



**Republic v Chala (Criminal Case 11 of 2017)  
[2023] KEHC 20836 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20836 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE 11 OF 2017  
DKN MAGARE, J  
JULY 3, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CHIVATSI NGALA CHALA ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the charge were that, Chivatsi Ngala Chala on 10<sup>th</sup> day of February, 2017, at Diani location, in Msambweni sub county within Kwale county within Coast Region in the Republic of Kenya murdered Bahati Mwambire.
2. The formal information signed by prosecution counsel, Timothy Mbutu Musyoki and filed on 21/03/2017. The accused was brought to court on 21/03/2017 and an order for psychiatric examination and appointment of counsel was made. On 21/03/2017 the matter was taken to court came for plea. This was after the accused's psychiatric reports indicated that the accused was fit to stand trial. The information containing the substance of the charge was read to the accused, in Kiswahili, a language the accused understood and a plea of not guilty entered on 6.4.2017.
3. The court made a ruling on bond. This resulted in the Accused being granted bond during the trial for Ksh 500,000/= and a surety of similar amount. The surety was approved on 21/7/2017. The Accused was released after about 4 months.
4. The matter started before Justice D O Chepkwony, Justice Asenath Onger, Justice Njoki and finally myself. After several false starts, the matter started on 29/10/2019 with the prosecution making an opening address. The matter proceeded with a total of 10 witnesses testifying.



5. It is important to point out that part of the proceedings indicate the deceased as she. In the translation from Kiswahili to English, the pronoun was not fully appreciated, given that the name Bahati, is in most cases feminine.

### **Burden of proof**

6. The burden of proof is on the prosecution. It never shifts to the defence. The courts have dealt and settled what constitutes the burden of proof. In *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, the court, Justice R. Nyakundi, stated as doth: -

“As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 provides as follows in a passage alluded to me considered the greatest jurist of our time Lord Denning:

“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

7. In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. The burden of proof of an accused’s guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.
8. Likewise, at the close of the prosecution case under section 307 (1) of the *Criminal Procedure Code* the prosecution must satisfy by way of the evidence presented so far that a prima facie case exists to warrant the accused person to be called upon to answer.”

### **Burden of proof**

9. The standard of proof in Kenya has been settled and articulated in the *locus classicus* case of *R.T. Bhatt v Republic* [1957] EA 332 – 335 where the former Eastern Court of Appeal pronounced the guiding principles as doth: -

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

10. In Peter *Wafula Juma & 2 others v Republic* [2014] eKLR, Justice Francis Gikonyo had this to say: -

“expression ‘Burden of proof’ entails; ‘legal burden of proof’ and ‘evidential burden’. The two should not be confused, and I will write something to elucidate on what each entails



later. Of instant benefit to this appeal is that, after a long raging debate, dating back to the late part of 1700, on whether or not legal burden of proof could shift under any circumstances, it is now a well settled principle of law that, the legal burden of proof in criminal matters never leaves the prosecution's backyard. Viscount Sankey L.C in the case of H.L. (E)\* Woolmington V DPP [1935] A.C 462 pp 481 in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

11. It is therefore clear that the burden of proof is on the prosecution. Evidential burden will only be in respect of matters specifically provided. The legal burden of proof remains throughout the trial on the prosecution.
12. In the case of *Republic V Andrew Mueche Omwenga* [2009] eKLR the court, Maraga J as then he was stated as doth: -

“Section 203 of the Penal Code under which the Accused is charged defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. It reads:-

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

It is clear from this definition 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. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

In the first element, there must be evidence proving that the death of a human being (the deceased) actually occurred. The evidence required to prove the death is usually the autopsy reports given by pathologists. But there are circumstances where the cause of death is too obvious to require medical evidence like where the deceased person was stabbed through the heart or where he is decapitated or his head is crashed. Stating this principle in *Ndungu Vs Republic* [1985] KLR 487 the Court of Appeal stated at p. 493 that:-

“...in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”

13. Further to the foregoing, in the case of *Peter Wafula Juma & 2 others v Republic* (supra), the court, Justice F Gikonyo, stated as follows regarding the legal burden of proof in criminal cases.

- (11) Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof



throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except in so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the constitutional right of the accused; presumption of innocence, not to give incriminating evidence and to remain silent.”

14. The burden of proof remains with the prosecution throughout. The defence has no burden to prove. They had an option of keeping quiet. They had no reason to defend their innocence. The defendant only has what we can call evidentiary burden for matters which are within their knowledge as provided by section 111 of the *Evidence Act*. In this matter, no question arose requiring the use of section 111 of the *Evidence Act*, which provides as follows: -

“ 111. Burden on accused in certain cases

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

- (2) Nothing in this section shall—
- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
  - (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
  - (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

15. The court will analyze all the evidence to establish if the state discharged its legal burden of proving the offence of murder contrary to section 203 as read with 204 of the *penal code*, beyond reasonable



doubt. In *Gordon Omondi Ochieng v Republic* [2021] eKLR, the court, while dealing with the issue of what constitutes the test of beyond reasonable doubt, it stated as doth: -

- “29. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that that to find conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:
- “[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa V R*, [2013] eKLR.”
30. In the famous case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the 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 short of that will suffice.”
31. And in *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:
- “Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”
16. My understanding of beyond reasonable doubt is that the evidence must strongly point to the guilt of the accused and not consistent with his innocence. There could be other doubts, like, what if I am wrong? What if it was predestined? Those are surmises outside the law. The standard of proof does not work on hyperbole and conjecture or some fanciful surmises but only on concrete evidence whether direct or circumstantial.

## Evidence

17. The first witness, George Otieno Adede, testified on 29/10/2019 that he is a mason. On 10/2/2017 he was at Rock paradise with William Nyai and he saw the accused chasing the deceased. The deceased fell near a banana stem and the accused started beating the deceased with a stone he was holding and hit the deceased on the head. The accused had an iron bar.



18. They reported the matter at Diani police station and took the deceased who was injured, using a tuk tuk to Diani dispensary. The deceased, Bahati Mwambire Dandi was treated and allowed to go home. The deceased gave the witness the stone the accused used to beat him. The deceased later on, on 10/2/2017 told the witness that they differed over a woman called Emily whom both of them wanted.
19. The deceased continued normally until 21/2/2017 when tears were flowing from his eye. An X-ray was done and they were referred to Jocham. On 8/3/2017 he was told the deceased had died. On cross examination, he stated that the deceased was chased for about 20 Metres before falling.
20. PW2, William Nyae Ruwa testified that he is a hawker. On 10/2/2017 he was at paradise with PW1. He said he saw the accused chasing the deceased. The deceased fell and the accused stabbed the left side of the head with an iron bar. He agreed that the accused ran and jumped over a fence. The matter was reported to Diani police station and the witness identified the OB extract. They took the deceased to a dispensary where he was treated. He stated it was because of a love triangle with an estranged wife, whom they state that the Accused was living with as husband and wife. The deceased was beaten because of a woman.
21. On cross examination he stated that the Accused ran away with an iron bar and the police collected a stone from the scene. On cross examination he stated that one day the deceased had pointed to the accused as the man living with the deceased's former wife.
22. PW3, PC Wilson Gitau testified that he was at Diani police station when the deceased came and complained that he had been beaten by Ngala Chai. He issued a p3 form but it was not filled by a doctor. The complainant never went back and as such the witness did not investigate. On 10/3/2017, he was called by the OCS that PW1 had reported the death of the deceased herein. He stated on cross examination that he arrested the accused and the wife, Emily. He learnt that Emily had a love affair with the deceased.
23. PW4 Hafigi Amanai Salim testified that the deceased was his friend. He was called and went to Diani Dispensary and was request to take care of the deceased as PW1 was going upcountry. They took the deceased to costs Provincial General Hospital, but were redirected to Jocham. He was later informed the deceased had died. The time he was taken to Jocham was 22/2/2017.
24. PW5, Dr Fadiya Swaleh produced a report on postmortem done by doctor Guyo. Upon appearance he has a scalp wound. He was about 60 years old. The wound had been stitched with nylon stitches. There were no other external deformities. Internally, the wound on the head has subcutaneous hematoma and intracranial haemorrhage. He stated if the wound had been properly managed he will have survived intracranial hematoma but intracranial haemorrhage is difficult.
25. PW6 Omar Ali testified that he was a clinical officer at Ng'ombeni. At 4pm on 10/2/2017 a man came for treatment reporting assault at 3pm using a stone. The reasons for the assault were also well known to the deceased. There was bleeding on the right parietal region with a wound, 4cm by 1cm. This had active bleeding. The patient was stitched and referred for CT scan. He produced notes for 10/2/2017 and 21/2/2017. The scan showed no fracture on the cranial fault.
26. PW7, Jeremiah Lagat, CCIO, Embu, stated that he was earlier called by the DCIO to collect a suspect, the accused herein. Part of his evidence appears to be some kind of confession from the accused, which is inadmissible pursuant to section 25 A of the *evidence act*. He gave the evidence of the arrest and subsequent arraignment



### **Case to answer**

27. The court found the accused with a case to answer and put him on his defence by dint of section 306 (2) of the *Criminal Procedure Code*. Upon compliance with their rights under section 306 (2). The Accused elected to give sworn testimony and call one witness, his wife Emily. The matter was set for Defence hearing on 18/4/2023 where the accused testified as DW1 and the wife as DW2.

### **Defence Evidence**

28. The accused stated that he was at his place of work, but left for lunch. He arrived safely home, and found a man sitting in his veranda with his children. Upon seeing the accused the man started running. The Children were happy to receive him. He packed the bicycle and ran after the man, to know why he was running away.
29. The man ran towards Mnazi den, he ran over a fence and was hurt. The accused left him. He did not know the PW1. He stated he heard the allegations of the affair in the cells. He recalled an unknown man who had hitherto called his wife but the wife gave the husband the phone to pick and asked why he was calling his wife.
30. He was arrested on 11/3/2017. He gave the history of the arrest. On cross examination, he was steady on his evidence. His position was that he did not know the affair with the wife but he just wanted to know why he was running away.
31. DW2 testified that he was at her house on 10/2/2017. She was told that there was someone peeping into the house. She knew the person because she used to see him with PW3. She stated that earlier this person saw her as a girlfriend.
32. She recalled that an unknown number called and she gave the husband the phone to answer. She did not know the caller.
33. On 9/2/2023, the then trial court went on transfer and directed that the matter be mentioned before me. I gave directions under section 200 and took the defence evidence and final submissions.
34. The man started sending love messages and was being replied to by the Accused. The deceased did not know that he was not chatting with the Accused's wife but the Accused himself.
35. I will note that from the demeanour of DW2 she was lying straight in my face. She did not look at the Accused all the time she was testifying. She encouraged her two men of her undying faithfulness while the evidence was to the contrary. I do not believe her evidence, it is not possible, that she knew the man peeping through her house, knew it was the person who had approached her some time back. She knew more than she was telling. I will disregard her evidence.

### **Prosecution's Submission**

36. The state filed submissions on 30/05/2023. After setting out the evidence on the law, they laid out three issues for determination: -
- a. Proof of death
  - b. Death was due to unlawful commission or commission
  - c. Unlawful Act with malice aforethought.
  - d. Proof and cause of death and unlawfulness of death



37. The state submitted that they had proved that the deceased died and his death was unlawful since the deceased died as per the post mortem report produced by PW5 and the cause was severe head injury secondary to blunt trauma.
38. They stated that the death was unlawful due to the act or omission of the accused. The state relied on the evidence of PW1 and PW2 as direct evidence of the people who saw the deceased being chased by the accused and the deceased had a stone and a metal bar. The state continued that the accused hit the deceased with the iron bar. The death was directly linked to that act.
39. The state posits that the deceased was 55-60 years and as such he could not have jumped a wall. They do not lay the basis for this assertion on the age one stops jumping over a fence when being chased.
40. The prosecution set out the contents of section 206 of the *penal code* on what constitutes malice aforethought. The issue of the iron rod was said to be the basis. According to the prosecution, the deceased was hit with a stone and he fell. He was then hit with an iron bar.
41. They state that evidence that the Accused did not know the deceased was a sham.

### **Defence submissions**

42. The accused filed submissions on 30/5/2023. They raise two defences, to wit,
  - a. The deceased took a risk going to see the accused's wife knowing that she was married and as such invaded his tuff resulting in grave and sudden provocation. They submit that malice aforethought is missing and as such are amenable to manslaughter.
  - b. The proximate cause of death was not the injuries inflicted by the accused due to the poor nutrition, poor medical attention and mismanagement and wasted physique could have been the cause of death.
43. They analysed the evidence of all witnesses. He referred the court to page 35 of the typed proceedings showing that the prosecution witnesses confirmed the amorous relationship between the deceased and the Accused's wife, DW2.
44. At page 60 of the record, the accused state it is admissible pointing to the same fact. The accused relies on section 33(1) of the *evidence Act*. They rely on several cases, some of which are irrelevant to the case: -
  - a. *Julius Lopeyok Wero v Republic* [1983] eKLR
  - b. *Kabindi David Kenga v Republic* [2000] eKLR, where the court of appeal stated as doth: -"It is a settled principle of law that the accused does not have to prove provocation but only to raise a reasonable doubt as to its existence. There is positive and un rebutted evidence that the appellant went wild and lost his power of self-control so soon as he saw the deceased on his homestead. The visit despite constant warning was totally uncalled for and was at most meant to annoy the appellant. In our view the act constituted grave provocation on his part as it appeared that the sad killing of his sister was still weighing heavily on his heart.

Moreover, we see no reason to disbelieve the appellant's version of the quarrel, which not only is not controverted by the prosecution eye-witnesses of the assault but also is supported by his evidence as far as it goes.

The sum total of the evidence adduced during the trial is that the attack on the deceased by the appellant was immediate before there was time for his passion to cool. We think that in the particular



circumstances of this case the doctrine of provocation should, as advised by one of the assessors, ensure to the benefit of the appellant and that the charge of murder should be reduced to manslaughter.”

45. It is their view that the deceased lacked self-control temporarily due to grave and sudden provocation. They invoke sections 207 and 208(10) of the [penal code](#).
46. The defence also relies on several cases some of which are non-existent.
47. Lastly, the Accused submitted that there was no proof of the proximate cause. They challenged the way the deceased, who was living alone, had even slept on an empty stomach. He stated that the cause of death was secondary to poor nutrition and mismanagement of treatment.

### **Analysis**

48. I have gone through the evidence. The prosecution relies on both direct and circumstantial evidence to prove their case. The evidence of PW1 and PW2 are direct evidence on what they saw. However, the two witnesses differ on what they saw.
49. It is succinct that a report was made by none other than the deceased himself, less than 2 hours after being hit. He categorically stated that he was hit by stone. That is in exhibit 1. The P3, which was not real an extract of the OB, indicate, that the deceased was hit with a stone and blunt object. The OB extract is worthless evidence. there is the OB itself, where the event was recorded. We could get the proper report that the deceased made.
50. PW2 indicated that the deceased was also stabbed by an iron bar. That evidence is unbelievable. The evidence of PW4, PW 5 and PW6 are all in agreement that this was a single wound injury caused by a blunt object. I therefore believe evidence that the Accused threw a stone that hit the deceased. He did not stab the deceased or hit him again.
51. The deceased did not care for his life. After getting assaulted, he was concerned about going to the police station, while bleeding instead of going to hospital first. The clinical officer indicated the excessive bleeding in exhibit 1. He only went for treatment a full 4 hours after the incident. He should have prioritised his health.
52. The clinical officer, PW 6 was meticulous on what he recorded. Though the deceased indicated he was hit at 3 Pm, evidence available is that he was hit earlier than 12.56 when the OB was recorded.
53. The deceased had his injuries recorded. He had no reason to lie. From the overwhelming medical evidence and eyewitness account that the deceased was hit by a blunt object. The same is seen from the accused's own evidence that the deceased was hit by a stone.
54. Further medical files from 24/2/2017, there was a CT Scan that showed that there was no fracture of the intracranial haematoma. The intracranial haematoma was later found in the postmortem. The post mortem report showed that the deceased had a wound on the scalp, with subcutaneous haematoma with intracranial haemorrhage.
55. I find and hold that the cause of death was severe head injuries secondary to blunt head trauma.

### **Cause of death**

56. The deceased was hit on the head by a stone. The deceased was not treated well. He went to hospital 4 hours later while he was bleeding. He had to pass by the police station. His health appeared to have deteriorated due to the injury. His health could not have deteriorated were it not for the injury inflicted.



Accordingly, I find the accused caused the death of the deceased. The elements constituting actus reus is thus proved beyond reasonable doubt

### **Malice aforethought**

57. Sections 206, 207 and 208(1) deal with malice aforethought. These sections posit as doth: -

“Malice aforethought 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.

207. Killing on provocation 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.

208. Provocation defined

- (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 selfcontrol 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

58. In the case of *Republic v Johanna Chepkwony Kipkorir* [2019] eKLR, D S Majanja J, stated as doth: -

“The implication of section 208 of the Penal Code is that an unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter if the act is done in the heat of the passion caused by sudden provocation. It is a question of fact whether the accused in all circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation (see *Wero v Republic* [1983] EA 549). Furthermore, while the accused does not shoulder the burden of proving the defence, the prosecution must



marshal evidence to disprove the defence beyond reasonable doubt (see *Kenga v Republic* [1999] 1 EA 141).”

59. In *Republic v Paline Mugendi Nyaga* [2022] eKLR, the Court, L Njuguna, stated as thus: -
- “Right to life is protected by our Constitution under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In *Guzambizi Wesonga v Republic* [1948] 15 EACA 63 the court held that;-
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”
- [See also *Sharm Pal Singh* [1962] EA 13 and *Daniel Nzioka Mbuti & another v Republic* (supra)].
60. In *Karani & 3 Others v Republic* [1991] KLR 622 the court held that malice aforethought can be deemed from the nature of the injuries caused on the deceased and the weapons used. In this case, the only weapon used was a stone picked to chase an intruder from a man’s house. This was not a street brawl.
61. In a civil matter, *Elizabeth Wambui Gitinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR, Justice Ouko, JA as then he was started his judgement with the following poetic words: -
- “Just as the sanctity of a person’s property in the English common law was recognized in the famous dictum that “an Englishman’s home (or occasionally, house) is his castle and fortress”, *the Constitution* and land laws in Kenya protect, as fundamental the right to acquire and own property of any description; and in any part of Kenya. This sanctity was so important in the days of old that one Right Honourable, William Pitt, 1<sup>st</sup> Earl of Chatham graphically explained it thus;
- “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter.”
62. This is a fundamental principle the deceased breached. If not even the crown can invade a man’s house, not even an unknown ex-lover can do so. I got this uncanny idea that the deceased was a shadow in the Accused’s life. The 1<sup>st</sup> and second witnesses accused their friend of voyeurism. He was showing to the witness the Accused who was walking home from work.
63. PW 1 and PW 2 somewhat agree that the deceased was having an affair with the accused’s wife. The Accused was not in the know until the fateful day and the consequences and ramifications were dire and immediate for the deceased. I however, reject both the defence postulations about the deceased and the fence.
64. I refuse postulation that given that the deceased was 55-60 therefore could not jump over a fence. Criminal cases are heard and determined, not on conjecture, surmises and hyperbole. Only cogent evidence can prove the questions that linger.
65. On the other hand, PW2 and PW1 gave evidence that excluded jumping. Medical evidence available shows that the deceased was hit only once. There was no other injury indicated.



66. I find and hold that the injuries from which the deceased died, were caused by no one else other than the Accused.

### **Unlawful death**

67. The death was not caused during the official use of operations or military action on declared war. The death was caused by the injuries sustained from the actions of the Accused.

### **Malice aforethought**

68. All witnesses agree that the deceased had an amorous secret lust relationship with the Accused's wife. It was known to all except the Accused that the deceased had an affair with DW2. This was corroborated by PW1 and PW2. It also transpired that the accused's wife is the deceased's former wife. Whether the accused knew or did not know will never be known.

69. I painstakingly listened to DW2. Her evidence was disturbing, though she was not truthful. Nevertheless, since this judgement will be a public record, and to avoid any possibility of gender based violence I will withhold further analysis on this particular aspect as it is not Germane to the determination of the case.

70. The evidence of the affair appears to have been an open secret with everyone knowing except the accused who was in the dark until the material day which also for the deceased, because a fateful day.

71. In *Republic v Weldon Langat Towet* [2017] eKLR, Justice Maureen Odero stated as doth; -

“There is nothing to discount or negate the accused's defence that he believed he was defending his property (cattle) against imminent theft. PW2 who conceded that the lighting in the area was poor at the time cannot tell whether or not there could have been other nefarious elements hovering around the area. It is a well accepted concept in law that ‘a man's home is his castle’ and thus one may take all steps necessary to protect his home and property.

In acting as he did I find that the accused did not act recklessly and/or unlawfully. He shot his arrow in the belief (albeit mistakenly) that he was protecting his property.

In the case of *Beckford Vs Republic* [1987] All E.R 425 it was held

“If a plea of self defence was raised when the defendant had acted under a mistake as to the facts he was to be judged according to his mistaken belief of the facts regardless of whether viewed objectively his mistake was reasonable. Accordingly the test for self-defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed then to be .....”

72. In *Francis Maina Gachara V Republic* [2006] eKLR, the Court, justice Luka Kimaru stated as doth: -

“The evidence adduced by the prosecution does not therefore disclose any malice aforethought on the part of the accused. Neither does it disclose that the accused unlawfully killed the deceased without having the requisite mens rea. What the evidence discloses is that the accused having been provoked managed to chase away an intruder who wanted to harass his wife in his house. As the saying goes a man's house is his castle he has a right to enjoy all the comfort of his house without interference from any quarters. This includes enjoying the company of his family without interference from an outsider. In the present case it is clear



that the accused did what was required of him by chasing away the uninvited guest who had gone to his house to harass his wife. “

73. In this case, the deceased was entitled to assert authority of his home to defend his property and family. Unknown to him what was defending had already been stolen. However, a man cannot be punished for being ignorant. The deceased was daring not only to have an alleged affair, but walk straight into another man's house, in the presence of that other man's children in the middle of the day, while the owner of the house is toiling to fend for the family, to have an affair with the wife.
74. A man who comes as a true visitor does not run away. The net effect of the deceased's escapades cannot be fathomed in a common discussion. The deceased was not provoked, he went into the accused's house, instead of waiting and informing the Accused his mission he started a mini marathon. His old legs let him down. They say the guilty are afraid. The deceased clearly knew what he had done or was doing. We will never know what transpired before the man was caught and chased to his death.
75. No prosecution witness put the *raison d'être* for the presence of the deceased than secrets.
76. The deceased was chased a short distance before the Accused threw a stone which struck him squarely. He was poorly treated and thereafter succumbed to his injuries.
77. The accused may not have caught the deceased and DW2, *In flagrante delicto*. However, the totality of the evidence shows that the deceased was under grave and immediate provocation. It does not matter that this was an ex wife. His turn lasted when it did. The deceased had no right to interfere with a man's castle.
78. In the circumstances, the accused was gravely and suddenly provoked. And this resulted in temporary loss of self-control. It is an act of grave and sudden provocation but also to engage in an amorous relationship with the Accused's wife.
79. Therefore, there is no proof of malice aforethought. In the circumstances I substitute the charge of Murder with that of Manslaughter contrary to section 202 as read with 205 of the penal code.
80. Accordingly, I convict the Accused, Chivatsi Ngala Chala, of manslaughter contrary to section 202 as read with 205 of the *penal code* for the unlawful killing of Bahati Mwambire on 10<sup>th</sup> day of February, 2017, at Diani location, in Msambweni sub county within Kwale county within Coast Region in the Republic of Kenya.
81. The accused is informed of the Right of Appeal for 14 days.
82. The accused is invited to mitigate and a presentence probation report be prepared for sentencing.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3<sup>RD</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Miss Nyaginda for the state

Mr Lijoodi for Mr Otieno for the Accused

Court Assistant – Brian Mkala

