that he knew Maureen Atieno who was his wife. He stated that he also knew Lucy Achieng, PW1 in this case. He admitted that he had met Lucy Achieng and told her that he had found Charles Oduor Onyango sleeping (having sex) with his wife. He stated that he had no bad blood with the deceased Charles Onyango Oduor but that on the material evening he was in his house where he had rented and living with Maureen and that he had just returned from work when he found Charles Onyango Oduor and Maureen Atieno having sex in the house. That the two were shocked and he too was shocked, that he went out of the house as Charles Oduor was putting on his clothes and when Charles got out, he stabbed the accused person on the head using a knife. The accused stated that he held the deceased and they wrestled and that while the accused was trying to snatch the knife from the deceased, the deceased fell down and the knife stabbed the deceased. That the accused remained at the scene for about 5 minutes and ran away to go and report to the village elder but that the village elder went to look for the Chief. He stated that when he returned home, he did not know that the deceased was in the house. He stated that he could not tell if he had killed the deceased because he was only wrestling with the deceased and trying to snatch the knife and when the deceased fell down the knife stabbed him.

29. In cross examination by Mr. Okachi, for the prosecution, the accused person reiterated his testimony in chief and maintained that Maureen Atieno was his wife and that they were blessed with two Children, B and O. He stated that he had paid dowry and that they lived in a rental house at Ratuoro Market.

30. He denied ever differing with his wife before that date and stated that when he returned he found the door closed. That he knocked and that Maureen answered in low tone so he pushed the door and saw the deceased lying on top of Maureen. He maintained that he went out and sat down then the deceased came out wielding a knife and stabbed the accused on the head and left cheek. The court was shown scars in the said areas on the accused person's head and left cheek. He stated that he was treated in hospital but that upon being arrested, his treatment notes remained at home. He stated that the knife was found at the scene where they fought. He stated that he was not pleased with the act of finding his wife having sex with the accused person in his house. He stated that he did not plan to kill the deceased. He stated that he fought the deceased because the deceased had a knife which he used to stab the accused and maintained that the deceased fell on the knife which stabbed him and that he died instantly.

31. None of the advocates filed written submissions despite leave being granted on 20/10/2019.

## **DETERMINATION**

32. I have considered the evidence by the prosecution witnesses and the defence. The main issue for determination is whether the accused person herein committed the offence of murder and with malice aforethought. To prove the offence of murder, the prosecution must establish the following essential elements:

*(1) The death of the deceased.*

*(2) That the death of the deceased was unlawful.*

*(3) That in the causing death of the deceased the accused had malice aforethought.*

*(4) That it was the accused who killed the deceased.*

33. I will therefore consider each of the ingredients together with the entire evidence on record.

### **a) The death of the deceased**

34. The prosecution adduced evidence of PW1 Lucy Achieng Aminga who knew both the accused and the deceased as well as MAUREEN Atieno the wife to the accused. She stated that when the accused person met her at the market at Ratuoro, he had injuries on his hand which was bleeding and that he told her that he had found Maureen red-handed with a man and that he had dealt with him. The accused person too admitted in his testimony on oath that he told Lucy that he had found the deceased and Maureen red-handed and dealt with him. He also stated that he found the deceased having sex with Maureen Atieno, the accused person's wife in the latter's rented house at Ratuoro and that the deceased came out of the house with a knife and charged at the accused injuring him on the head and cheek so they wrestled and that the deceased fell down and the knife stabbed him then the accused left the scene to go and report to the village elder. In cross examination, the accused stated that the deceased died instantly.

35. **PW2 Rose Akinyi** received information that his son had been killed at Ratuoro in a woman's house. She went to the scene and found the deceased lying dead. She identified his body to the doctor who performed the post mortem.

36. PW3 Dr Biko Opidi carried out a post mortem on the deceased's body on 13/9/2017. It was identified to him by PW2 the deceased's mother. He confirmed that the deceased died due to haemorrhagic shock due to a penetrating injury to descending Thoraci aorta resulting in pericardial hematoma caused by penetrating trauma. The doctor produced the postmortem Report as Pex 1.

37. PW4 the area Assistant Chief received information from the village elder of Kanyamaji village on the death of the deceased, he went to the scene and saw the deceased dead with a knife stabbed in his chest still insitu. He called the area Chief and OCS Siaya police station who went to the scene, took away the body and investigated the case. He produced the knife which he found stuck in the deceased's chest as PEX 2.

38. PW5 the investigating officer received information on alleged murder at Ratuoro Market. He proceeded to the scene inside a rented house where he found the deceased lying with a knife still in his chest, he took the body to Siaya County Referral Mortuary and organized for postmortem and recorded witness' statements.

39. As earlier stated, the accused person admits fighting with the deceased on account of finding the deceased having sex with his (accuse person's) wife in the accused person's rented house but he claims that it was the deceased who emerged with a knife from the house and that he stabbed the accused on the head and left cheek then the accused wrestled with the deceased to snatch the deceased the knife. That the deceased fell down and the knife stabbed him then the deceased died instantly.

40. There is no doubt that the deceased died as a result of the injuries sustained as a result of the stabbing that he received that evening. Accordingly, iam persuaded that the prosecution has discharged the burden of proof beyond reasonable doubt the death of the deceased.

41. On whether **the second element of the offence of murder was proved beyond reasonable doubt that the death of the deceased was as a result of an unlawful act**, in law, every homicide is unlawful unless authorized by law or excusable under the law. That proposition was elucidated in *Sharm Pal Singh [1962] EA 13*, *see also Guzambizi Wesonga v Republic [1948] 15 EACA 63* where the court held:

*“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”*

42. According to the prosecution, the death of the deceased was unlawfully caused. The postmortem report compiled by PW3 show the nature of injuries suffered by the deceased. The cause of death is attributable to the penetrating stab injury in the deceased's chest. The weapon used was sharp consistent with assault.

43. The accused person himself stated in cross examination that he did not plan to kill the deceased. He claimed that the knife belonged to the deceased and that it was the deceased who emerged from the house and attacked the accused injuring the accused on the left head and cheek using the knife in question. The accuse claimed in his defence that he wrestled the deceased trying to snatch the knife from the latter and as a result the deceased fell and the knife stabbed him.

44. According to the accused, on the material day he returned to the house after a day's activities. When he arrived the door to his house was locked. He made a forced entry into the house only to find the deceased and the wife having sexual intercourse. According to the accused the deceased and Maureen the wife to the accused were shocked and that he too was shocked so he went and sat outside only for the deceased to emerge with a knife in his possession which he aimed at the accused to inflict physical harm.

45. This court had the opportunity to see and hear the accused testify. There was no eye witness to the incident. Only the accused told the court what happened, Maureen who was his wife was not found to tell a different story. The accused met PW1 on the market and told her that he had found Maureen red-handed and that he had dealt with the culprit. The accused claims that he went and reported the incident to the village elder who refused to go to the scene and instead called the Assistant Chief and informed him of what had happened.

46. According to PW5, the accused was at large until he was arrested in connection with a theft case that is when the police were notified and they rearrested him in connection with this case.

47. The issue that emerges in this case is that the accused person was provoked by the deceased who emerged from the house with a knife and that the accused only wrestled the deceased to snatch the knife from the deceased as a result the deceased fell and the knife stabbed him. However, PW 1 Lucy testified and her evidence was not controverted that the accused person had been married to MAUREN but that they had separated shortly and that when the accused met her at the Market, he told Lucy PW1 that he had been hunting for 'them' and that he 'had found them.' His hand had blood stains.

48. PW5 who rushed to the scene upon receiving information found the deceased dead and lying on the floor, facing up. In my humble view,

if the deceased had fallen on the knife, he would have been found lying on the knife. There is no evidence or possibility that when the knife allegedly fell down, it stood there upright and that the deceased could have fallen on it.

49. However, in the absence of an eye witness and the evidence of Maureen, this court is left with the statement of the accused person and PW1 that the accused person found Maureen who was his wife having sex with the deceased and that he was provoked by the heat of the moment. The court had the opportunity of seeing the accused. He had healed scars on his left head and left cheek. PW1 also saw him bleeding from his hand. I believe that the accused fought with the deceased. However, I do not believe the accused when he says that he had not disagreed with his wife. PW1 stated that the accused and Maureen had separated for a short while. I believe her testimony as she impressed the court as a truthful and creditworthy witness. In my humble view, the evidence as a whole points to legal provocation.

50. Section 207 of the Penal Code provides:

***“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 he is guilty of manslaughter.”***

51. Section 208 (1) of the Penal Code defines the term provocation as follows:

***“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 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.”***

52. This question on provocation and provisions of section 208 (1) of the Penal Code have been a subject of interpretation and discussion in our courts in several cases. In ***Republic v Hussein S/O Mohamed [1942] EACA 66*** the Court of Appeal for eastern Africa held:

***“When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation.”***

53. In ***Peter Kingori Mwangi & 2 Others v Republic [2014] eKLR*** the court stated”

***“for provocation to exist the following two conditions must be established:***

***(1) The subjective condition that the accused was actually provoked so as to lose his self-control and***

***(2) The objective condition that a reasonable man would have been so provoked.”***

54. In ***Elphas Fwambatok v Republic [2009] eKLR*** the Court of Appeal held:

***“In our view once a person is provoked and starts to act in anger he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case several injury can be inflicted within a very short time particularly if one has a panga – we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims.....”***

55. In ***Mabanga v Republic [1974] EA 176*** the court further held inter alia on this subject:

***“The judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the court was in the particular circumstances of this case provocation sufficient to have rendered the offence of murder to manslaughter.....”***

***We have on our own revisited the content of section 208 of the Penal Code and construed it. To us content of provocation means any wrongful act of insult of such a nature as to be likely when done to an ordinary person.....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.”***

56. I have considered the prosecution evidence of PW1 and PW5 and the accused defence in answer to the charge. It is crystal clear that the accused was married to MAUREEN whom the accused claims to have accosted having sex with the deceased. The accused testified that besides finding the deceased in bed with his wife there was an attempt to stab him with a knife in possession of the deceased.

57. It could therefore be concluded that sexual infidelity of a wife is an integral and essential trigger for the accused person’s loss of self-control by grave provocation and in the heat of passion. Passion as here used means any of the human emotions known as anger, rage, sudden resentment or terror which renders the mind incapable of cooling down on reflection.

58. According to *H. Gross, a theory of Criminal Justice (Newyork Oxford University Press 1979 at 69:*

***“In those cases where reason succumbs to passion, the will is determined by something external to it – A relation which Kant terms the heteronomy of the will. In such cases the person’s reasons for acting in a certain way pertain only to what he/she desires, independently of his moral beliefs. On the other hand, when the person’s will is determined by reason, the will is said to be self-ruled; for reason is viewed as something internal to the will. A will that is determined by reason is at one with itself. According to Kant such a will can override passion and desire.”***

59. The question to be answered in self-defense is whether the force used by the accused was reasonable and necessary in the circumstances. The answer to the arguments is found in *Palmer and McInnes Cases (Supra)* in which the Court of Appeal adopted with approval in the case of *Peter Kingori v Republic (Supra)*. The first test applicable is whether the accused exceeded the bonds of self-defense.

60. The prosecution evidence is that the deceased sustained only one stab wound injury in the chest and the knife was found still stuck in his chest. It would appear that the accused had over-powered the deceased during the confrontation. The prosecution medical evidence as to the cause of death is a testimony to the fact that accused targeted the sensitive and vulnerable part of the body herein, the heart as the stab wound pierced through the heart tearing the aorta. The disproportionate attack against the deceased person was excessive indicative of the intention to occasion serious grievous harm. The acts by the accused were unlawful and the acts inadvertently caused the death of the deceased.

61. On whether malice aforethought was proved against the accused person beyond reasonable doubt, malice aforethought is provided for under section 206 of the Penal Code. It may be established by way of evidence when any of the following circumstances exist:

***“(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.***

***(b) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***

***(c) An intention to commit a felony; and***

***(d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.”***

62. Malice aforethought can also be inferred from the manner of the killing as was held in the case of *Abanga alias Onyango v Republic Court of Appeal Cr. Case No. 32 of 1990 that:*

***“(The deceased in this case was stabbed severally with a sharp object apparently the knife recovered by PW6. The knife once used for a commission of the offence like grievous harm or murder is a lethal weapon. It is clear from the postmortem report that the accused targeted the head, neck anteriorly and posteriorly. The medical doctor described the interior stab wounds in the following manner:***

***3 stab wounds anteriorly on the face, right chest, 2 stab wounds measuring 5cm and 4cm in length, a through and through stab wound though the next anteriorly measuring 15 cm running from left to right. Four stab wounds to the head and neck, the largest being a 10 cm through and through wound to the nape of the neck being left to right on the neck. A 6 cm stab wound between the shoulder blades. A 4 cm stab wound over the left scapula and 5 cm stab wound over right scapula.***

***On the right shoulder a 5 cm and 7 cm deep stab would on the Dorsten of the right hand and 3 cm long stab wound.***

***There is no dispute that the assailant herein had an opportunity and time to inflict the extensive injuries. He was not a person in a hurry. The vulnerable parts of the body were targeted.”***

63. See also the case of *Tubere S/O Ochen v Republic [1945] 12 EACA 63. In Republic v Nedrick [1986] 1WLR 1025 where it was observed that* the existence of malice aforethought is not a question of opinion by the court but one which the prosecution must prove beyond reasonable doubt by law of evidence.

64. In this case the deceased and the wife to the accused were having sexual intercourse. The accused in revenge retaliated by stabbing the deceased. It is the accused person’s word against the prosecution. The prosecution was under a duty to prove malice aforethought or that the accused attacked the deceased and not vice versa. I believe the testimony of the accused that he was attacked by the deceased. The accused however, from the evidence on how the deceased was found lying on the ground, must have stabbed the deceased in the chest and left him for dead then he took off. The prosecution did not adduce evidence to establish malice aforethought. Accordingly, the offence of murder cannot be sustained.

65. Having found that the crime defined as murder has not been proved by the prosecution and taking into account that the deceased died as a direct consequence of a vicious fight with the accused, and having found that the accused was provoked, the question is whether this court should acquit the accused person. Section 207 of the Penal Code provide as follows:

***“When a person who unlawfully kills another under circumstances which, but for the provisions for this section, would constitute a 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.”***

66. That fact of the deceased being armed at the time was neither proved by direct or circumstantial evidence to warrant this court consider defence of self on the part of the accused absolute defence to exonerate him from criminal responsibility.

67. As was stated by Nyakundi J in **Republic v Daniel Okello Rapuch [2017] e KLR**:

*In the circumstances of this case i seriously wonder how many married men would have the strength to walk away when they find a stranger drinking from the very well he considers a personal possession and sexually engaged without inflicting some kind of corporal punishment. In the instant case the accused reacted in revenge toward off the trespass into his beloved wife and partaking from the forbidden well only meant for the accused as the lawful husband. As held in the case of Peter Kingori (Supra) the force in self defence by the accused exceeded the acceptable limits of punishment and a life was lost. In my view although the act of adultery is morally reprehensible i do not believe death is the usual or expected result of it.*

68. **Jonathan Burchell** the leaned author of *Principles of Criminal Law 2<sup>nd</sup> Edition* states as follows at pg 139 – 140, “**avoiding the attack where the threat is one of personal injury, a defence is not necessary if the attack can be avoided by retreat or escape. Indeed save legal systems concerned about preservation of human life, impose on the victim of an attack a duty to retreat in so far as this is possible and could not expose another human being to harm.**”

69. In this case, the evidence being that although the accused was entitled to beat the deceased when he found him in bed with his wife, the retaliation of the accused in occasioning a stab wound in the chest of the deceased being a vulnerable part of the body, cannot be said to be reasonable act of self-defence. That force used by the accused in my considered view exceeds reasonable force and is not excusable.

70. Thus, I find that the accused stabbed the deceased in the circumstances of provocation and in the heat of passion but he that he did retaliate by using excessive force. The charge of murder under section 203 requires all of the key integral elements more specifically that of malice aforethought. The established facts from the evidence are not consistent with the existence of malice aforethought. That, therefore discharges the accused of the offence of murder contrary to section 203 of the Penal Code.

71. In the absence of malice aforethought, the offence of murder cannot be established. What I find to have been proved beyond reasonable doubt by the prosecution is the unlawful killing of the deceased by the accused person which falls under section 207 of the penal Code.

72. Accordingly, pursuant to section 202 of the Penal Code any person who by unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter. The offence of manslaughter can be broken into three elements:

(1) There must be an unlawful act.

(2) The unlawful act must be dangerous.

(3) The unlawful act must cause death. (**See Republic v Church [1965] 2 WLR 1220**).

73. In the present case, guided by the evidence and the judicial precedents cited hereinabove, I substitute the charge of murder with that of Manslaughter and find the accused person guilty of the offence of manslaughter as stipulated in section 207 and proceed to convict the accused person with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

74. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 18<sup>th</sup> Day of December, 2019.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Okachi Senior Principal Prosecution Counsel

Mr. Ochanyo Advocate holding brief for Mr. Mirembe Advocate for accused

The accused person

CA: Brenda and Modestar