



**Republic v Nyangau & another (Criminal Case E006 of 2022)
[2024] KEHC 3184 (KLR) (14 March 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL CASE E006 OF 2022
WA OKWANY, J
MARCH 14, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

ZACHARIA OBERI NYANGAU 1ST ACCUSED

HENRY MISIGA NYANGAU ALIAS JOSHUA 2ND ACCUSED

JUDGMENT

1. Zachariah Oberi Nyangau and Henry Misiga Nyangau alias Joshua, the 1st and 2nd accused herein were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that: -

On 26th January, 2017 at around 10.00 am at Bonyaiguba village, Bonyaiguba Sub Location in Nyamira South Sub-County, within Nyamira County, jointly with others already before the court, murdered Isaac Onyinge Machora.

2. The prosecution presented a total of 5 (five) witnesses to support its case while the defence presented the evidence of 4 witnesses.

Prosecution’s Case

3. PW 1 Dennis Okweri Machora, the deceased’s brother, who was at his home in Nyangori village on the evening of 26th January 2017 saw lorry that was driven by one Abel Muturi coming to collect building stones from the deceased’s land. He identified the people aboard the lorry as the 2nd accused herein, Edwin Gekara, Rasugu Momanyi and Kariuki Monana since he knew them, prior to that date, as workers in the nearby quarry. PW1 stated that no sooner had the 2nd accused and his companions started loading stones on the lorry than the deceased arrived at the scene where he protested against their actions while claiming that the stones belonged to him. According to PW1, the deceased’s



protest/objection did not yield any fruits as the 2nd accused and the people who had accompanied him continued to load stones on the lorry.

4. PW1 testified that the deceased and one John Samusi Monanda had a long-standing dispute over the ownership of the quarry stones and that the area chief had intervened in the dispute to no avail. PW1 stated that, in the process of loading the stones on the lorry, the accused persons herein and Edwin Gekara pelted the deceased with the quarry stones thereby causing him fatal injuries.
5. PW1 stated that the accused persons fled from their homes after the incident but were arrested sometime in February 2022 after which they were arraigned before this court for the offence of murder. He stated that Edwin Gekara was charged and convicted for the offence of murder in an earlier related case. He added that the deceased was killed because he refused to let go of his stones and that the 1st accused was involved in previous fights with the deceased.
6. On cross examination, PW1 stated that the 1st accused threw the first stone at the deceased followed by the 2nd accused and Edwin Gekara.
7. PW2, Joseph Muchora, the deceased's father, testified that he was at his home on the material date when he heard noises and noted that some people were quarrelling over stones. He proceeded to the scene of the quarrel where he found the deceased lying on the ground with serious injuries on the head and back. He noted that the deceased was bleeding profusely from the head. He added that he found many people at the scene including PW1 and the deceased's wife but did not find the accused persons at the scene. He confirmed that the deceased succumbed to his injuries as he was pronounced dead on arrival at the hospital.
8. PW3, Mary Nyaboke, the deceased's wife, testified that she was at the scene of the attack where she witnessed the accused persons and one Edwin Gekari stoning the deceased. She explained that Edwin is the 1st accused's son. She added that the 1st accused's wife, one Josephine, also participated in assaulting the deceased.
9. According to PW3, this was not the first time that the accused persons were attacking the deceased as they had a long-standing dispute over the ownership of the said stones. She further testified that the accused persons fled from the area soon after incident but were arrested sometime in 2021 after some of the assailants had been charged, convicted and imprisoned over the deceased's murder.
10. PW4, Inspector Silas Owino Owenga, a police officer attached to the Director of Criminal Investigations (DCI) office at Nyamira South testified that he was in his office on 18th December 2022 when he received information that two suspects, who had allegedly jumped bail in a concluded 2017 murder case, had resurfaced and were threatening witnesses who had testified in the said case. He arrested the two suspects, the accused persons herein, and charged them with the offence of murder.
11. On cross examination, PW4 stated that the accused persons in the 2017 case were convicted and were serving their respective sentences.
12. PW5, Sgt. Rebecca Kathoka, was on duty at DCI Nyamira North on 26th January 2017 when an irate mob carrying a dead body came to the police station with a complaint that the deceased had been stoned by about four (4) people. She advised the mob to take the deceased's body to the mortuary and later visited the scene of crime and the suspects' home.
13. PW5 further testified that a post mortem examination of the body of the deceased revealed that the cause of death was excessive internal bleeding. She stated that their investigations revealed that the deceased and the accused's family had a longstanding dispute over the ownership of the stones that



led to the stoning of the deceased on the fateful day. She testified that on one Edwin Gekara and his mother Josephine Oberi Nyangau were charged and convicted of murder in the earlier case.

14. PW5 witnessed the post mortem examination on the body of the deceased and produced the post mortem report (P. Exhibit 1) at the hearing. The report revealed that the cause of death was cardiopulmonary arrest due to depressed skull fracture and intracranial and subdural haemorrhage following blunt trauma to the head.

The Defence Case

15. At the close of the Prosecution's case, this Court found that the accused persons had a case to answer and placed them on their Defence.
16. In his unsworn statement, DW1, the 1st Accused herein, explained that he was arrested on 15th February 2022 over an allegation that he had illicit brew. He testified that police officers searched his house but did not find any alcohol and that he was surprised when he was later charged with the offence of murder. He denied any involvement in the murder of the deceased.
17. DW2, the 2nd accused, similarly gave an unsworn testimony in which he denied any knowledge of the circumstances under which the deceased met his death. He maintained that he had been falsely accused of the murder.
18. DW3, Lydia Nyansurura Misiga, the 2nd Accused's wife and the 1st accused's sister in law testified that she was at her home on 26th January while her husband, the 2nd Accused had gone to herd cattle at Nyamaiya. She stated that following the deceased's murder, a huge crowd armed with all manner of weapons invaded and burnt down her home thereby leaving her with no option but to escape with her children. She denied her husband's involvement in the murder of the deceased.
19. On cross examination, she explained that the 1st and 2nd accused are brothers from the same mother and that she knew the deceased as a resident of Nyangori.
20. DW4 Monanda Samusi an uncle to the deceased and the accused persons' neighbour testified that he went to see a lorry that had come to collect stones near his home. He testified that the deceased was not at the scene when he arrived but that PW1, PW2, one Teresia (PW2's wife) and many other people were at the scene. He stated that soon after his arrival at the scene, the deceased, who was on his way to Nyamira where he worked arrived at the scene where PW2 was chasing away the stone loaders. He advised PW2 to allow the loaders to go on with their work since the stones belonged to him.
21. DW4 testified that PW2, the deceased's father, told the deceased not to leave the scene so that they could wage a war against the loaders by breaking the lorry. According to DW4, it was upon this advice that the deceased went back home, removed his work clothes and came back to the scene armed with a panga. He stated that the deceased dragged one Edwin from the top of the lorry and that they both fell down. He explained that it is at this juncture that some of the people at the scene became agitated and threw stones at the deceased in a bid to stop him from cutting Edwin with the panga.
22. DW4 explained that many people pelted the deceased with stones and that it was difficult to who threw the stones. He further stated that the accused persons herein were not at the scene. He explained that he knows one Josephine as the mother of Edwin and that both mother and son are currently in prison having been convicted over the death of the deceased.
23. On cross examination, he stated that the disputed stones were from his land but that Joseph Muchora did not want him to sell the stones. He further stated that there were so many people at the scene that



he could not tell if the 1st and 2nd accused were also there. He estimated the total number of the people at the scene at about 15.

Analysis and Determination

24. The Prosecution was required to prove the following ingredients in order to secure a conviction on the charge of murder: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

(See the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR.)

(a) The death of the deceased

25. It was not disputed that the deceased died following an attack that occurred on 26th January 2017. The death of the deceased was confirmed by PW5 who produced the post mortem report which revealed that the cause of death was cardiopulmonary arrest due to depressed skull fracture and intracranial and subdural haemorrhage following blunt trauma to the head.

(b) Proof that accused committed the unlawful act which caused the death of the deceased

26. PW1 and PW3 testified that they witnessed the Accused persons and two other people, who have already been convicted and sentenced over the same offence, pelting the deceased with stones. PW1 testified as follows: -

“Zachariah Oberi Nyangau – was also working at the quarry. Zachariah came and said the deceased had disturbed them a lot and he should be finished. They continued to load the stones.

Joshua was on top of the lorry – he took a stone from the lorry and threw it to the deceased and hit him on the head – forehead – top of the head. Joshua told him to leave or he dies. Zachariah also took a stone and hit him on the head. Edwin also took a stone and hit him on the chest. Josephine also took a stone and hit him on the back.

After that, they started raining stones on him. I was close by about 1 meter away. I went close to try and save the deceased – stop the war. The deceased was bleeding and the assailants took off.”

27. PW3, on the other hand, stated as follows: -

“Edwin was loading stones on the vehicle. The deceased asked them why they were taking the stones. Zachariah came with a tyre which he was using to burn stones. He put the tyre down and started to beat the deceased. He hit him with stones and fists.

Josephine also beat the deceased – Josephine is the wife of Zachariah.

Joshua also hit the deceased with stones. Joshua was not on top of the lorry. Edwin also attacked deceased with stones.”



28. The accused persons, on their part, presented the evidence of an eye witness DW4, Monanda Samusi, who testified as follows over the sequence of events that led to the death of the deceased: -

“I was at home. A lorry was picking/loading stones from near my home. I went to see what was going on. At the scene I found PW2, Teresia the wife of PW2 Machora, Dennis Okweri (PW1). I found the lorry there. There were two lorries on the road. There were people loading stones on the lorries. The deceased was not at the scene at that time. The deceased later came to the scene – he was on his way to Nyamira where he works.

Joseph Machora was chasing the stone loaders away – he did not want them to load stones on the lorries. I told Joseph to let the loaders do their work as the stones belonged to me.

PW2, the father to the deceased told the deceased not to go away so that they can wage war on the loaders – to bread the lorry (“pasua gari”). The deceased went, removed his work clothes and took a panga – he came with a panga. Edwin (convicted) was on top of the lorry – when the deceased came, he dragged Edwin from the top of the lorry and they both fell down. Many stones were thrown at the deceased to stop him from cutting people with the panga. Many people threw stones. I cannot tell who threw stones.

Accused 1 & 2 were not at the scene. Accused 1 & 2 are brothers. Stones hit the deceased and people did not know he had died.”

29. The above extracts of the testimonies of PW1, PW3 and DW4 reveal that both the prosecution and the defence witnesses confirmed that there was a confrontation at the scene where the lorry was collecting stones. It was not disputed that the protagonists disagreed over the ownership of the stones. The point of departure, however, is on the involvement of the accused persons in the murder of the deceased.

30. While the prosecution witnesses stated that the 1st and 2nd accused participated in the attack that led to the death of the deceased, DW4 testified that the accused persons were not at the scene of the attack. This court must now determine the identity of the deceased’s killers. I note that when DW4 was subjected to cross examination, he stated that there were so many people at the scene of the attack that he could not tell if the accused persons were also present. He testified as follows: -

“I went to the road and I found many people at the scene. I cannot tell how many people were present. If the Accused 1 & 2 were at the scene, I cannot tell. I do not know the names of all the people who were at the scene, but they could have been about 15 people.”

31. From the testimony of DW4 it is clear that that he was not sure if the accused herein were at the scene or not. This means that the accused persons may as well have been among the people who attacked the deceased. The prosecution witnesses, on their part, were unequivocal that the accused persons were at the scene of the attack. I note that their evidence was not shaken on cross examination.

32. Turning to the evidence presented by the accused persons, DW1 and DW2, I note that they merely denied any involvement in the death of the deceased. I find that their evidence was made up of mere denial that did not oust the evidence presented by the prosecution.

33. DW3, on the other hand, was not at the scene of the attack. She stated that her husband, the 2nd Accused did not participate in the attack of the deceased as he had gone to Nyamaiya where he works as a herder. I find that the evidence of DW3 cannot qualify to be classified as alibi evidence as she did not state that she was actually with the 2nd Accused in Nyamaiya at the time of the attack. I further find that her evidence did not shake the evidence of the prosecution witnesses.



34. For the above reasons, I am satisfied that the prosecution proved, beyond reasonable doubt, that the Accused did the unlawful act which caused the death of the deceased which constitutes the ‘actus reus’ of the offence.

(c) Proof of malice afterthought

35. The court must now determine whether accused persons, with malice aforethought, inflicted the injuries that resulted in the death of the deceased. The ingredients of murder were explained in the case of *Roba Galma Wario vs. Republic* [2015] eKLR where the court held that;

“For the conviction of murder to be sustained, it is imperative 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.”

36. Malice aforethought was defined in the following cases;

(a) *Nzuki vs. Republic* [1993] KLR 171 where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

- Intention to cause death

- Intention to cause grievous bodily harm

- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.

(b) In the case of *Daniel Muthee vs Republic Criminal Appeal No. 218 Of 2005 (UR)* cited in the case of *Republic vs Lawrence Mukaria & Another* [2014] eKLR, the Court of Appeal considered what constitutes malice aforethought and observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

37. Section 206 of the Penal Code gives the instances when malice aforethought is established. It states that:-

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

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;



- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

38. It is trite that even in instances where any or all of the other ingredients are proved, it will not be murder if the accused person is shown to have been provoked and/or to have acted in self-defence. What then is provocation? What is self defence and when do the two defences arise?

39. Black’s Law Dictionary, 7th Edition defines the term “provocation” as “Something (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion.”

40. Section 208 of the Penal Code explains what constitutes provocation a follows:-

“S.208 (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

41. Self defence on the other hand, as the term itself suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one’s family or one’s property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

42. The law generally abhors the use of force or violence. There are, however, instances where the use of reasonable force is justified. For instance, an accused charged with an offence may seek to plead that he acted as he did to protect himself, or his property or others from attack or to prevent a crime or to effect a lawful arrest. Such pleas when successfully raised provide a justification for the accused’s conduct thereby rendering his act lawful. Since the use of lawful force is not an offence, the accused will be acquitted of the offence as the element of mens rea will be missing.

43. A person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it. This defence therefore turns on two requirements: one, that the force must be necessary and secondly that it must be reasonable.

44. It is not necessary, however, for an actual attack to be in progress before the accused may use force in self defence. The danger the accused apprehends, however, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means. It is sufficient if he apprehends an attack and uses force to prevent it. In Beckford vs. R [1988] AC 130 Lord Griffiths stated (at p.144) that: -

“ a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.”



45. In *Mokwa vs. Republic*, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force. In *Palmer vs. R.*, [1971] 55 Cr. App. R. 223 at p. 243 the English House of Lords held: -

“The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter.”

46. In *Palmer vs R.*, (supra) quoted with approval by the Court of Appeal in *John Njoroge Vs Republic*, Cr. App. No. 186 of 1987, it was held thus: -

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation....If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction.”

47. I should point out that like in all other criminal cases, where accused raises the defences of self defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt. In *Beckford Vs R* [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

“It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fails to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful.”

48. In the instant case, I note that the evidence of DW4, when considered in totality, presents a scenario where the accused persons can be said to have acted in self-defence when they saw the deceased confront their kin, one Edwin, and pull him down from the lorry while armed with a panga. It is to be noted that Edwin was the son of Josephine and the brother of the accused persons herein. In the circumstances of this case, one can say that the accused persons reacted to in order to repulse and stop him from attacking their relative with the panga.

49. DW4 named PW2 as the initiator of the conflict as he (PW2) incited the deceased to stay put so that they could wage war against the people who were loading stones on the lorry.

50. I find that DW4 was as a candid witness who had no reason to mislead the court on what transpired during the attack considering that he was a close relative to the deceased who was his nephew. He



testified that he was very saddened by the death of the deceased. On cross examination DW4 testified as follows, on his kinship with the deceased: -

“Joseph Machora (PW2) is my brother from the same father different mothers. I have a good relationship with Joseph Machora’s family. We have no land dispute. We only differed over the stones. The stones were from my land but Joseph did not want me to sell the stones.”

51. Self-defence was discussed in the case of Ahmed Mohammed Omar & 5 Others v Republic [2014] eKLR where it was held: -

“What are the common law principles relating to self defence” The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in *Palmer vs R* [1971] AC 818. The decision was approved and followed by the Court of Appeal in *R vs McInnes*, 55 Lord Morris, delivering the judgment of the Board, said:

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, 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 be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. 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 may be no longer any link with a necessity of defence. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”

The Court further held: -

“The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in *DPP V MORGAN* [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds.”

52. In the present case, both the prosecution and the defence witnesses confirmed that the deceased and the accused persons had a long-standing dispute over the ownership of the building stones that the accused persons were allegedly loading on the lorry. PW1 testified as follows over the dispute: -

“They came and started packing stones on the lorry. It turned out that there was a dispute on the ownership of the stones. The area chief had ordered that the stones should not be



carried away, but they insisted on taking the stones. The deceased claimed that the stones had been taken from his land.”

53. PW2 testified as follows over the dispute: -

“I heard some noise from the road. There was a quarrel over stones.”

54. PW3 similarly weighed in on the dispute over the ownership of the stones as follows: -

“The reason for the attack was a dispute over the stones. It was not the first time that they were beating him. The chief had ordered that the stones should not be taken away. The stones belonged to us.”

55. The evidence of DW4 over the genesis of the fight paints a picture of a charged atmosphere where two rival groups with a long-standing dispute over the ownership of the stones confronted each other. According to DW4, the deceased was stoned by the people at the scene the moment he (the Appellant) yanked one Edwin from the top of the lorry as they feared that he would attack them with the panga. A critical analysis of the testimony of DW4 reveals elements of self-defence and provocation that this court cannot be overlook.

56. It did not escape this court’s attention that the dispute over the stones involved members of the deceased’s family on one side and the accused’s family members on the other side. Indeed, all the prosecution witnesses, except the two police officers (PW4 and PW5) were the deceased’s relatives, namely; his brother, father and wife respectively. Similarly the accused persons herein are relatives. It would appear that the two families locked horns in a fight that ended in deadly consequences.

57. If the testimony of DW4 is anything to go by, then one can say that the deceased was not an innocent bystander who was caught up in a deadly crossfire but was an active participant/catalyst in the brawl.

58. The question which begs an answer, at this point, is whether the accused persons used reasonable force to repulse the attack by the deceased. In assessing the “reasonableness” of the action taken by the accused persons herein, it is important to consider the circumstances of the case. The Court of Appeal dealt with the issue of self-defence in the case *Njeru v Republic* [2006] 2 KLR 46, and held that: -

1. Killing of a person can only be justified and excusable where the action of the accused which caused the death was in the course of averting a felonious attack and no greater force than was necessary was applied for that purpose. For the plea to succeed, it must be shown by the accused, on a balance of probabilities, felt that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack.
2. In this case, it was the duty of accused to show that at the time of the cutting deceased’s neck, he was in the course of averting a felonious attack and that no greater force than necessary was applied. Accused was bound to show that he was in immediate danger or peril arising from a sudden and serious attack by the deceased.
3. By virtue of Section 17 of the Penal Code, the principles of the English common law were applicable in determining criminal responsibility for the use of force in defence of the person or property. Under those principles, a person who attacked may defend himself but he may only do what was reasonably necessary. Everything would depend on the particular facts and circumstances.



59. I have considered the injuries occasioned to the deceased who died as a result of skull fracture and internal bleeding. I find that while the accused can be said to have been provoked or acted in self-defence following a brawl over the ownership of the stones, they cannot escape responsibility for ending the life of another person. The accused invited the wrath of the deceased and his relatives by defying the directives by the local administration to keep off the stones that were the subject of the confrontation.

60. I however note that the fight broke out in the heat of the moment as accused persons did not plan or anticipate the killing of the deceased. Provocation, when coupled with self defence, can reduce a murder charge to manslaughter. This was the finding in *Mbugua Kariuki v Republic*, [1976-80] 1KLR 1085 and *Republic v Gachanja*, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

61. In *Mancini vs Director of Public Prosecutions*, [1941] All ER 272 the English House of Lords held that not every kind of provocation will reduce murder to manslaughter. To have that effect the provocation must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the act which causes the death. The test to be applied therefore is that of the effect the provocation would have on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary and reasonable person to act as he did.

62. The factors that the court should consider in discerning whether an act is punishable as murder, or culpable homicide/manslaughter, not amounting to murder, were outlined in *Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh* 1976 (4) SCC 382 where the court observed that:

a.

29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following,



among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body;(iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger;(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.”

63. Applying the circumstances highlighted in the above-cited case to the present case, I find that they point towards proving manslaughter as opposed to murder for the following reasons: - the nature of the weapons used in the killing were stones that were picked at the scene; the stones were reportedly thrown at the deceased by many people and one cannot therefore tell if all the assailants aimed at the deceased’s vital body parts; the amount of force used by each assailant cannot also be ascertained; the act was in the cause of a sudden free for all fight as the accused persons were loading the stones on the lorry; the incident was not planned but happened at the heat of the moment; there were prior fights over the same stones; there was grave and sudden provocation when the deceased approached and yanked down one of the loaders when armed with a panga and the deceased was attacked by an irate mob.

Disposition

64. For the reasons that I have stated in this judgment, I find that the accused persons cannot, in the circumstances of the case be held guilty of murder. I therefore reduce the charge of murder to manslaughter. I accordingly acquit the Accused of the charge of murder but convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIDE MICROSOFT TEAMS THIS 14TH DAY OF MARCH 2024.

W. A. OKWANY**

JUDGE**

