



**State v Odongo (Criminal Case E034 of 2022)  
[2024] KEHC 5742 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5742 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E034 OF 2022**

**RE ABURILI, J**

**MAY 9, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**CALEB OGUTO ODONGO ..... ACCUSED**

**JUDGMENT**

1. The accused person Caleb Oguto Odongo 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. The particulars of the offence are that on the 6th day of December, 2022 at around 1900hrs in Manyatta 'B' within Kisumu East Sub-County within Kisumu County, the accused murdered one Eden Michael. The accused person pleaded not guilty to the charge against him and the matter proceeded to trial. The prosecution called a total of eight (8) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

2. PW1 Veronica Asiko Namsaba testified that the deceased used to work for her mother as a farmhand while the accused is her mother's neighbour. She testified that on the 6.12.2022 she was at her mother's house at Yellow Bridge Kasagam when at around 6pm her daughter called her from outside saying, "mama mama watu wanapigana nje."
3. PW1 testified that she immediately got outside and saw the accused cutting the deceased with a panga on the legs. It was her testimony that she moved close and asked the accused "japolo, what are you doing to Michael alias Ticha." She testified that as the accused was cutting the deceased he told the deceased in Dholuo that he had warned the deceased to stop sleeping with his-accused's wife but that the deceased was not heeding. PW1 testified that the accused was taunting the deceased to stand and go and take his (accused's) wife.



4. It was PW1's testimony that the accused continued talking to the deceased as he walked away after he cut the deceased. She testified that she went and confirmed that the deceased had a cut on the neck and was bleeding heavily. PW1 testified that she confirmed the deceased's neck cut when he was lifted by people who had gathered at the scene.
5. PW1 testified that she called her brother Dickson who came with a vehicle and took the deceased to hospital but that she later received a call from her brother informing her that the deceased had passed on. It was her testimony that the incident took place between 7.30 – 8pm and that she was able to see what was happening as there was light outside her house. She testified that she was standing 2 feet away from where "japolo", the accused, was cutting the deceased, "Ticha".
6. PW1 identified the accused on the screen as he was testifying from prison. It was her testimony that she heard that the accused and deceased were rivalling over a girl.
7. In cross-examination, PW1 admitted that she was not present when the fight broke out. She testified that the accused "japolo" was angry when she found him cutting the deceased. It was her testimony in cross-examination that the girl being fought over was the accused's wife and that the accused was saying that the deceased was seducing his wife. PW1 further testified that the accused has children and that she knew that one of his children was admitted in hospital and that the accused was to take care of the child, exchanging with his wife.
8. PW2 Dickson Namsaba testified that he does taxi business. It was his testimony that both the deceased and accused were his neighbours. He testified that on the 6.12.2022 at around 8pm, he received a call from his sister Veronica, PW1 who informed him that "Ticha" had been killed by "Japolo." He testified that he also received a call from his mother who informed him to get a vehicle to take "Ticha" to hospital.
9. PW2 testified that he got on a boda boda and went to the scene and that further, he called a friend who went with a vehicle to the scene. It was his testimony that at the scene, he saw "Ticha" badly injured and bleeding heavily with a cut on the neck and legs. He testified that he did not find "japolo" at the scene. He further testified that his friend Freddie came with a vehicle wherein they placed the "Ticha" in the boot. PW2 testified that "Ticha" was groaning but when they reached Russia Hospital he raised his head once and went silent. He testified that the doctor pronounced him dead upon examining him and further explained to them that the deceased would not have survived even if they had taken him to hospital immediately following the assault as his vessels on the neck were severed.
10. PW3 John Fred Wanga testified that he knew the deceased as "Ticha" and that they lived in the same estate but that he did not know the accused. It was his testimony that on the 6.12.2022 he was in his house at Manyatta when he noticed a missed call from PW2 and on calling him, PW2 informed him to go and assist him take the neighbour to the hospital.
11. PW3 testified that he went to PW2's home where he found a badly injured person whom they placed in the vehicle and took him to Russia Hospital where the doctor upon examining the deceased informed them that he was already dead.
12. PW4 No. 256484 PC (W) Evelyne Nyaboke testified that on the 6.12.2022 she was at Nyamasaria Police Post at about 8.30pm when an individual arrived at the post armed with a panga and introduced himself as Caleb Odongo. It was her testimony that her colleague Jacob Maguti challenged the armed man to surrender the panga.
13. PW4 testified that the armed man informed them that he had cut a man who was having an affair with his wife hence his surrender. PW4 testified that the armed man informed them that he had a sick child



- in hospital and so he and his wife took turns in staying with the child but on that day when he went to check on the child and relieve his wife he found her missing and was informed that she had been seen with the deceased so he went home, picked his panga and found the deceased with his wife and proceeded to cut him.
14. PW4 testified that the accused was disarmed by PC Magut and they proceeded to book him and informed their in charge. She identified the accused on the screen as the person who surrendered himself at the police station.
  15. In cross-examination, PW4 reiterated that the accused surrendered himself and complied with their directives. She further testified that the accused informed them that it was not the first time he had found his wife and the deceased together and that he had warned them severally.
  16. PW5 Gordon Khamala Waliama, a Government Analyst working at the Government Chemist in Kisumu produced a report following a request by CPL. Peter Malimali of DCI Kisumu East to conduct DNA examination. He testified that they received two memo forms dated 14.2.2022 as follows;
    - i. A panga with a black rubber handle in a newspaper wrapping marked 'A'
    - ii. Blood samples of Eden Michael Otieno (deceased) 'B'
  17. It was PW5's testimony that the 2<sup>nd</sup> memo dated 2.2.2023 had one item submitted: A green long-sleeved jacket in a green carrier bag 'X'. He further testified that the request was to examine the said items and determine any presence of biological evidential material and determine the origin of the said biological material.
  18. PW5 testified that he analyzed the exhibits on 6.12.2023 and his findings were as follows:
    - i. The panga item 'A' was moderately stained with blood of human origin.
    - ii. The jacket item 'X' was lightly stained with blood of human origin.
  19. It was his testimony that he obtained DNA profiles from the said blood stains and concluded that the DNA profile generated from the blood stains on the panga item 'A' and the jacket item 'X' both match the DNA profile of Eden Michael Otieno, the deceased person. PW5 testified that he prepared and signed the report on 6.12.2023, which report he produced as PEX1.
  20. In Cross-examination, PW5 testified that the green jacket came later, after 1<sup>1/2</sup> months after the submission of the panga and blood sample.
  21. PW6 Dr. Lucy Ombok testified that on the 14.12.2022 she carried out an autopsy on a male African of 169cm of good nutrition whose body was well preserved and externally, she found that the body had the following injuries:
    - i. a deep cut wound on the neck 6cm deep and 10 x 4cm wide,
    - ii. a deep cut wound on the back measuring 10 x 3cm
    - iii. a deep cut wound on the left leg behind the knee measuring 11 x 5cm
    - iv. a deep cut wound on the left arm measuring 4 x 2cm
  22. It was her testimony that there were several cut wounds on both legs and that there were no injuries on the internal systems. She testified that she concluded that the cause of death was severe hemorrhage bleeding from several deep cut wounds on the body especially the deep cut wound on the neck. It



was her testimony that she issued a death certificate no. 1527802 and she proceeded to produce the postmortem report as PEX3.

23. PW7 No. 235266 CIP Michael Lemayian, the investigating officer in this matter testified that on the 6.12.2022 while working, he received information from Sagam Police Station of a serious assault case where the victim had been taken to JOOTRH. He testified that he later received information that the victim had passed on and that the accused had surrendered himself to Nyamasaria Police Post with a blood stained panga saying that he had killed the deceased upon finding him in a compromising position with the suspect's wife.
24. PW7 testified that he proceeded to the area the following day on the 7.12.2022 and took over investigations. It was his testimony that he took possession of the surrendered panga which he took to the Government Chemist at Kisumu for forensic investigations. He further testified that he obtained a custodial order to facilitate completion of investigations. It was his testimony that he arranged for a postmortem to be carried out on the deceased's body and a mental assessment for the accused.
25. PW7 reiterated PW4's testimony on the accused's surrender. To the police station following the incident. He produced the panga as PEX5 and the blood-stained green jacket as PEX6. It was his testimony that he reached out to the deceased's wife to testify but she refused stating that the deceased embarrassed her by having an affair despite her protests.
26. In cross-examination, PW7 stated that the accused reported the incident and surrendered to the police before the deceased had passed on. He further testified that they got the green jacket, PEX6 from the accused while he was in custody. He admitted that he was informed of the deceased having an affair with the accused's wife which was even known by the deceased's own wife.
27. In re-examination, PW7 testified that he got information from Evelyne Atieno, the deceased's wife, regarding the deceased's affair with the accused's wife and further that the deceased's wife was bitter because of the shame.
28. PW8, George Omondi Wanyang testified that the deceased was his paternal cousin. He testified that on the 6.12.2022 he received a call from one of their cousins that something had happened to the deceased and so he proceeded to JOOTRH where he saw the deceased's body and on the 14.12.2022 he identified the deceased's body to the doctor carrying out the autopsy.

### **The Defence Case**

29. Placed on his defence, the accused person gave a sworn testimony that on the 6.12.2022 he had a sick child in hospital and so he and his wife were taking turns caring for the child with him taking the night shift while his wife took the day shift.
30. It was his testimony that on the material day, he went to the hospital at around 1 – 2pm to take milk to the ailing child and only found his child with his wife missing. He testified that he inquired from a neighbour in the same ward and she informed him that his wife had left. The accused testified that she called his wife to establish her whereabouts and she informed him that she had returned to the house to take care of the younger child who was not feeling well.
31. The accused testified that he stayed in hospital with the ailing child until 6pm when he went to the house. It was the accused's testimony that he found the deceased and his wife having sex. He testified that he got angry and found himself at the Police Station at 8pm though he could not recall what he told the police. The accused testified that he was informed that he had cut the person whom he found having sex with his wife with a panga. The accused admitted that he knew the deceased.



32. In cross-examination, the accused testified that on the material day he did not see the deceased with his wife twice nor did he see them at the hospital or at Yellow Bridge in Manyatta B. He testified that he did not intend to kill the deceased.
33. The accused denied arming himself prior to going and killing the deceased. He testified that he was not in hospital the whole day of 6.12.2022 and that he was doing bodaboda after which he went to visit his child. The accused denied killing the deceased or knowing what transpired. He testified that he rides a bicycle and further that he did not use a panga for boda boda.

### **Submissions**

34. Only the defence counsel filed written submissions urging this court to find that the accused was provoked by the deceased who he found having sex with his -the accused person's wife. He relied on Sections 207 and 208 of the *Penal Code*.
35. Counsel submitted that the deceased herein was having an affair with the wife of the accused person and that they were, in fact, found in the act, which the accused testified aroused anger in him that he can't remember the happenings of the said date. He submitted that the circumstances of the case clearly demonstrate that the accused person herein was provoked into committing the crime once he found his wife with the deceased in a sexual act yet she had lied to him that she had left the hospital, leaving the sick child unattended, to go and care for the younger child.
36. It was submitted that the prosecution never disputed the fact that the wife of the accused person and the deceased were found in a compromising situation as was the testimony of the accused person.
37. Counsel further relied on the *Holy Biblical Book of Proverbs* Chapter 6:32 -35 which provides that  
“ whoever commits adultery with a woman lacks understanding  
He who does so destroys his own soul  
Wounds and dishonor he will get,  
For jealousy is a husband's fury  
Therefore he will not spare in the day of vengeance.  
He will accept no recompense,  
Nor will he be appeased though you give many gifts”
38. According to the defence counsel, the holy book clearly describes the level of provocation the accused person was put to and the anger aroused in him, which the accused person summed up by saying, he doesn't know what happened after he found the deceased with his wife in the act, he only remembers surrendering himself to the police. On this particular day, it was not just any other day, the accused person had a sick child in hospital and yet the wife had left the minor in the hospital, lying to the accused person, alone to engage in an affair with the deceased, who had been warned before.
39. On why the wife to the deceased never came to testify in court, it was submitted that the investigating officer indicated that the deceased's wife informed him that she refused to testify because she had previously warned the deceased not to continue with the affair and thus it was an embarrassment to her. He submitted that the accused person did not make any plans to murder the deceased neither did he have intention to murder the deceased and that no prosecution witness testified that the accused person had motive and or prepared himself to commit the offence.



40. On the several injuries inflicted on the deceased, it was submitted that the prosecution cannot argue that because of the several injuries inflicted upon the deceased, it amounts to malice aforethought. He relied on the Court of Appeal decision in the case of *Elphas Fwambatok v Republic* [2009] eKLR where it was held that:

“We find it difficult to appreciate why the learned Judge of the superior court came to a conclusion that a man provoked and acting on the spur of the moment cannot inflict several severe injuries upon his victim. 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 injuries can be inflicted within a very short time particularly if one has a panga”

41. Counsel invited this court to examine the circumstances in this case, where the accused person had a sick child in the hospital whom the wife was to take care of, yet he found the wife with the deceased in a sexual act which angered him until he doesn't remember what happened. He submitted that the prosecution through the facts failed to prove that the accused person had malice aforethought to commit the offence.

42. Reliance was placed on the case of Mombasa Court Of Appeal Criminal Appeal No.118 of 2014 *VM K v Republic*[2015] eKLR where the court stated as follows:

“To sustain an information of murder, however, the prosecution's case must satisfy the twin requirements of actus reus or guilty act and mens rea and or malice aforethought. Whereas there is no dispute that the deceased died at the appellant's hands, the question is what was the appellant's state of mind at the time? According to the appellant, the deceased had raped his wife and robbed her of a suit case of clothes the previous night. Accordingly, it is the appellant's case that this served to provoke him into killing the deceased.”

43. Counsel maintained that the accused person herein was not in his rightful mind to have control over his actions and thus create malice aforethought hence the ingredients of the offence of murder were not established.

### **Analysis and Determination**

44. I have carefully considered the evidence adduced in this case and the arguments in submissions by the accused's counsel. The issue for determination is whether all the elements of the Information for murder as set out in section 203 as read with section 204 of the Penal Code were proved beyond reasonable doubt. The accused faces a charge of murder contrary to section 203 of the *Penal Code*. That section defines murder as follows:

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

45. The issue for determination is whether the prosecution have proved all the elements of the offence of murder as stipulated in section 203 As read with section 206 of the *penal Code*.

46. The prosecution has to adduce evidence to establish that the accused caused the deceased death by an unlawful act which lead to their death. The components required to establish a murder were restated



in the matter of *Anthony Ndegwa Ngari v R* [2014] eKLR, with the Court of Appeal articulating them as follows:

- i. The occurrence of the demise of the victim;
- ii. The perpetration of the illegal deed by the defendant; and
- iii. The presence of premeditated intent on the part of the defendant.

47. In this instance, the initial two components are not under contention. The death of the deceased was established by PW1 and PW2 as corroborated by the autopsy report produced in evidence by the Doctor who carried out an autopsy on the body. The cause of that death is also proven by the post mortem report to be severe hemorrhage bleeding from several deep cut wounds on the body especially the deed cut wound on the neck. The fact of the death being caused by an unlawful act is also not in dispute as the evidence of PW1 was clear that she saw the accused person cut the deceased with a panga and from the injuries sustained by the deceased as per the autopsy report, they were not self-inflicted. Neither were they sustained in absolute self defence. Therefore, the main issue in contention revolves around whether it was the accused person herein who unlawfully killed the deceased and whether the unlawful killing was with malice aforethought.
48. The prosecution must prove the presence of malice aforethought in the unlawful killing of the deceased by the accused. The standard of proof is beyond reasonable doubt.
49. On whether the accused person is the person who inflicted the fatal injuries on the deceased, the evidence of PW1 which was not controverted was that she was in her homestead when her child called out to her saying people were fighting and that when she went to check, she found the accused cutting the deceased with a panga and she asked the accused why he was killing the deceased who was commonly known as Ticha. That the accused was telling the deceased that he had warned the latter not to sleep with his wife but the deceased could not heed the warning and that he was telling the deceased to stand and go to where the accused person's wife was. That the accused then walked away while still talking. The witness moved o where the deceased was and found him seriously injured with a cut on the neck, which cut was corroborated by the postmortem report on the injuries sustained by the deceased with the one on the neck having largely contributed to his demise. PW1 then called her brother Dickson who went to the scene and called PW3 who came with a vehicle and took the deceased to hospital where he was pronounced dead.
50. The accused testified that he did not intentionally kill the deceased and that he did not know how, after finding the deceased having sex with the accused person's wife, found himself at the Police Station.
51. The evidence by PC (W) Everlyne Nyaboke who testified as PW4 was to the effect that the accused person herein surrendered himself to the Police station in her presence and that PC Mugutu disarmed the accused in her presence at Nyamasaria Police Post. The panga as recovered from the accused and subjected to forensic examination by the Government Analyst as testified by Godwin Khamala, PW5 showed that the blood on the panga had the DNA Profile of the deceased Eden Michael Otieno.
52. The accused person was under no duty to give evidence. On the other hand, the testimony of PW1 and PC Everlyne Nyaboke was not challenged at all and having heard and seen the two witnesses testify, I had no doubt that they were telling the truth and that there was absolutely no reason why they could frame the accused with such a heinous offence. I am therefore persuaded beyond reasonable doubt that it was the accused person who unlawfully killed the deceased.



53. On whether the accused person had malice aforethought when he unlawfully killed the deceased, the circumstances which constitute malice aforethought are described under Section 206 of the [Penal Code](#) as follows:

- “206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - (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.”

54. In his defence, the accused testified that he found the deceased having sex with his wife and that he became angry and the next thing he remembers was that he was at the Police Station. He further testified that he did not remember what he told the police. In essence, the accused put forth the case that he was temporarily insane at the time he committed the alleged offence.

55. In contrast, PW4 testified that the accused surrendered himself to their police post while armed with a blood stained panga which they managed to have him surrender. It was her testimony that the accused informed them that he had a sick child in hospital and so he and his wife took turns in staying with the child but on the material day when he went to check on the child and relieve his wife he found her missing and was informed that she had been seen with the deceased so he went home, picked his panga and found the deceased with his wife and proceeded to cut him.

56. In addition to this testimony was that by PW1 who testified that she saw the accused cutting the deceased with a panga on the legs. It was her testimony that she moved close and asked the accused “japolo, what are you doing to Michael alias Ticha.” She testified that as the accused was cutting the deceased he told him in Dholuo that he had warned the deceased to stop sleeping with his wife but that the deceased was not heeding.

57. The law on sanity and insanity is found in sections 9 to 12 of the [Penal Code](#) the starting point is Section 11 which provides that every person is presumed sane and responsible for his actions at all times including when he is alleged to have committed an offence because sanity is the normal and usual condition of mankind. Section 11 of the [Penal Code](#) is thus in the following terms:

- “11. Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”



58. The presumption of sanity is, however, rebuttable, hence the recognition in criminal law, of the defence of insanity. This is provided for in Section 12 of the [Penal Code](#), which provides for the application of the defence of insanity in the following terms:

“12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

59. This section must be read together with section 9 of the [Penal Code](#) which provides:

“9.

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.”

60. This is the basis of the generally accepted notion that persons who cannot appreciate the consequences of their actions should not be punished if those actions happen to be criminal acts. Both sections 12 aforesaid and the M'Naughten Rules, in the old famous [M'Naughten's case](#), 1843-10 C & F 200, recognize that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to law. The test as to insanity is strictly on the time when the offence was committed and no other.

61. It would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the precise time of the commission of the crime for it is impossible to know the mind of a man. Borrowing from a medieval English Judge, Brian CJ in a 1468 case of [Greene v Queen](#), and who in turn reiterated Cicero who famously remarked that:

“The thought of man is not triable, for the devil himself knoweth not the intendment of man”.

62. The defence case is thus founded on the defence propounded by section 12 of the [Penal Code](#). In the case of [Leonard Mwangemi Munyasia v R](#) [2015] eKLR, the Court of Appeal stated:

“Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.



63. Despite the accused's person insistence that he could not recall any thing between the time that he found his wife having sex with the deceased and the time he found himself at the police station, no evidence was led by the accused towards his mental capacity as the mental assessment report prior to him taking plea was that he was fit in all respects to stand trial.
64. Pursuant to section 12 of the *Penal Code*, it is trite that insanity will only be a defence if it is proved that at the time of commission of the offence, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act that he is charged with or was incapable of knowing that it was wrong or contrary to law. The test is strictly on the time when the offence was committed and no other. See *Leonard Mwangemi case* supra.
65. The evidence that will best disclose the state of mind of the accused at the time of commission of the offence is: evidence of his mind-frame leading to the occurrence of the act; what the accused actually did at the material time, and what those around the accused observed contemporaneously with the occurrence of the act.
66. The only evidence adduced was the mental state examination carried out prior to standing trial. I do note that Dr. Nyamute, Psychiatrist, in his report dated 20<sup>th</sup> December 2022 notes that the accused's thought content no delusions, thought process – intact, judgements – intact, cognition – intact and memory – long term and immediate recall all normal.
67. From all the above evidence, my overall understanding of the accused's mental state is that from his history, it is clear that he was stable, fit and okay. He was working and providing for his family. The accused person seemed to be a caring man as is evident from the testimony herein wherein he was taking part in the care of his ailing child by staying with the child overnight at the hospital. He further testified that he would visit the child even when it was his wife's shift to take care of the child.
68. What was the accused's conduct during the incident? How did he effect the act of killing, and what can be made out from his actions as to his state of mind at that time?
69. The first thing to note is that the defence did not contest the fact that the accused committed the act, however, the accused intimated in his testimony that he was not in control of his mind at the time of the act. The post mortem report shows how he acted, and it may also partly reveal the mind of the accused. That is, that he essentially caused deceased's death through the multiple cut wounds he inflicted on the deceased:
- i. Deep cut wound on the neck 6cm deep by 10cm by 4cm
  - ii. Deep back cut wound 10 x 3cm
  - iii. Deep cut wound on the left leg behind the knee 11 x 5cm.
  - iv. Deep cut on the left arm 4 x 2cm
  - v. Several deep cut wounds on the both legs.
70. In my view, this reveals an almost maniacal cutting activity. It is not lost on this court the evidence presented herein that the accused had caught the deceased several times in compromising positions with his wife and warned him to stay away from her. Maybe this last instance that he caught the deceased and his wife in his own house may have pushed the accused over the edge.
71. This leads this court to determine the question raised in the submissions by Mr. Bagada counsel for the accused person, whether the accused, having stated in his defence that he found the deceased having sex with his-the accused person's wife, constituted provocation as to make him unlawfully kill the deceased.



72. According to Mr. Bagada, his client was provoked to commit the offence and that therefore there was no malice aforethought established. Counsel relied on the provisions of sections 207 and 208 of the Penal Code on provocation and also cited the Biblical verses from Proverbs Chapter 6:32-35 that warn men from committing adultery and the consequences thereof.
73. I have carefully and anxiously considered all the available evidence and the submissions by the defence counsel. I am left to determine that the accused behaved as though he were unstable merely to mask the fact that he had killed the deceased; and that he was in fact temporarily insane at the time of the killing. In my view, there is no evidence of the accused's history of unstable mind. On the contrary the evidence adduced by the prosecution particularly that of PW1 was that the accused was aware of what he was doing. PW1 testified that on inquiry as to why the accused was cutting the deceased, the accused remarked that he had warned the deceased to stop sleeping with his wife but that the deceased was not heeding.
74. My view is that this is a clear indication of the accused's mental state at the time he committed the offence. Further, PW4 testified that when the accused presented himself at the police station to surrender, he introduced himself by his names and proceeded to give the officers a clear description of the events leading up to the deceased's murder. This is further evidence, in my view, that the accused comprehended what was happening and what he had done.
75. Having said all the above, in my view, the real point of this case turns up whether or not legal provocation as defined under section 208 (1) of the Penal Code was disclosed to trigger the actions taken by the accused. In order to answer this question, it is appropriate at this stage to set out the law relating to provocation. 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.”
76. 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.”
77. 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 the earlier case of *Republic v Hussein S/O Mohamed* [1942] EACA at pg 66 the Eastern Court of Appeal held as follows:
- “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.”

78. In the case of *Peter Kingori Mwangi & 2 Others v Republic* [2014] eKLR the court stated that, 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.

79. In deciding a similar situation on provocation, the Court of Appeal in the case of *Elphas Fwambatok v Republic* [2009] eKLR held thus:

“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.....”

80. In *Mabanga v Republic* [1974] EA 176 the court further held interalia on this subject as follows:

“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.”

81. I have considered the prosecution evidence of PW1 and that of the investigating officer who conceded that the deceased’s wife refused to come and testify because she had cautioned the deceased, her husband, to stop having an affair with the accused’s wife to no avail.

82. My conclusion is that it was the sexual infidelity of the accused person’s wife was 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. The accused action in cutting the deceased into pieces with such rage and anger is persuasive that his passion had not cooled. 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.”

83. Accordingly, I am satisfied that the accused person unlawfully killed the deceased in the heat of passion having found the deceased having sex with the accused person’s wife who had abandoned a sick child in hospital. I find and hold that malice aforethought was not proved beyond reasonable doubt, despite the serious multiple injuries inflicted on the deceased using a panga.
84. In the end, I find the accused person herein not guilty of the charge of murder.
85. However, as the killing of the deceased was unlawful, I invoke the provisions of section 179 of the Criminal Procedure Code as read with section 207 and 208 of the Penal Code and find the accused person guilty of the offence of manslaughter contrary to section 202 As read with section 205 of the Penal Code and Convict him accordingly. Sentence to be imposed after records and mitigation.
86. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 9<sup>TH</sup> DAY OF MAY, 2024**

**R.E. ABURILI**

**JUDGE**

