



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA

HCCRC NO. 41 OF 2015

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VS

MICHAEL OCHOLA ONGORE.....ACCUSED

J U D G M E N T

1. The accused **MICHAEL OCHOLA ONGORE** 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 charge are that on the 21st day of March 2014 at around 2210hrs, at Rambugu village, Singer sub-location, Rarieda Sub-County within Siaya County murdered one **GEORGE OCHIENG OTOTO**.

2. The Prosecution called six (6) witnesses. The facts of the prosecution case are that on 21st March 2014, PW1 Erick Otieno Onywera at around 9.00pm, he met Michael Ochola Ongore (the accused) and the deceased herein nicknamed Lumumba, son of Ototo Hamisi near Rambugu Primary School; near the deceased's home. The accused asked PW1 whether he could assist him with some money and he would repay him with a goat. PW1 asked to be shown the goat and the three of them proceeded to the home of Michael's sister in-law and on arrival the accused asked his nephew to open the livestock door to enable PW1 see the goat but before the door could be opened the wife of Michael's brother, Rosemary Adongo Odemba (PW3) come out and told them she did not want the goat sold at that time. PW1 apprehended the problem and left the accused and the deceased. That after 10 minutes PW1 heard screams coming from the home of the accused. PW1 proceeded to the home of Michael Ochola Ongore, the accused, where he saw the body of Lumumba Ototo lying on the ground with blood oozing from the upper part of the deceased's body. PW1 then called the Area Assistant Chief Wycliffe Ongoro Odiango (PW5) and uncle to the deceased one George Owano Hamisi (PW2). That Assistant Chief came to the scene within five (5) minutes, picked PW1 and both proceeded to Assistant Chief's home (PW5) where they found the accused. The Assistant Chief tied the accused's hands with a rope and the three of them mounted the Assistant Chief's motorbike and proceeded to Lwala Kotiende Police Post. PW1 recorded the statement and the accused was put in police cells. PW1 and the Assistant Chief returned to the scene to await for the police officers, who came after a while, collected the body of the deceased and took it to Bondo Sub-District Hospital mortuary.

3. PW2, George Owano Hamisi, stated that on 21/3/2014 at around 9:30pm, he received a telephone call from PW1 informing him that Michael Ochola (the accused) had killed George Ochieng. PW2 proceeded to the accused home, where he found the body of the deceased. He also found PW1 with other people at

the scene. That on 27/3/2014 at 12 noon he identified the body of George Ochieng Ototo at Bondo Sub-District Hospital Mortuary to the doctor for postmortem. PW2 stated he knows the accused as he is his cousin.

4. PW3, Rosemary Adongo Odemba, sister in-law to the accused stated that on 21/3/2014 at around 9.00pm while at her home she heard the accused in company of PW1 and the deceased talking outside her house with her son Dominic Omondi, who went and picked a key to the goat's shed and then went out. That after 30 minutes, PW3 joined them at the goat shed where PW3 found Enock (PW1), Lumumba (the deceased), Michael (the accused) and her son. That the three were already inside the goat shed while PW3's son was outside. PW3 was told by her son the three were discussing the price of a goat. PW3 asked the accused what was happening and he kept quiet. The accused came out, informed PW3 what was the matter all about and told PW3 they will come the following day and all agreed. The accused and his group then left for his house. That after 30 minutes the accused's wife went to PW3's home and told her, Michael had stabbed Lumumba and he has died. PW3 then proceeded to accused's home and found Lumumba (deceased) lying on the ground bleeding from the neck, next to the door of the accused's house. PW3 then returned to her house. She stated that Michael Ochola Ongore, her brother in-law is also known as "*Kilo*".

5. PW4, Doctor Awino Bob, testified that on 27/3/2014 at 12.30pm at Bondo District Hospital mortuary, he carried out a postmortem on the body of George Ochieng Ototo. That on external appearance, there was linear laceration on the right cheek, pale conjunctivae, no cyanosis, there was a deep stab wound on the upper neck, 2 in number one 8cm and the other 4cm; on respiratory system, there was massive right pleural hematoma, collapsed upper lobe of right lung and on cardio-vascular system, there was severed right carotid artery. That as a result of examination, PW4 made an opinion that the cause of death was due to massive haemorrhage in the lungs and severed carotid artery from neck stab wound. PW4 had death certificate issued no. D4650541, he signed the postmortem report which he produced as P.exhibit 1.

6. PW5, Wycliffe Ogolla Odiengo, the Area Assistant Chief stated that on 21/3/2014 while at his home, he received a telephone call from Erick Onywera (PW1) at 10.00pm telling him George Ochieng Ototo(deceased herein), had been murdered by Michael Ochola Ongore(accused) at the accused's home. He then proceeded to the scene and found the body lying just few metres from the door to the accused house with blood oozing from the deceased's neck and a big crowd of people crying. He called OCS from Lwala Kotiende Police Station, who referred PW5 to Aram Police Station. He called Aram Police Station and at the same time he received a call from his wife telling him that, the accused was at PW5's home. PW5 left for his home with PW1, in his motorbike and found the accused seated at the verandah of PW5's house, having a sword in his hands, which was stained with blood and his clothes were also stained with blood. PW5 enquired from the accused what had brought him there and he told PW5 that he had a quarrel with George Ochieng, the deceased, and that he had killed him. PW5 took the sword from him and took it to Lwala Kotiende Police Station and handed him over to Cpl Ngara. PW5 stated he knew the deceased as his subject and as his former school mate. He stated he knew Erick Otieno Onywera as his village mate. He also stated he had known the accused since childhood as they grew together from the same village.

7. PW6, No 232333 C.I. Abdi Rahim Abdullahi, OCS, Aram Police Station, the Investigating Officer, in this case told the court that on 21/3/2014 at around 10:00pm, while at the police station, he received a telephone call from the Assistant Chief, Wycliffe Ogolla(PW5), informing him of a murder incident at Rambugu village. He was told Michael Ochola Ongore, had killed George Ochieng Ototo. PW6 in company of Cpl Ntongai proceeded to the scene of murder; at the scene, he found the Assistant Chief (PW5) and a big crowd of members of public including PW1. He found the deceased near the door step to the house of the accused, lying down on his back. He observed the left side of the neck of the deceased had a stab wound. He started investigation by interrogating the witnesses at the scene and took their particulars. He then removed the deceased's body from the scene and passed through Lwala Kotiende Police Station, where the accused had been taken by PW5 and PW1. At the police station, the accused was removed from the cells and PW6 talked to the accused who appeared drunk. PW5 noted the accused's left hand had an injury and he was given the murder weapon by Cpl Geoffrey Ngara. He left the accused at the police station and took the deceased's body to Bond Sub-District Hospital mortuary.

That the following day, he started recording witnesses statements and also proceeded to Bond Principal Magistrate Court and sought extension of 10 days period to hold the accused at Aram Police Station to enable him complete the investigation. That after completion of the investigation, he recommended the accused to be charged with the offence of murder. PW6 produced the knife, he recovered from Cpl Geoffrey Ngara as P.exhibit 2, which was stained with blood. PW6 stated that in the course of his investigation, he gathered information that at the material night, the accused went to the homestead of PW3, with PW1 and the deceased wanting to sell his goat which was at PW3' home, PW3 refused, that annoyed the accused and he killed the deceased at his (accused) home. PW6 stated that he recorded the accused's statement under enquiry. He identified the accused (pointing at him in the dock) and gave his name as Michael Ochola Ongore. He state the accused person surrendered himself to the Assistant Chief's home (PW5) with the murder weapon.

8. When the accused was called upon to defend himself, the accused stated on oath that he knew the deceased who had come from the same clan with him. That in October 2013, the deceased had lent him Kshs.3,000/= which was payable in one month's time; but the accused was not able to pay. That on 21/3/2014 at 7:30pm, the two spent some time at the accused's home, the deceased told the accused he wanted his money back, the accused told him he did not have money but the deceased insisted he repays his money that day. The accused then told the deceased he had a goat which he could sell and pay him or give him the goat. The deceased stated he could get either the goat or the money. They then left to where the goat was kept at the home of PW3, sister in-law to the accused but on the way, they met Erick Otieno Onywera (PW1), who the accused offered to sell the goat to, so as to give the deceased his money. The accused told PW1, if he had Kshs.3,000/= he could give him, so as to pay the deceased, and he gets the goat. The three proceeded to PW3's home so that PW1 could see the goat. On arrival at PW3's home, the accused called PW3's son, one Dominic Okongo Odemba, who came to where the three were, the accused explained to him what he wanted and asked him for keys to the goat shed. That after the shed was opened and as they were viewing the goats and discussing, PW3 came and objected to the sale, saying she did not want the sale conducted at night, asking them to come the following day for the goat. The accused and his group agreed with PW3 and all left. That at the junction, Erick Otieno Onywera(PW1), took the route towards his home, leaving the accused and the deceased for a while, after which the deceased took another route, as if he was heading to his home as the accused took the route to his home. That the accused while at his door and before it could be opened, he saw the deceased George Ototo, coming towards his home through the entrance to the accused's compound, that though the door was already opened for the accused to enter into his house, he decided to wait for George Ototo to find out what he wanted. The deceased then told the accused, he wanted his money right away, that if the accused did not give him his money, he won't go back for his money. The accused told him he thought they had finished the issue, as he was to get the goat the next day, to which the deceased insisted he should get his money. The accused told the deceased, calling him nephew, that he should go home and come the next day, as it was already morning.

9. That when the accused told the deceased so, the deceased, stepped back, pulled out a knife from his waist, telling the accused to pray to his God, as he advanced towards the accused, struck him with the knife, which the accused blocked with his left hand and he was cut on the left arm three times forcing him to pounce on the deceased and both of them started struggling over the knife, both fell down while the deceased was holding the knife, as the accused was holding the deceased's hand which was holding the knife, that whole on the ground, the accused felt like the deceased hand had weakened. He also heard him breathing his last as he made a loud noise. The accused got up and observed that blood was oozing from the deceased's neck, and noted that the knife was stuck on the deceased's neck. The accused pulled out the knife and left to make a report at Chief's home (PW5's house), carrying the knife with him. The accused did not find the Chief (PW5) at his home, but his wife, who called the Assistant Chief, who came after 30 minutes and who asked the accused, "*after you have killed someone, you come to my home?*" The Assistant Chief took the knife, tied the accused's hands with a rope and took him to the police station. The accused stated, PW5 was accompanied by PW1, and that he did not tell the Assistant Chief anything, the accused stated exhibit 2, is the knife which the deceased had, and which he used to cause injuries to the accused (court show injuries on the arm of the accused with 3cuts). He stated that was the knife he wanted to get from the deceased and it is the same knife he pulled from the neck of the deceased. He told the court, the owner of the knife was the deceased's, as he used to see the deceased

always with the said knife at his home, using it for shredding sisal leaves into pieces. He stated, prior to 21/3/2014, he had seen the knife with the deceased. He stated the knife was not his. The accused denied having planned to kill or causing grievous harm to the deceased, stating that the death of George Ochieng Ototo is painful to him, as it was not something that he had planned. He stated the stab wound at the neck of George Ototo, was caused by the deceased and he is the one who caused his death by stabbing himself with the knife at the time they struggled.

10. The accused faces a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code. Section 203 of the Penal Code** define murder as follows: -

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

11. Malice aforethought is a primary ingredient for the offence of murder. What constitutes malice aforethought has been set down under **Section 206 of the Penal Code** as follows:-

“206. Malice aforethought shall be deemed to be established by Malice aforethought. 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.”

12. In proving a charge of murder, the Prosecution is under statutory duty not only to prove the death of the deceased but that the death was caused by the accused and the accused did so of malice aforethought. For conviction of murder, therefore to be sustained, the prosecution should establish the following ingredients: -

(a) Death of the deceased and its cause.

(b) The accused caused the death through an unlawful act on omission.

(c) the accused possessed an intention to cause harm/kill or possessed malice aforethought.

13. The standard of proof required in this case, being a criminal case, is that of proving the case beyond reasonable doubt. It is therefore in a criminal case incumbent upon the prosecution to adduce evidence that is strong, cogent, credible and consistent to prove its case to that required standard of proof beyond reasonable doubt.

14. Whether the prosecution proved the death of the deceased and its cause? From the evidence of PW1, PW2, PW3, PW5 and PW6 who visited the scene of the incident at the home of the accused, on the night of 21/3/2014, they confirmed that they found the deceased body, lying next to the accused's house doorsteps dead. PW6 testified he collected the deceased's body and took it to Bondo Sub-District Hospital mortuary. PW2 identified the deceased body on 27/3/2014 to Dr. Owino Bob, PW4, who carried out the postmortem examination on the body of the deceased. PW4 also issued certificate of death no. DA65054 in respect of the deceased. The accused in this case is not disputing the death of the deceased. I therefore find from the evidence of the prosecution, that the death of the deceased is proved to the

required standard of proof. PW4 in his postmortem report opined the cause of the death was due to massive haemorrhage in the lungs and severed carotid artery from the neck stab wounds. PW4 who conducted postmortem on the body of the deceased made a finding that the deceased sustained the deep stab wounds on the right neck measuring 8cm and 4cm respectively, which injuries he observed were caused by a sharp object. PW1, PW3, PW5 and PW6 confirmed seeing stab wound and blood oozing out from the deceased's neck when they went to the scene of the incident. The accused even in his evidence, he stated he pulled the stuck knife from the right side neck of the deceased and saw only one stab wound. The knife was produced as P.exhibit2. I find from the evidence adduced by the prosecution that they proved the death of the deceased to the required standard of proof and the cause of the death of the deceased.

15. I now turn to the next issue for consideration thus whether or not the prosecution proved that the accused caused the death of the deceased? The accused denied killing the deceased. The offence in this case was committed at night and there was no eye witness or direct evidence or anyone who witnessed the accused kill the deceased or causing grievous harm that led to the death of the deceased. The prosecution case is therefore based on circumstantial evidence.

16. The Court of Appeal in myriads of authorities set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. The principles were set out in the case of **Musili Tulo V Republic [2014]eKLR** where Court of Appeal had this to say on circumstantial evidence: -

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

(i) The circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by accused and none else.

Those principles were set out in the case of GMI v Republic [2013]eKLR which echoes the locus classicus case of R. V Kipkering Arap Koske & Another, 16 EACA 135.

In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke V Republic [1958]EA 715 citing with approval Teper V Republic[1952]AL 480 thus:-

It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

17. In **Republic V Nicholas Ngugi Bangwa[2015]eKLR**, the Hon. Lady Justice Lesiit had this to say on circumstantial evidence:

“Regarding circumstantial evidence the leading case is Republic V Kipkering Arap Koskei & Another 16 EACA 135, where the court held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In order to test whether the circumstantial evidence adduced by the prosecution merits the legal threshold it must meet the principles set out in the case of Abanga Alias Onyango V Republic CR.A No.32 of 1990(UR) where the learned Judges of the Court of Appeal stated thus: -

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

18. In the case of **Republic V George Odhiambo Wera [2017]eKLR**, this court pronounced itself thus:

“The next issue for consideration is who caused the death of the accused? Accused denied having caused the death of the deceased. In this case, there is no direct evidence but the prosecution case is purely circumstantial. In the case of Elizabeth Gatiri Gachanja and 7 others V Republic Criminal Appeal No 51 of 2004; the Court of Appeal sitting at Nairobi set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of guilt of accused person. In that case, it was held: -

(a)there had been no eye witness to the death of the deceased. In such a case the test to be applied was clear. In order to draw inference of guilt from circumstantial evidence, the facts of the case must have been incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, the burden of proving facts which justify the drawing of this inference is always on the prosecution and never on the accused.

(b) It was necessary for the court to be sure that there were no other co-existing circumstances which should have weakened or destroyed the inference of guilt.

(c) In law, there was no set number of witnesses required to prove a fact. Even the evidence of one witness could have formed the basis for a conviction as long as the court had found the evidence credible. Where such evidence was on the identification of a person who claimed that he was not properly identified then the court had to examine such evidence with the greatest care.....”

In the case of James Mwangi V Republic (1983)KLR 522, still on circumstantial evidence, the Court of Appeal held: -

In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference....”

19. In the instant case, PW1 was the first person to respond to the distress call after he had departed with the deceased and the accused from the home of PW3. That upon arrival at the accused’s home, he found the deceased lying on the ground, next to the doorstep to the accused’s house, bleeding with no one else at the scene. PW1 then called PW2 and PW5 and informed them what had happened. According to the testimony of PW2 and PW5, PW1 informed them that the accused had killed the deceased. That based on

the information, PW5 got from PW1, he called PW6 informing him that the accused had murdered the deceased. That PW1 in his testimony before this court, he stated that he did know what caused the death of the deceased, as he was not at the scene at the time the death occurred. The evidence then of PW1, in my view, then renders the assertion by PW2, PW5 and PW6 doubtful, as to who killed the deceased as the evidence by PW1 is based merely on suspicion as their assertion that the accused killed the deceased were based on the information given by PW1, who in his testimony denied knowledge of who caused the death of the deceased. I therefore, find that the evidence of PW1, PW2, PW5 and PW6 do not pinpoint at who killed the deceased. PW1 did not state from the screams he could hear, the deceased making a dying declaration or mentioning the person who was killing him.

20. The other evidence for consideration is that of PW3, Rosemary Adongo Odemba, whose testimony is that, the deceased wife went to her home and told her that the accused had killed the deceased. That upon receipt of that information, she stated she rushed to the scene in company of her co-wife Jane Anyango, where upon they found the deceased lying next to the doorstep, to the accused's house bleeding from the stab wound on the neck. That apart from that brief statement purportedly given to PW3 by the accused's wife to PW3, PW3 did not in her testimony give details to the court, how the accused's wife told her, the death occurred. I find the accused's wife and co-wife of PW3, Jane Anyango; were not called as witnesses, I find in absence of their evidence, PW3's evidence lacks corroboration and may not stand the test of credibility. The accused's wife was competent witness and the court was not told, that her testimony was sought but she declined to give it. Her evidence was crucial bearing in mind that she was at her home at the alleged time of the commission of the offence.

21. The available circumstantial evidence, would be *prima facie*, without more, no doubt lead to an irresistible inference on the guilt of the accused. That is because of the following findings; the accused was the last person to be seen with the deceased on their way to their respective homes, the accused in his sworn defence admitted being at the scene of the crime, the accused turned himself to the Area Assistant Chief (PW5), immediately after the incident, the accused was in possession of the murder weapon used to allegedly to commit the offence; the accused clothes were stained with fresh blood; PW5 testified the accused admitted to him that he killed the deceased; the accused had debt to the deceased pending since 2013 and the accused had three fresh injuries on his arm.

22. The issue is whether other co-existing circumstances emerged in the testimony of the accused which either weakened or destroyed the inference of the accused guilt from circumstantial evidence? The accused in his testimony stated that he went to PW5's home not to turn in himself but to report what had happened at his home and carried the knife for the same reason. That his clothes were blood stained, which can be explained by his testimony that he was struggling with the deceased and both of them fell down; that by the time the deceased was stabbed by the knife and by the fact that he too sustained 3 cut injuries on his left hand. He also denied telling PW5 or admitting that he killed the deceased. PW5's evidence imputes confession and as far as it is intended to secure a confession by the prosecution, it is inadmissible as it does not satisfy the strict requirements of the law on admission of a confession. PW5 being an Assistant Chief, is not amongst the persons upon whom a confession can be made (*see Section 25A of the Evidence Act*). I therefore find the purported confession by the accused to the Assistant Chief (PW5) inadmissible.

23. In the instant case, the accused gave sworn testimony explaining what transpired on the fateful night of 21/3/2014. The only testimony before this court as to what happened, is the lone eye witness account of the accused. The accused stated that after he parted ways with the deceased, the deceased returned to his home, demanding repayment of his money. That suddenly, the deceased asked the accused to say his last prayers, pulled a knife from his waist, attacked the accused, who sustained injuries to his left arm, the accused then grabbed the deceased by his right wrist, which was holding the knife, they then struggled, falling down, with the accused falling on top of the deceased. It is at that moment that the accused felt the deceased's hand which was holding the knife weaken and then noticed the knife had stabbed the deceased's neck and was stuck on it. He then got up, pulled the knife out but the deceased was motionless. He then decided to go and report to PW5's home. The accused explained the knife was with the deceased; it belonged to the deceased and he used it for his sisal business. The prosecution did not contravert the accused's evidence. I find the accused's evidence credible and cogent. The same was not

rebutted in anyway by the testimony of prosecution witnesses. The prosecution has submitted it was not possible for the deceased to have stabbed himself twice. The prosecution did not call evidence to demonstrate that the deceased could not, in view of the evidence given by the accused, have stabbed himself at his neck. PW4, the doctor, who gave evidence did not state that it was impossible for one to inflict such a stab at his neck faced with the situation as explained by the accused, while involved in struggle with another person and while holding a knife. I find the accused testimony on its evaluation and analysis tends to weaken and destroy the inference of guilt, on the part of the accused, from circumstantial evidence the prosecution relies on in this case.

24. I find from the evidence of PW1, the accused and deceased, were on the material time upto the time they parted with PW1, in good terms and on a friendly mood. PW1 in his evidence never mentioned there being any disagreement between the deceased and the accused. PW3 who was amongst the last person, to see the accused, the deceased and PW1 leave her home, never mentioned witnessing any disagreement or misunderstanding between the deceased and the accused. In this case and from the evidence of the accused, the accused owed the deceased some money, during the material time, the accused went out of his way to appease the deceased regarding repayment of the loan due to the deceased. From the evidence adduced, I find no evidence that the accused was annoyed by the deceased demand for his money. The aggrieved party in this case would have been the deceased, but I find no evidence pointing to the fact that the accused turned hostile to the deceased at the accused's home, which lends credence to the explanation by accused that the deceased came back to the accused's home after they had parted ways and attacked him. That there is no evidence of the accused attempting to injure the deceased after they parted with PW1 and if he had bad intention, then the accused would not have waited for the deceased to come to his house and kill him in full view of his family. The conduct of the deceased including going to PW3's home at night to see the goat offered as a security, for repayment of the loan he had advanced to the accused since 2013, is a clear indication that the deceased had resolved to have his money paid on that material night. I believe that is why he insisted on going to see the goat at night and not to wait for any other time. This act lends credence to the accused's testimony that even after the two parted ways, the deceased returned to the accused's home, insisted to be paid his money that night and ended up attacking the accused using his knife exhibit P2.

25. In view of the evidence adduced before the court by both the prosecution and the accused, I find that it was the deceased who attacked the accused with the knife, which resulted into struggle over the knife, leading to both the accused and the deceased falling down, as consequence whereof, it is possible that the deceased's knife accidentally stabbed the deceased as he was holding it and as the accused was attempting to restrain the deceased from stabbing him, causing his instant death. I further find in the struggle, it was possible for the deceased and even the accused to have sustained multiple stab wounds and other injuries. I therefore find as there is no direct evidence as to whether the accused stabbed the deceased with the knife, the prosecution failed to prove the case against the accused beyond any reasonable doubt.

26. **In case I am faulted on this finding, I would now proceed to determine whether or the prosecution proved that the accused caused the death of the deceased of malice aforethought?** The defence submitted that if the accused caused the stab injuries, that he did so without malice aforethought and primarily in self-defence and/or provocation. **Section 17 of the Penal Code** dealing with defence, of self-defence provides as follows: -

“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

27. In **Ahmed Mohammed Omar and 5 others V Republic (2014)eKLR**, the Court of Appeal set out clear guidelines regarding the conditions when self-defence will suffice as a defence by an accused person. The court in that judgment addressed itself thus:-

“In the circumstances, the appellant's contention that they acted in self-defence plausible? Section 17 of the Penal Code states that:-

“17. Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

What are the common law principles relating to self defence? The classic pronouncement on this issue and which has been severally cited by this Court is that the Privy Council in *Palmer V Republic* [1971]A.C.814. The decision was approved and followed by the Court of Appeal in *R V McINNES*, 55 Cr. App. R.551. Lord Morris, delivering the judgment of the Board, said: -

It is both good law and good sense that a man who is attacked may defence himself. It is both law and common sense that he may do, but may only do what is reasonable necessary. But everything will depend upon the particular facts and circumstances.....some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some of act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in moment of the situation. If an attack is serious so that it puts someone in the immediate peril, then immediate defensive action may be necessary. If the moment is one of the crisis of someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off and old score or may be pure aggression. There may be no longer any link with a necessity of defence.....the defence of self-defence either succeeds so as to result in an acquittal or it is disapproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. In in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.

The above Common Law principles have been applied locally in several decisions.

In *Robert Kinuthia Mungai V Republic* (1982-88)1KAR 611, the appellant visited a lady friend at her house and at 4.30am, there were awakened by the deceased, who was also a boyfriend of the lady. He uttered threats to kill them both and attempted to strangle the lady. He also threw a hurricane lamp at the appellant and a piece of glass cut him above the eye. The appellant took his gun, which he was licensed to carry, and fired into the air. The deceased was not deterred, he continued with his threats. The appellant, fearing for the life of the lady, shot the deceased and killed him. The appellant was charged with murder but the High Court convicted him of manslaughter. On appeal, this court held that the appellant had acted in the course of defence of the person and also for the purpose of preventing a felony and quashed the conviction.

In the appeal before us, the learned Judge rejected the defence of self-defence that was advanced by the appellants. He held that the appellants were not in imminent danger at the time when they shot and killed the deceased persons. He also found that the degree of force used was reasonable in the in the circumstances; it was excessive.

However, in *Robert Mungai V Republic* (supra) the Court, having received several English and local authorities, delivered itself thus:

“.....we think in view of the earlier East African cases we have considered, and the more recent English decision in *R v Shannon* Crim. LR 438 1980, that, the interpretation of the judgment of the Privy Council in *Palmer V Republic* is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered”

In this appeal, there was no evidence from any of the prosecution witnesses that the deceased persons were armed with any guns, it is the appellants who asserted that the deceased persons

shot at them. Perhaps the only weapons that the deceased had were pangas, swords and a toy gun. That is why the learned trial Judge held that the appellants used excessive force in the circumstances. However, there was evidence that the deceased defied a police order to stop and confronted the appellants.

In Robert Kinuthia Mungai V Republic (supra), the Court held that it is a doctrine recognized in east Africa that excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the Court to regard the offence not as murder but as manslaughter. But if the defence of the self-defence is upheld, a conviction for murder cannot be sustained.”

28. In the instant case, the accused did not believe he was being attacked by the deceased. He was actually attacked with a knife P.exhibit 2 by the deceased. He suffered three cut injuries on his hand which this court noted, and before he pounced on the deceased, held his right hand with which the deceased was holding the knife P.exhibit 2 as a struggle ensued. The deceased had told the accused before attacking him to say his last prayers. I find from the above, that the accused life was evidently in imminent danger and as such he had reasonable grounds to react as he did, which led to the fatal injuries, which the deceased sustained. The accused in so doing acted in self-defence. That where defence of, self-defence is upheld, a conviction for murder cannot be sustained. In the instant case, self-defence, raised as defence has not been disapproved by the prosecution and shown to have been unlawful. It has not been proved that the force used by the accused was not necessary to prevent himself from the unlawful attack by the deceased. I find the prosecution did not therefore prove their case against the accused person to the required standard of proof.

29. **Having come to the conclusion that I have, I find the prosecution has failed to adduce evidence to prove the case against the accused person to the required standard of proof, thus beyond reasonable doubt. In the circumstances, I give the accused the benefit of doubt and acquit him of the charge of murder accordingly. The accused is set forthwith at liberty unless otherwise lawfully held.**

DATED AT SIAYA THIS 30TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Mr. Wakla: for the Accused

M/S Odumba: for State

Court Assistants:

1. George Ngayo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE