



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 41 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EDWARD MAINGE MUTISO.....1ST ACCUSED

JOHN MUHINDI MUASYA.....2ND ACCUSED

JUDGEMENT

1. The accused herein, **Edward Mainge Mutiso**, and **John Muhindi Muasya** are charged with the offence of murder contrary to section 203 as read section 204 of the *Penal Code*. It is alleged that the accused, on the 1st day of August, 2013 at Katani Area in Athi River District within Machakos County, murdered **Makau China**. Both the accused pleaded not guilty.

2. In support of its case the prosecution called 8 witnesses.

3. According to PW1 **Paul Kitonga Ndunga**, a used plastic material collector, on 1st August, 2013, one **Kivate** a driver a motor vehicle belonging to Unilever while in the company of the turn boy called Mbindyo, drove to the dumpsite to dump some rubbish. One of those who were present was a boy called **China** (the deceased) who was drinking some substance. The other present included the accused herein. The deceased then took some soap belonging to the 1st accused with the intention of returning the same but the 1st accused barred him and hit him with a spade on the head twice. The 2nd accused also hit the deceased with a broom. As a result, the deceased fell down, then got up and said he was going to report to the police and proceeded to the council officer at Mavoko while holding his head. The next day when they went to the office they found the deceased lying behind the house without a shirt dead. According to PW1, the people he saw hitting the deceased were the deceased was the 1st accused and 2nd accused though he could not remember the 2nd accused's name. It was his evidence that both the accused were friends and they beat the deceased because the deceased because he took the soap. He identified the photograph of the deceased lying dead near the house.

4. In cross examination, PW1 reiterated that he was present when the deceased was being beaten by accused persons. According to him, there were about five persons removing rubbish from the car but he only saw the accused beating him. He stated that after the beating the deceased, who could talk got up and said he was going to the police. It was his evidence that the incident took place between 2pm and 3pm and he never saw the deceased after that till the next day when he was already dead. The house where the deceased was found, according to him, was about 1 ½ hours walk from the dumpsite. It was his evidence that at the time the deceased was leaving the dumpsite, he was not bleeding though his head was swollen at the front. However, when he saw the body the next day it did not have any injuries but the head was swollen. He disclosed on that day the deceased was drunk.

5. PW2, **Felista Mumbua Musyoka**, who was also operating from the dumpsite testified that on 1st August, 2013 she was collecting waste paper from the dumping site when at 3 pm a lorry from Unilever camp went to dumping site to dump waste. According to her the driver was called **Wate** and she was later informed that its turn boy was called **Mbondo**. She testified that there were two boys on top of the lorry removing the rubbish/waste and others who were known to her, were on the ground including herself. It was her testimony that it was the two accused who were on the top of the lorry. She saw the deceased who came drunk take soap but was told by the 1st accused to return it. However, the deceased did not do so but instead went and held held the lorry. The 1st accused who had a spade hit the deceased on the head twice while the 2nd accused who had a brush lifted the brush and it touched the deceased's head who fell down. After lying down for some time the deceased got up and left towards Mavoko Municipal Council and by the time she left for home at 4.30pm she never saw the deceased again. The following day she met some boys who informed her that the deceased was dead and she proceeded to view the body. After that the other boys apprehended the accused and took them to the Mlolongo police station. It was her evidence that when she saw the body of the deceased it did not have a shirt and confirmed that it was his body that was in the photograph which she identified. She stated that she knew the deceased and the two accused before the incident as they used to work well with the two accused and they never differed.

6. In cross-examination, she stated that on that day it was the accused who were on top of the lorry who were removing the rubbish while the ones on the ground were waiting for waste and rubbish. According to her, the ones on the ground had nothing on their hands. The deceased who found her there took soap and went with it, he did not return and nobody bothered with him at that time. It was her evidence that the force which was used by the accused on the deceased was not great force but he was hit by a spade on the head twice but by the time the brush was lifted he had fallen. There was however no blood or bleeding when he was hit. PW2 did not hear him utter anything when he stood up. The next day when she viewed the body, she did not see the body with any injuries though the front of the head was swollen but he had no shirt on.

7. PW3, **Moses Ndunda Mbithe**, who was also operating from the dumpsite testified that on 1st August, 2013 he went to work late around 2 pm and found the Unilever lorry which they were expecting that day having arrived and was being cleaned by the 1st accused, the 2nd accused, **Mwali** and **Kivindu**. The deceased who was lying on the floor, got up and walked away saying that he was going to report at the council office at Mavoko. He was however not aware what the deceased was going to report on. According to PW3, the deceased was not bleeding. When the lorry, he left with it. The next day when he was at Simba cement he was called by a boy called **Zechi**, since deceased who informed him that the deceased was dead. It was his evidence that they used to meet with the deceased at the dumpsite. Upon proceeding to the dumpsite, he found the police there and they put the body of the deceased in the car and it was taken away. He got to hear that the suspects were the accused herein and he assisted in their being apprehended and being taken to the police post. It was his evidence that the accused were my friends. It was however his evidence that he never saw anyone beating the deceased and saw him leave the dumpsite but never saw any injuries though he would never know if he had any.

8. PW4, **Japan Kalelu**, the deceased father testified that on 2nd August, 2013 he was given a number by his brother, **Joseph Nzuki**, to call and upon calling the same he talked to a boy called **Nzioka** who told him to go to Mlolongo. The next day he proceeded to Mlolongo police station upon being informed by the said boy that the deceased had been beaten by some people. At the station he was informed that the deceased had been beaten by two boys who had been arrested and that the deceased had died. He proceeded to the mortuary at Machakos and saw the deceased. He also identified the body of the deceased for the purposes of post-mortem. According to him, it was found that the deceased had been injured on the head.

9. It was his evidence that he saw the deceased's body for the first time on 3rd August at the Machakos level 5 hospital mortuary but did not notice any injuries on the body then. It was only on the day of the post-mortem that he was told of the injuries by the doctor. When he saw the body, blood was oozing from the nose and the head was swollen.

10. PW5, Inspector Edwin Manyeki, attached to Directorate of Criminal Investigation at Embakasi Division as a forensic crime scene investigator, received a request from officers of Mlolongo police station on the 15th January, 2016 at around 10.20 hours for photograph and a report of a crime scene which was procured on 23rd March, 2013 by one **James Mutagwa Muthini** who was a crime scene investigator stationed at Embakasi office at the time. He got into contact who said ex officer who handed over to him a DVD disc containing photographs which he took for processing. The photographs were of a deceased male called **Japan Makau China** who was alleged to have been found lying dead on 2nd August, 2013. He printed 5 photographs and issued a certificate and which he duly signed and stamped dated 9th February, 2016. He exhibited the same. He however did not know the deceased.

11. **Dr. Fredrick Okinyi**, a pathologist who testified as PW6 filled a postmortem report for the deceased which was done on 16th August, 2013 at Machakos Level 5 Hospital. The body was identified by **Japan Kaleli** the father and **Wilfred Mutiso** the deceased uncle and police. On external examination of the body, the finding were that the deceased was a young African male dressed in blue trousers, his body was preserved by refrigeration, he had synosis (darkening of the fingernails showing lack of oxygen) and a bruise/injury on the skull. Internal examination showed a bruise on the skull and contusion measuring 6 by 4 cm, a depressed right parietal fracture, subdural haematoma (bleeding) approximately 200 cc of blood, features of increase intracranial pressure (head injury). In his opinion, the cause of death was head injury from blunt trauma and he exhibited the postmortem.

12. In cross-examination, he stated that the head injury caused by blunt trauma- injury caused by a blunt object to the head. In his opinion, it would not make a difference if the object is flat or cylindrical but would depend on the edge of the object and the impact. In this case it was a blunt object. It was his opinion that they were fresh but as the body was well preserved, he could not state the age of the injuries. He did not notice any other injuries on the body.

13. PW7, James Mwaura Kamau, on 1st August, 2013, was in company of other people, seated at dumpsite at Mlolongo at 2 pm waiting for the lorries to arrive when a Unilever vehicle arrive and they approached it. Present was the deceased who was drunk while the two accused persons were the ones offloading the vehicle. The deceased then put his hand on the car asking for some soap and the accused and the deceased started arguing and insulting each other. The 1st accused then hit the deceased with a spade on the head twice while the 2nd accused hit him with a broom. The deceased then left them and fell down for a while before getting up saying that he was going to report to the police that he had been hit. According to the witness, the deceased was not bleeding. The next day in the morning at 8 am they got a report that the deceased went and slept somewhere and died. When he saw the body of the deceased, it had no injuries. It was his evidence that he knew both the accused with whom they used to work together at the dumpsite and had never differed with them.

14. In cross-examination he stated that the deceased wanted to take some soap from the vehicle which that day was to be taken by the 1st and 2nd accused persons and not the deceased. It was his evidence that prior to that day the accused and deceased used to work with him, they had no problem with each other. In his evidence, the accused were hitting the deceased to prevent him from taking the soap.

15. In re-examination he explained that the soap was brought as waste but at the dumpsite it was arranged who was to take the soap during the week and it was the accused's property and this was known to the deceased hence the accused had the right to refuse to give the deceased the soap. He confirmed that the 1st accused hit the deceased with a spade on the head.

16. PW8, **CIP Richard Yego**, on 2nd August, 2013 we received information that a body was found at Mavoko dumping site. Accompanied

by the OCS **CIP Boniface Lumumba, PC Waweru** and other officers, they proceeded to Mavoko dumping site where upon arrival they found a body of a young man next to the road. Upon observation it had a swelling on the forehead and on asking from the people around they confirmed knowing him as **Makau China**. The scene of crime officers then took photos and the body was taken to Machakos Level 5 Mortuary. Upon his return to the station he found the two accused persons had been arrested by those who were working with the deceased and it was alleged that they had been working with the deceased. At the scene they were informed the deceased was working at the dumping site and was last seen on 1st August, 2013 offloading rubbish from the truck. They rearrested the accused and after considering witness statements charged them with the offence.

17. Referred to the statements of PW1, PW2 and PW7 he stated that he was not the one who recorded them though he confirmed that they stated that the deceased was taking the accused's properties and it was then that he was hit by the accused and left.

18. Upon being placed on their defence, the 1st accused, in his sworn testimony stated that before his arrest he was doing jua kali work at Katani Mavoko. He stated that on 1st August, 2013 he was at Mavoko dumpsite working with vehicle for Colnet and that nothing unusual happened. The next day 2nd August, 2013 some people went and told him that he was required at the police station. It was his evidence that PW1 lied to the court since he did not see him on 1st August, 2013. He also did not see PW2 who was a business woman at Sabaki stage and used to go and buy plastics but was not working where the 1st accused was. According to the 1st accused, he was the one in charge of the dumpsite and PW3's evidence was untrue. As for PW7, the 1st accused testified that he was working at the club Dawa ni Miti. The 1st accused asserted that the charges against him were fabricated and he did not commit the same. He disclosed that he disagreed with PW7 who was working at a club.

18. In cross-examination, the 1st accused stated that he was dealing in selling scraps and he had known the deceased for three years. The deceased, he stated was my friend and they never disagreed. According to him the deceased used to go there looking for work and they used to see each at the kiosk near Ballast Company. It was his evidence that though he was working with Colnet vehicles, he was also getting scrap from the dumpsite On 1st August, 2013, it was his evidence that he just saw the deceased on the road drunk while he saw the 2nd accused near Sabaki and by then they had not entered the dumpsite. It was his evidence that three of them were friends and used to sit together without any problem.

19. On his part, the 2nd accused testified that he was working in Mavoko collecting scrap. On 2nd August, 2013 at about 10.30 am, he heard that the deceased had passed away. However, on 1st August, 2013, he was at the dumpsite and nothing unusual happened by the time he left his work and that he left the deceased well. It was his testimony that the evidence of PW1, PW2 and PW7 was not true. According to him, he never saw PW3 at work while he left PW7 working at the club. It was his case that on 1st August, 2013 he had contracted someone to do work for him and he would pay him Kshs. 200/= after delivering to him the scrap. However, on 2nd August, 2013 he was arrested and taken to police station where he found the 1st accused and on 3rd August, 2013 is when he was informed that the deceased had passed away.

20. In cross-examination, he stated that on 1st August, 2013 he was at the dumpsite till 11.00 am and that they were with 1st accused at the dumpsite. He however did not see the deceased at the dumpsite that day.

21. On behalf of the prosecution, it was submitted that the death of the deceased persons and the cause of the death was proved by the evidence of PW-6 **Dr. Fredrick Okinyi** who conducted post-mortem after the body of the deceased was identified by **Japan Kaleli** (PW4) for the purposes of post-mortem. Based on his evidence it was submitted that the prosecution's evidence properly established death and the cause of deaths required by the threshold.

22. The Prosecution relied on Section 203 of the **Penal Code** which provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. It also relied on Section 206 of the Penal Code, which defines malice aforethought in terms of any of the following circumstances on the part of the accused

(a) An intention to cause 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 netted 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;

24. It was noted based on the decision in **Republic vs. Daniel Anyango Omoyo [2015] eKLR** that once the prosecution proves one or a combination of the above, malice aforethought will be deemed to have established In that case the Court held *inter alia* that:

“It is to be noted that once the prosecution proves one or a combination of the above circumstances, malice aforethought, will be deemed to have been established and in such a situation, there would be no escape route for the accused person.”

25. Based on the evidence on record, it was submitted that it is quite evident that the attack on the deceased persons was not random or spontaneous. The evidence of PW1, PW2 and PW7 is that the accused persons attacked the deceased person using a spade and a broom which was planned, pre-meditated and well executed by the accused persons. According to the Prosecution, the evidence implicates the accused persons as the people who attacked the deceased by the evidence of three eye witnesses which neither the accused persons disputed. It was noted that the evidence on record indicates that the deceased persons had been hit on the head with a spade and a broom. The injuries inflicted were on the vital part of the body and this shows that the accused persons had all the intention of inflicting injuries or grievous harm on the deceased persons which led to their death. To the prosecution, these injuries could only have been intended to cause the death of or grievous harm to the deceased person. The Court was therefore invited to find that there was malice aforethought on the part of the accused persons within the meaning of section 206(a) of the Penal Code.

26. It was further submitted that the accused persons were armed with dangerous and offensive weapon and they set upon the deceased who was unarmed. Such attack, it was contended, had a clear outcome that it would cause harm, injuries and even death to the victims and that is exactly what happened in this case. The accused persons had unlawful intention, acted on the said intention with malice aforethought, thus the ingredients of the offence of murder have been proved beyond reasonable doubt.

27. In light of the foregoing, the Prosecution through **Mr Ngetich** submitted that it discharged its burden of proving their case beyond any reasonable doubt against the accused persons. It was urged that the accused be found guilty of the offence of murder and the court proceeds to sentence them accordingly.

28. On behalf of the defence it was submitted that from the evidence there was no evidence of ill will against the deceased and that the accused did not mean to harm him but only hit him so that he could stop taking their property. It was noted that the accused were not armed with any offensive weapon but a broom and a spade which were necessary tools of their work. According to the defence, there was a lacuna of evidence as to what may have happened to the deceased between 2.00pm on 1st August, 2013 and when he was discovered dead the next day at 8.0 am, a period of 18 hours. Therefore, the material evidence tendered as regards the death of the deceased could not conclusively determine when the fatal injury was sustained or conclusively determine that the injury was exclusively caused by the type of work tools that the accused had used on the deceased since the only connection was that they were blunt objects.

29. It was submitted that no direct evidence by the prosecution that the accused persons caused the death of the deceased and the prosecution relies on circumstantial evidence to prove its case. Nobody was called to testify that they witnessed the accused persons kill the deceased. The people present when the deceased was being hit did not consider the light blows administered to be serious in any degree whatsoever to warrant their assisting the deceased to get medical attention or arresting the accused persons on the spot for assault. Counsel further submitted that serious doubt is created as to whether it is the light blows from the accused persons that eventually caused the death of the deceased or there were other intervening factors as there is a lacuna between the time the deceased left the dumpsite and the time he was found dead.

30. While relying on the case of **Nzivo vs. Republic [2005] 1 KLR 699** it was submitted by **Mr Mwangangi** for the accused that the circumstantial evidence tendered does not irresistibly point to the accused persons to the exclusion of all others who inflicted the fatal blows. That the accused person could have gotten himself into another quarrel and gotten beaten up again or could have fallen down in a stupor and hit his head on the ground, a wall or another blunt surface. With regards to *mens rea*, he submitted that there was no evidence to prove the same, that they were using the spade and the broom to offload and clean the lorry and that is far from being armed with an offensive/ dangerous weapon intended to cause harm to anyone. Mr. Mwangangi submitted that malice aforethought had not been proven and that the accused persons were only protecting their property and that they used what they had at hand under the circumstances to ward off the deceased using reasonable force. Counsel urged the court to find that they accused persons acted diligently and reasonably in defending their property by using necessary force to make the deceased back off. That his death was inadvertent and solely authored by the deceased who provoked the accused persons into some degree of force to halt the deceased thieving ways. He asked the court to discharge the accused persons.

31. Reliance was also placed on **Joseph Kimani Njau –vs- Republic (2014) eKLR**.

Determination

32. I have considered the evidence on record. The prosecution's case in summary is that on 1st August, 2013, both the accused persons were offloading waste from a vehicle belonging to Unilever at Mavoko Dumpsite where an altercation arose between the accused persons and the deceased. The source of the altercation was that the deceased took the soap which on that day was earmarked for the accused persons. As a result, in an attempt to ward off the deceased, the 1st accused hit the deceased with the spade which he was using to remove the material from the vehicle twice. It was also stated that the 2nd accused who had a broom also hit the deceased with him. As a result the deceased who was already drunk fell down and lay there for some time. When he got up he threatened the accused that he was going to report them at the police station and left. That was the last time he was seen alive.

33. The following day, his body was found next to house quite far from the scene of the incident since PW1 stated that it was about 1 and ½ hours walk. When the body was examined by PW6, he found that it had synosis (darkening of the fingernails showing lack of oxygen) and a bruise/injury on the skull. Internal examination showed a bruise on the skull and contusion measuring 6 by 4 cm, a depressed right parietal fracture, subdural haematoma (bleeding) approximately 200 cc of blood, features of increase intracranial pressure (head injury). In his opinion, the cause of death was head injury from blunt trauma.

34. Whereas the accused persons testified that there were at the scene, they contended that no incident occurred while they were there.

35. I have considered the evidence on record. Section 203 of the **Penal Code** under which the accused is charged provides that: -

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

36. Arising from the foregoing 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.”

37. In **Republic vs. Mohammed Dadi Kokane & 7 Others [2014] eKLR** the elements of the offence of murder were listed by **M.**

Odero, J as follows: -

1. **The fact of the death of the deceased.**
2. **The cause of such death.**
3. **Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly**
4. **Proof that said unlawful act or omission was committed with malice aforethought.**

38. In Mombasa High Court Case Number 42 of 2009 between **Republic vs. Daniel Musyoka Muasya, Paul Mutua Musya and Walter Otieno Ojwang** the court expressed itself as hereunder:

“The prosecution therefore is required to tender sufficient proof of the following three crucial ingredients in order to establish a charge of murder:

- a. Proof of the fact as well as the cause of the death of the deceased persons.*
- b. Proof that the death of the deceased’s resulted from an unlawful act or omission on the part of the accused persons.*
- c. Proof that such unlawful act or omission was committed with malice aforethought.”*

39. In this case, there was no doubt as to the fact of death of the deceased. This was proved by the witnesses and particularly the evidence of PW6 who conducted the post mortem examination on the body. From his evidence, it was clear that the death was not a natural one and that it arose from the fact that there was an external force.

40. As to whether the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, the prosecution evidence as led by PW1, PW2, PW3 and PW7 was clear that there was a disagreement between the deceased and the accused persons on 1st August, 2013. The disagreement was as a result of the deceased’s attempt to take the soap which the accused persons deemed to belong to them. In order to stop this, the 1st accused who had a spade which was his tool of trade struck the deceased on the head twice. The 2nd accused also had a broom. However, the evidence is not clear that he also struck the deceased. While PW1 and PW2 testified that he did so, PW7 testified that he raised the broom but the deceased fell down before he was struck. The deceased seemed to have sustained some serious injuries since he fell down and stayed there for some time before walking away while threatening to report the incident to the police.

41. From the evidence of PW1, PW2, PW3 and PW7, it is clear that the accused persons were present at the scene on that particular day. PW1, PW2 and PW7 were clear in their evidence that a scuffle ensued between the accused and the deceased during which the deceased sustained injuries. There was no reason why all the three witnesses testified as the manner in which the deceased sustained injuries if they were not there. In fact, all the witnesses testified as to the existence of good relationship between the deceased and the accused prior to the incident. This was not the evidence expected from persons who colluded to nail the accused. The evidence of PW1, PW2, PW3 and PW7 was therefore truthful and believable as regards the circumstances under which the deceased sustained his injuries. While the burden is always on the prosecution to prove all the ingredients of the offence, the conduct of an accused, it has been held may properly be found as corroborating the prosecution case. This was the position of the Court of Appeal in **Francis Charo Opo vs. Republic [1980] eKLR** where the said Court held that:

“At the trial, and before this Court, the appellant’s defence was an alibi: he was at Kibarani, some distance away. We have come to the same conclusion as the judge; his alibi was false. The appellant was with the complainant on the material afternoon and had the opportunity to commit the offence; he has consistently lied in maintaining otherwise; and we think that these falsehoods give to the proved opportunity a complexion such as to amount in the circumstances of this case to corroboration; see *R v Erunasani Sekoni s/o Eria* (1947) 14 EACA 74, 76.”

42. While it is true that there is no evidence as to what happened to the deceased after he walked away, the cause of his death as opined by PW6 was in sync with the injuries that he had sustained following the assault by the 1st accused. While there is discrepancy as to the part played by the 2nd accused in the said injuries, the evidence of all the three witnesses was clear that the 1st accused hit him with a spade twice. Accordingly based on the evidence on record, I find that the deceased met his death as a result of an unlawful act or omission on the part of the 1st accused person. I however find no evidence linking the 2nd accused with the death of the deceased. He is therefore acquitted under section 215 of the **Criminal Procedure Code**.

43. It is however not enough to simply prove that the action of the accused caused the death of the deceased. In **Joseph Kimani Njau vs. Republic [2014] eKLR** the Court of Appeal stated that:-

“In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that *mens rea* for murder was not proved. Failure to prove *mens*

rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

44. A charge of murder may therefore not be sustained unless the *mens rea* for murder is proved. The element of intention in committing the offence was examined in the English case of Hyam v DPP [1974] 2 ALL ER 41 where Lord Diplock observed as follows:

“No distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequent, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act.”

45. As to whether malice aforethought has been established, Section 206 of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

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

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

(c) An intention to commit a felony.

(d) An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

46. In the case of Nzuki v. Republic [1973] KLR 171 the Court of appeal stated that in the commission of the offence of murder it must be committed with the following intentions: -

“(i) The intention to cause death;

(ii) The intention to cause grievous bodily harm;
(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those circumstances to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue form his conduct is not by itself enough to convert a homicide into a crime of murder.”

47. In Nzuki vs. Republic (1993) KLR 171, the Court in substituting Nzuki’s charge of murder with manslaughter observed:

“there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant’s conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”

48. In this case, it is clear from the evidence on record that prior to the incident, there was no bad blood between the deceased and the accused. To the contrary, it would seem that they were in good terms prior to that date. That the 1st accused used excessive force in wadding off the deceased is not in doubt. However, what caused the disagreement was a minor disagreement over the use of the soap by the deceased. From the evidence, the deceased was drunk and probably had he been sober the incident might not have occurred.

49. Having considered the evidence placed adduced in this case, I am unable to find that the death of the deceased was caused by malice aforethought on the part of the accused. Based on the holding in Nzuki vs. Republic (supra) I am unable to find that the ingredients of murder have been proved and I find the accused person not guilty of the offence of murder.

50. Section 179 of the **Criminal Procedure Code** provides that:

179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

51. For these reasons and on the principles set out herein above, I reduce the charge of murder with which the 1st accused was charged to that of manslaughter. I accordingly acquit the 1st 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*.

52. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5TH DAY OF JULY, 2021.

G V ODUNGA

JUDGE

In the presence of:

Both accused persons

Mr Ngetich for the State

CA Geoffrey