



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL CASE NO. 39 OF 2015
REPUBLIC.....PROSECUTOR
VERSUS
HONSTER KISANYA EDAGWA.....ACCUSED

JUDGEMENT

1. Honster Kisanya Edagwa hereinafter referred as the accused stands charged with the offence of murder contrary to Section as read with Section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of offence as crafted by the prosecution and set out in the charge sheet are that: “on the 2nd day of March 2015 at about 12.00hrs at Gichagi village in Ngong within Kajiado County allegedly killed one Paul Mungeta Adagwa, the deceased.”

2. The accused pleaded not guilty and therefore set in motion scheduling his case of trial. He was represented by Mr. Walkla advocate while Mr. Akula appears for the state. The prosecution summoned eight (8) witnesses to prove the charge of murder beyond reasonable doubt in respect of the accused. Whereas there were no eye witnesses who could testify about the incidence that led to the death of the deceased, the prosecution depended entirely on circumstantial evidence to prove the accused guilty.

THE PROSECUTION CASE WAS SET OUT AS FOLLOWS:

3. George Kimemia (PW1) the assistance chief of the area told this court how he received a telephone call from a neighbour and clan regarding a fight involving the accused and another not before court. PW1 testified that he travelled to the scene where he confirmed the death of the deceased whose body had multiple injuries. As regards the scene, PW1 deposed that he saw the knife next to where the body was lying. PW1 further testified that he telephoned Ngong Police Station who also visited the scene and took the accused body to City Mortuary.

4. Lisa Osesia, PW2, a sister to the accused and the deceased, testified on how the news of the incident was conveyed to her by children of a neighbour. The witness explained that on receiving the information she left her house for her brother’s house to find out what had happened to the deceased. It was further her testimony that a quick observation of the deceased body confirmed that he was no more. She was therefore asked to make calls to the other brothers and at the same time booked the report with Ngong Police Station. As PW2 was explaining the incident to a police officer at the report office she was shown a young man who had submitted himself to the station on the same issue. PW2 was able to identify the accused as his younger brother. In her further testimony PW2 testified and introduced into evidence that the deceased was holding a stainless knife by the right hand.

5. During cross-examination it emerged that the accused and the deceased had a dispute over a DVD machine. The point of contention involved the taking away of the deceased DVD by the accused without

consent from him. This matter according to PW2 became a subject of discussion at a family meeting held at their rural home on 17.3.2015. In the said meeting which the accused did not participate the deceased had complained against the accused behaviour and the missing DVD. PW2 further confirmed that the deceased telephoned the accused with firm instruction that he returns the DVD prior to his arrival in Nairobi. According to PW2 the accused never returned the DVD and it appeared that on 22.3.2015 the deceased had gone to the house of the accused to follow up on the matter. That indicated that the two appeared to have developed differences culminating in the tragic incidence where one of them lost his life.

6. PW3 Watson Edagwa a brother to the deceased testified as to the role he played in positively identifying the body to the pathologist who performed the postmortem on 1.4.2015.

7. PW4 John Edagwa also a brother to the deceased and the accused testified as to the calls he received from PW2 that the accused had killed their brother during a fight. It is not disputed from the testimony of PW4 that he joined other family members at the scene where the murder took place. PW4 confirmed that on observing the body he saw cut wounds on the neck and the ribcage area. He further corroborated PW2 testimony in respect of a dispute between the accused and the deceased over a DVD machine. That brings us to the role played by police officers.

8. On 22.3.2015 PW5 PC. Emmanuel Tekai, a gazzeted scenes of crime Officer was invited by PW8 PC Benjamin Kupei to document the scene of the murder in question. According to PW5 on visiting the scene he took various photographs depicting the general view of the scene and body of the deceased. The photographs taken and processed under this supervision together with the report were admitted on evidence as exhibits 1 and 2 respectively.

9. PW6 Sgt John Mbewa who was at the time at Ngong Police Station received a report from the accused of having been assaulted by his deceased brother. PW6 further testified that he went ahead to hold the accused in custody. At the same time PW1 and other members of the public made a report on the fight between two brothers where one of them passed away. This culminated in the scene visit in company of PW5 and PW8. During the initial interrogation according to PW6 they made a decision to collect the body from the scene which was transferred to City Mortuary for a postmortem. It further emerged that the investigations were conducted by PW8 PC Benjamin Kapei. The evidence of PW8 focussed on the role of recording witness statements, putting together the relevant exhibits including arranging for a postmortem report.

10. According to PW8 testimony, who spent considerable time on the case confirmed that the death of the deceased is traceable to the fight between them on 22.3.2015. PW8 further told this court that the murder weapon being the knife was recovered from the scene. It was admitted in evidence as exhibit 5. The evidence given by PW8 also confirmed that the blood stained knife, bed sheet and T-shirt also blood stained together with the swab of the accused were subjected to the forensic analysis at the government chemist. However, due to unavoidable circumstances as explained by the prosecution counsel the analyst report was never presented at the final trial of this case.

11. In so far as the postmortem report is concerned PW7 Dr. Peter Ndegwa testified that he prepared the autopsy report dated 1.4.2015. In the testimony of PW7 the deceased's death was caused by exsanguinations due to penetrating stab wound to the abdomen. The other findings from the postmortem were severed mesenteric blood vessels and penetrating stab wound left hypochondrian extruding to the bowels. The pathologist report was admitted in evidence as exhibit 4.

12. At the close of the prosecution case the accused was placed on his defence. In his address to the court the accused denied the offence and particulars that he killed his brother the deceased. According to the accused the circumstances giving rise to the conflict with the deceased are traceable to the DVD machine belonging to the deceased. The accused told this court that he had taken away the DVD from the deceased house but in due course it developed mechanical defects. That therefore necessitated that it be taken to the technician for repairs. It was further the accused evidence that the DVD machine was not available to be returned to the deceased as demanded at the time. In his defence the accused attributes the

non-return of the DVD as the cause which provoked the deceased to pick a quarrel and subsequent fight in his house. The accused further disputes the events in the house as portrayed by the prosecution case that he was the one who stabbed the deceased. The accused however explained to this court that during the beatings it was the deceased who picked the kitchen knife. During the struggle the accused further testified that he tried to dispossess the deceased of the knife but with no success. In his evidence he attributes the pull and push motion as the moment he heard the voice of the deceased to the effect **“you have killed me”**. He therefore at no time did he get hold of the knife to draw it against the deceased.

13. Mr. Wakla, the learned counsel for the accused has submitted and pointed out that the prosecution has failed to prove its case beyond reasonable doubt. Learned counsel argued that there was no eye witness to murder and the circumstantial evidence before court did not meet the required threshold to implicate the accused. Learned counsel further contended that it emerged from the evidence that the accused and deceased had a strained relationship arising from the DVD machine taken away by the accused without his consent. That at one particular moment on 21.3.2015 the deceased came into contact with the accused whom he assaulted over the same issue. Learned counsel further submitted that the following day it was the deceased who followed the accused up to his house where ostensibly an attack took place. In all these circumstances learned Counsel contended that the prosecution called no evidence of the fiancée to the accused who was present during the alleged fight.

14. On the other hand learned Counsel submitted that in the view of the evidence by the prosecution the accused should be accorded the defence of self as provided for under Section 17 of Penal Code. Learned counsel submitted that it's apparent that the deceased was the one who went to the accused house with the sole purpose of assaulting him. As on the material day according to, learned counsel contention provocation by the deceased cannot be ruled out. Learned counsel submissions argued and invited the court to take notice of the deceased prior conduct of assaulting the accused on 21.3.2015 and the due day on 22.3.2015.

15. In order to buttress his submissions learned counsel relied on following authorities:-

(i) ***Musili Tulo v Republic [2014] eKLR***

(ii) ***GMI v Republic [2013] eKLR***

(iii) ***Republic v Kipkering Arap Koske & Ano 16 EACA 135.***

(iv) ***Michael Ochola Ogore v Republic UR HCCR. Case No.41 of 2015 at Siaya High Court***

(v) ***Ahmed M. Omar & 5 Others v Republic [2014] eKLR***

(vi) ***Robert Kinuthia Mungai v Republic [1982-88] I KAR 611***

(vii) ***Roba Galma Wario v Republic [2015] eKLR***

(viii) ***Republic v Martin Kinyua Nancy [2016] eKLR***

16. In a nutshell learned counsel submitted that in view of the evidence adduced the prosecution has failed to prove the ingredients of the offence of murder contrary to section 203 beyond reasonable doubt.

SUBMISSIONS BY THE PROSECUTION:

17. Mr. Alex Akula, the senior prosecution counsel turning to the instant case submitted that the eight witnesses proved the case beyond reasonable doubt against the accused. On his part learned prosecution counsel reiterated the background of the DVD initially in possession of the accused but owned by the deceased. The bone of contention according to learned counsel was the failure by the accused to return back the DVD to the deceased despite various demands made prior to this fateful day. To start learned counsel for the state submitted that it is manifest that the deceased persons had promised to return of his

DVD to the accused house when he was met with a violent attack.

18. In addition learned counsel submitted that there is no evidence to show that the accused acted in self defence. He relied on the proposition that the accused did not seem to have sustained any major physical injuries to warrant the fatal stab wounds he inflicted on the deceased. Learned prosecution counsel further submitted that it is not at dispute that on 22/3/2015 at Gichagi village the accused armed himself with a knife and used it to harm the deceased. It was learned counsel contention that assuming for a moment that the accused was acting in self-defence, then the real question would be whether he did so by using excessive force. Learned prosecution counsel maintained that given the history of the dispute the accused was not ready to surrender or account for the DVD he had taken from the deceased without his consent. This action by the accused was therefore to bring this thorny issue of the DVD to a final end by taking away his brother's life. Learned prosecution counsel further submitted the evidence supports the essential ingredients of the offence of murder contrary to section 203 of the Penal Code.

19. Learned prosecution counsel urged this court to rely on the following cited cases which show that the charge against the accused has been proved beyond reasonable doubt:

- 1. *Republic v Godfrey Ngotho Mutiso [2008] eKLR***
- 2. *Morris Aluoch v Republic Cr. Appeal No. 47 of 1996 UR***
- 3. *Republic v Tubere S/O Ochen [1945] 12 EACA 63***
- 4. *James Masomo Mbatha v Republic [2015] eKLR***
- 5. *Daniel Anyango Omoyo v Republic [2015] eKLR***
- 6. *Libambula v Republic [2003] KLR 683***

20. In reliance of these cases the learned prosecution counsel submitted that the accused intentionally used unlawful force on the deceased. It was the contention of the learned counsel that the court should examine the circumstances of the case to ascertain the following:

- The nature of the weapon used.
- The part of the body targeted.
- The conduct of the accused during and after inflicting harm and including the motive to be presumed from the facts of the case.

21. According to the learned prosecution counsel applying the legal principles in the cited cases and the evidence adduced the accused had the motive and plant to kill his brother. He urged this court to find a manifestation of malice aforethought.

22. I have considered the charge, prosecution and defence case and the submissions by learned counsel for the accused. The essential elements of the offence of murder contrary to section 203 of the Penal Code which the prosecution must prove beyond reasonable doubt consist of the following:

- a) *That the deceased Paul Mungeta Edagwa is dead (deceased).***
- b) *That the death of the deceased was through unlawful act of omission or commission.***
- c) *That in causing death the accused had malice aforethought.***
- d) *That the accused has been positively identified as the one who participated in killing the deceased.***

23. As stated in the case of **Republic v Andrew Mueche Omwenga [2009] eKLR:**

“It is clear from the definition of murder that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission”.

24. This case affirms therefore that the above ingredients of murder must be proved beyond reasonable doubt in order to secure a conviction.

25. The standard of proof in criminal cases the prosecution bears the burden of proving each element of the offence against an accused person beyond reasonable doubt. This burden is more so entrenched in our Republic Constitution under Article 50 (2) (a) which provides that, ***“an accused has a right to be presumed innocent until the contrary is proved.”***

26. The Evidence Act under Section 107 provides as follows:-

“Whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist”.

27. It is trite that beyond reasonable doubt is not beyond iota of doubt. In the case of **Miller v Minister of Pensions [1947] 2ALL ER 371 at pg 373-374** one of the realist jurist of our time **Lord Denning** stated as follows:

“Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable the case is proved beyond reasonable doubt, but nothing second of that will suffice”.

28. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented before a trial court. From the reading of the legal principle in the Miller case what is required is not an absolute or mathematical certainty, but a moral certainty (also Victor Webraska [1994] 511 US).

29. The cardinal rule both from a constitutional and statutory stand point is that the legal burden to prove elements of an offence against an accused person lies with the prosecution from the beginning to the end. The accused assumes no burden of proof.

30. In considering how I should proceed in resolution of the matter I am persuaded as I do to consider each element of the offence vis viz the evidence against the accused.

31. (a) The death of the deceased:

The death of the deceased is not disputed in this particular case. This is because the accused person in his defence confirmed that they had an altercation with the deceased on 22.3.2015 in his house. It was at this scene according to the accused the deceased is said to have sustained the fatal injuries. PW1 George Kimemia, the Assistant Chief, PW2 Lisah Edagwa and PW3 Watson Edagwa, PW4 John Edagwa the sister and brothers to both the accused and the deceased visited the scene and testified to the facts that the deceased died on the material day. The prosecution further proved documentary evidence by way of photographs captured by PW5 P.C. Tekai a gazetted scenes of crime officer. The photographs duly seen and admitted in evidence by this court confirm the death of the deceased. PW6 Sgt Mbewa and PW8 PC Kapei who also visited the scene and collected the body of the deceased which was take to the City Mortuary corroborates the testimony of PW1, PW2, PW3, PW4 and PW5. According to PW8 a post-mortem was conducted by PW7 Dr. Ndegwa on the body of eh deceased duly identified by PW3 and PW4. The post-mortem produced as exhibit 4 indicated that the deceased died due to exsanguinations as a result of the penetrating stab wound to the abdomen.

The prosecution has therefore discharged the burden of proof on the first element.

32. (b) That the death of the deceased was due to an unlawful act of mission/commission:

The accused person is criminally held culpable for the acts leading to the death of the deceased if any of the circumstances under section 213 can be inferred from the evidence of the case. This is what in law is referred to as the '**actus reus**' of the offence (the act of killing).

33. There are three elements I consider as constituting **actus reus** in cases of this nature namely; commission of an unlawful act, the act must be dangerous, the unlawful act must cause the death.

In many of the homicide cases the unlawful act is an assault of the victim.

34. In homicidal the causation issues are provided for under Section 213 of the Penal Code. Causation is an important element as defined under this section that causing death includes acts which are not the immediate or sole cause of death. The Court has a duty to examine the evidence in order to make a finding whether the accused falls under any of the following circumstances;

(a) The accused inflicts injuries and the deceased undergoes treatment which causes his death.

(b) The accused inflicts injuries on the deceased but the deceased failed to get proper medical attention.

(c) Whether the acts of the accused occasioned the deceased to take evasive action which resulted in his death.

(d) Whether the act(s) of the accused hastened the death of the deceased.

(e) Finally whether the acts of the accused accompanied by that of the deceased or of other persons accelerated the death of the deceased.

35. In light of Section 213 of the Penal code the killing of another human being is presumed unlawful unless where it is committed in execution of a court order, reasonable defence of self or property. This is clearly discussed in the case of **Guzambizi Wesonga v Republic [1948] 15 EACA 63**. According to this element it is important to establish whether the acts or omission by the accused was the sole or direct proximate cause of the deceased injuries which resulted in his death.

36. In the English case of **Republic v White [1910] 2 KB 124** to establish causation in fact it must be proved that, but for the defendant's acts, the death of the victim would not have occurred. It was also held in **Republic v Malcherek [1981] 73 CR Appeal R 173** that if the death is caused by a combination of two causes and the accused's acts remains an operating and substantial cause. The accused will still be liable for the cause of death.

37. In the instant case the prosecution witnesses PW1 visited the scene and saw the deceased having sustained stab wounds with the knife next to his body. The murder weapon kitchen knife was admitted in evidence as exhibit 5. According to PW8 it was recovered at the scene of the murder and the investigations conducted revealed that the accused used it to inflict the fatal injuries.

38. The accused in his defence denied that he was the one in possession of the knife which caused the stab wounds against the deceased. The accused's defence was to the effect that the deceased armed himself with the knife where the fight ensued in his house. The accused, fearing for his life, made an attempt to snatch away the knife from the deceased. According to his evidence in the course of pull and push the knife must have accidentally occasioned injuries to the deceased. The defence further argued that their case is made plausible by the testimony of PW2 who insisted that the deceased was found holding the knife by his right hand.

39. In this particular case the sequence of events are traceable to PW2 evidence regarding the accused conduct of carrying away the deceased DVD machine without his consent. It is not in dispute that as far back to the 17.3.2015 the deceased had demanded of the accused to return the DVD machine. The evidence of PW2 shows that up to the fateful day of 22.3.2015 the accused had not heeded the call to return the DVD back to the deceased house. The confrontation between the accused and the deceased on the 22.3.2015 was in pursuit of the DVD by the deceased up to the accused house. There was a fight revolving around the issue of the DVD within the precincts of the accused house. The nature of injuries as observed by PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 depict penetrating wound left hypochondria extruding to the bowels. According to Dr. Ndegwa PW7 the penetrating wound caused the death of the deceased.

40. The inference I draw from the post-mortem is that of an attack upon the deceased at a cardiovascular and digestive system which rendered the death of the deceased unlawful. The Assistant Chief of the area who was among the first people to arrive at the scene is crystal clear as to the location of the knife. According to PW1 the knife murder weapon in this case was next to the body of the deceased. The police had not arrived by the time PW1 arrived at the scene. The evidence by PW2 to the effect that the deceased was holding the knife is not corroborated by any independent testimony. PW2 in this case was not an eye witness to the fight between the accused and the deceased.

41. I have weighed the evidence by PW1 both in examination in chief and on cross-examination. I am satisfied that the narrative on the position of the murder weapon was next to the body of the deceased. In view of absence of preservation of the scene in a timely manner the likelihood of interference by mischievous character cannot be ruled out. The possibility therefore that the deceased inflicted himself with the serious injuries of severing mesenteric blood vessels of the cardiovascular system is far-fetched.

42. The angle at which the point of the blade entered the skin of the deceased is constituent with the use of greater level of force required when cutting perpendicularly. It has been shown by the prosecution from the photographs taken and the postmortem report by PW7 demonstrates the nature of the stab wounds are correlated against the level of force that may have been applied. These two sets of findings are at variance with the narrative of the deceased inflicting the injuries.

43. The inference i draw from these observations is that the point of entry of the knife and have some inference on the measured values of penetration forces. It is not possible for this to take place when applying the force from the range and angle of the deceased hand. This dimensional range required to initiate the kind of wounds inflicted against the deceased could only arise where the force is from another person.

I am satisfied that the death of the deceased was unlawful.

44. (c) Whether the deceased death was coupled with malice aforethought:

On malice aforethought section 206 of the Penal code (Cap 63 of the laws of Kenya) sets down what constitutes one of the critical element distinguishing murder from manslaughter. The circumstances stated herein are to be proved by way of evidence in order to infer manifestation of malice. Thus:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following:-

(a) 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 or to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.

(c) An intention to commit a felony.

(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.”

45. The standard of proof that the prosecution must establish is beyond any reasonable doubt. The prosecution must prove that the deceased had the necessary *mens rea* (read intention) to cause trauma on the deceased. Further it was that injury which led to deceased death. The prosecution therefore has the burden to prove the intention to cause death or grievous harm to the deceased.

46. The courts in Kenya have through case law have developed the requisite jurisprudence around the provisions of section 206 of the Penal Code. In the case of *Roba Galma Wario v Republic [2015] eKLR* the court dealing with intention under section 203 of the Penal Code held as follows:-

“For the conviction of murder to be sustained it is important to prove that the death of the deceased was caused by the appellant and that he had the required malice aforethought. Without malice aforethought the appellant would be guilty of manslaughter as it would mean the death of the deceased during the brawl was not intentional.”

47. In *Isaak Kimanathi Kanuachobi v Republic Cr. Appeal No.96 of 2007 UR* the same court expressed itself under the provisions of Section 206 of the Penal Code on malice aforethought:

“There is express, implied and constructive malice. Express malice is proved where it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example rape, or robbery) or when resisting or preventing lawful arrest even though there was no intention to kill it caused grievous bodily harm, he is said to have had constructive malice aforethought.”

(See *Republic v Stephen Kiprotich & 3 others [2009] eKLR HCC No. 34 of 2008.*

48. In the circumstances of this case, ***“where there was a fight involving the appellant and others in a place of worship, leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter”.***

49. I have considered the submissions by Mr. Wakla Counsel for the accused and also Mr. Akula for the State. The legal principles governing the inference on malice aforethought have also been elucidated in the samples of decided cases. The issue to be determined by this court is whether the accused in killing the deceased had malice aforethought.

50. In making a finding on this ingredient I must note that from the evidence of PW1-PW8 there was no eye witness to this offence. The prosecution is relying on circumstantial evidence. What is the view on circumstantial evidence?

51. In the case of *Mohamed & 3 others v Republic [2005] 1 KLR 722* the Court held:

“Circumstantial evidence means evidence that finds to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be seen as to exclude every hypothesis but the one proposed to be proved.”

52. It is further held in the case of *Mnyele v. Republic [2010] 2 E.A 315 and Cheratsi & Others v Republic [2003] 2 E.A 395:*

“That for a case founded on circumstantial evidence to hold, the chain of causation must be

complete, indeed so complete that there is no escape from the conclusion that the crime was committed by the accused person. A break in the chain could be fatal to the present case.”

(See the learned author of *Criminal Law 2nd Edition by William Musyoka J at pg 310*).

53. In the present case the very witnesses relied upon were the Assistant Chief PW1 George Kimemia. PW1 told this court that he received a telephone call that two boys have violently fought with one of them suffering fatal injuries. According to PW1 on reaching to the scene he confirmed the report and also saw the victim with multiple injuries. The matter was reported to the police where PW5 PC Tekai, PW6 Sgt. Mbewa and PW8 PC Kapei got involved and commenced appropriate police action. The accused according to PW1, PW5, PW6 and PW8 had already surrendered to Ngong Police Station. In the same vein PW2 Liza Edagwa, the sister to the deceased and accused was informed of the tragic incident. PW2 also went to the house of the accused and saw the victim on the ground with multiple injuries. She was involved in telephoning PW3, PW4 who joined in facilitating attendance at the time of the post-mortem. What the evidence of PW1 – PW8 points at is that the deceased had apparently gone to the accused house where the fight commenced resulting in fatal injuries.

54. The bone of contention which featured from PW2 and PW3 testimony was the dispute over the DVD. The DVD PW2 testified that it belonged to the deceased but forcibly taken by the accused at the time without returning it. It is not on doubt that the deceased and the accused fought. The murder weapon identified and produced as exhibit 5 was recovered and cogent evidence tendered as one used to inflict stab wound on the deceased.

55. From the evidence submitted by the prosecution and taken together with that of the defence it is clear that the two brothers fought and one of them died as a result. The circumstantial evidence taken cumulatively cannot establish the intention to cause death of the deceased. The attack presumably arose by the deceased going to the accused house to make demands over the DVD. In the circumstances of this nature the altercation sometimes escalates to a violent level without even the actors realising the risk and the danger associated with it. Sometimes fights of this nature happen at the spur of the moment without any malice or premeditation on the part of the culprits. This therefore to me negates the aspect of malice aforethought a significant element for the offence of murder.

I am therefore satisfied that the prosecution has not discharged the burden of proof on malice beyond reasonable doubt. That therefore removes the charge of murder against the accused as earlier indicated by the state.

56. The question which ought to be answered and alluded to by the defence is that of self-defence. Mr. Wakla submitted and argued that the action by the accused can be construed to fall within the exception of self defence in homicide case. Mr. Wakla further submitted that this is a case where the two brothers had a fight which incidentally resulted in the death of one of them. In support of his submissions to prove self defence learned counsel cited and relied on the follow authorities *Republic v Michael Ochola Ogore HCC No. 41 of 2015, Robert Kinuthia Munga v Republic [1982-88] I KAR 611, Ahmed Mohammed & 5 others v Republic [2014] eKLR, Republic v Mcinnes 55 Cr. Appeal 55*. According to learned counsel he invited this court to find that there is sufficient evidence that the case falls within the defence of self.

57. Mr. Akula learned counsel for the state submitted that there is no evidence that the accused acted in self-defence. Mr. Akula further contended that if indeed there was a fight the accused chances of sustaining physical injuries could have been immense. Mr. Akula argued and submitted that when the accused was first interviewed by the police he had evidence of injuries. He therefore dismissed the defence claim to invoke the defence of self. The prosecution has the burden of proving that the killing of the deceased by the accused was not done so by way of self-defence.

58. The test for distinguishing an appropriate degree of force from an excessive degree is well illustrated in the common law principles in the case of *Palmer v Republic [1971], Republic v Mcinnes 55 Cr. 551* where *Lord Morris* stated as follows:-

“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, but may only do what is reasonably necessary. But everything will depend upon the particular facts and circumstances.some attacks may be serious and dangerous others may not. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly one of proportion to the necessities of the situation. If an attack is serious 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. 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.

There must 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 disapproved 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 issue 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 will be left to the jury.”

59. In a recent case the court applied the principles in Palmer and McInnes principles as illustrated in **Republic v Joseph Chege Njora [2007] eKLR** as follows:-

“A killing of a person can clearly be justified and excusable where the accused’s action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or place arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or fore state the attack”.

60. In applying the above principles this court finds as follows from the evidence on record:-

There is no eye witness accounts of what transpired or how exactly the fight must have started between the two brothers. The prosecution purely relied on circumstantial evidence. The prosecution case as presented by PW2 indicated a dispute over a DVD belonging to the deceased which was in possession of the accused. According to PW2 on or about 17.3.2015 a family meeting had deliberated on the issue with a resolve to have accused return the DVD to the deceased. It is also on record that the accused persisted and becoming evasive inquiring a proper explanation to the deceased as to the whereabouts of his DVD.

61. The accused person on his defence stated that he had explained the deceased before the material day that the DVD was with the technician for repairs. However what the accused did not tell this court nor the deceased in his lifetime why he found it difficult to show him the alleged technician. The accused had the opportunity since the 17.3.2015 to leave instructions to the technician to release the electronic equipment to the deceased.

62. It cannot therefore be assumed in these set of circumstances that the deceased got into the house of his brother the accused to pick a fight. It would not also be true that the deceased in doing so had to arm himself with the knife as the accused wants this Court to believe. The accused person in an attempt to discredit the prosecution case told this court of a struggle with the deceased. He further stated that it was at that time accidentally the deceased fell and self inflicted himself with the sharp edge of the knife.

63. From the testimony of PW7 who examined the deceased during the postmortem serious injuries were noted in the cardiovascular system and the digestive system. In my view thus sharp penetrating wound could only have been possible by action of a third party targeting a particular part of the body.

64. I therefore discount the theory that the accused acted in self-defence and that the injuries were self inflicted. This prepossession is supported by the fact that the accused seemed to have escaped from a vicious fight without even a scratch. If there were such injury no medical evidence was produced to

support the claim.

65. In my finding in this case what the accused did was to attack the deceased and not purposely to defend himself from any possibility of imminent danger. The circumstances placed before this court did not provide reasonable grounds and justification that what the accused did was necessary to protect himself from injury or in defence of property.

I am satisfied that applying the test of a reasonable man in the accused's position would not have regarded the situation as one requiring use of excessive force against his own brother.

66. It is apparent from the evidence adduced by the prosecution weighed alongside the version by the accused the plea of self-defence is not acceptable in this case. The answer to this issue can be traced to the chain of events commencing with the time the accused carried away the DVD from the deceased house without authority. It is by no means clear from the circumstantial evidence presented by the prosecution witnesses that the accused had acted unlawfully and his actions exceeded the bonds of self-defence.

67. In determining whether the evidence of the accused was justified i find the following factors relevant as stated by **Prof. Burchell** in his book **Principles of Criminal Law Butterworth's Downin [2005]** as follows:

“Modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether taking all factors into account, the defender acted reasonably in the manner in which he defended himself or his property:

Factors relevant to the decision include the following (the list is by no means exhaustive)

- ***The relationship between the parties.***
- ***Their respective ages, genders and physical strength.***
- ***The location of the incident.***
- ***The nature, severity and persistence of the attack.***
- ***The nature of any weapon used in the attack.***
- ***The nature and severity of any injury or harm likely to be sustained in the attack.***
- ***The means available to avert the attack.***
- ***The nature of the means used to offer defence.***
- ***The nature and the extent of the harm likely to be caused by the defence.”***

68. In relying on these factors i bear in mind the characteristics of this case from the available evidence by the prosecution. It is evident that the deceased entry into the accused house cannot be considered as unlawful. It follows therefore that the accused violent retaliation was not meant to protect his property from any imminent danger or threats from the deceased.

69. I further take cognizance of all the events which inference can be drawn from the circumstantial evidence placed before me. These circumstances include the fact that there was a fight between the deceased and the accused. I also note that the knife; which was the murder weapon caused the fatal injuries. The accused had to flee from the scene, without even waiting to assist the deceased or seek medical assistance on his behalf.

70. The deceased prior to this fateful day demanded the return of his DVD from the accused but the latter

vehemently refused to give back the goods. The facts accepted by this court are that even the family intervention to persuade the accused return the property bore no fruits. It can be deduced from the prosecution case that the time delay for the accused to positively respond occasioned the deceased to initiate the return by visiting accused house. On this occasion the accused was the one who took the knife, targeted the cardio-vascular area and made an attack against the deceased without reasonable cause. I have great difficulty on my part to find that there could be real fight between two men, where one suffers fatal injuries and the other escapes unscathed.

71. The basis of the charge of this case as framed and proved by the prosecution establishes the following elements:

- That the accused assaulted the deceased with a lethal weapon.
- Secondly, the accused formed the necessary *mens rea* when he armed himself with the knife with intent to inflict fatal injuries.

72. As noted in the persuasive authority in the case of DPP v Church [1960] 1QB 59 the court held as follows on this issue:

“An unlawful act causing the death of another cannot, simply because it is unlawful act, render a manslaughter verdict inevitable. For such a verdict in exorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must be subject. The other person to, atleast, the risk of some harm resulting therefrom albeit not serious harm.”

73. As deduced from the facts of this case there is sufficient link between the accused unlawful act of stabbing his brother and subsequent death.

74. I therefore, on my part and in view that the prosecution has failed to prove malice aforethought decline to enter a verdict of guilty contrary to section 203 of the Penal Code but instead substitute it with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

75. Accordingly I find the accused guilty of the charge of manslaughter and convict him as per the law established.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAJIADO ON 4TH AUGUST, 2017

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Chege for Mr. Wakla advocate for the accused person

Mr. Akula for Director of Public Prosecutions

Mateli Court Assistant