



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL CASE NO. 30 OF 2011**

REPUBLIC..... PROSECUTOR

VERSUS

EDWIN ODERA MAKOKHA.....ACCUSED

**JUDGMENT**

**INTRODUCTION**

1. The Accused, **EDWIN ODERA MAKOKHA**, was on 22/06/2011 arraigned before this Court and charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya.

2. The particulars of the said offence were that: -

***“EDWIN ODERA MAKOKHA: On 12<sup>th</sup> day of May 2011 at Shiunzu Sub- Location, Central Butso Location in Kakamega Central District within Kakamega County, murdered JACKTONE AMBUNDO MAKOKHA.”***

3. The information was amended by the leave of Court on 25/01/2012 under Section 275 of the Criminal Procedure Code in relation to the date of the offence. The date was amended to 06/04/2011 instead of 12/05/2011 and the Accused and his Counsel did agree to the said amendment/endorsement.

4. The prosecution called 6 witnesses in proof its case. When the Accused was placed on his defence on 26/06/2012, Mr. Fwaya Counsel for the Accused indicated to the Court that the Accused opted to give sworn defence and would call one witness. However when the Accused was called to render his defence on 03/11/2014, Counsel indicated that the Accused had instead opted to give unsworn testimony and would not call any witness. The Accused gave the unsworn testimony aforesaid and denied any involvement into the death of JACKTONE AMBUNDO MAKOKHA (hereinafter referred to as “**the deceased**”).

5. It is also worth-noting that this case was initially heard by Honourable Lady Justice B. Thurairaja between 02/11/2011 to 25/01/2012 and a ruling on a case to answer made on 26/06/2012. When the Honourable Judge was transferred, directions were taken before Honourable Mr. Justice G. Dulu on 19/11/2013 where Section 200 of the Criminal Procedure Code was complied with and the Accused opted to proceed on with the case from where it had reached and indicated that he did not wish to recall any of the witnesses who had previously testified. Upon the transfer of Hon. Justice G. Dulu, the matter proceeded before this Court where the Accused tendered his defence. It is further important to note that when the prosecution closed its case the Counsel for the Accused indicated that he wished to tender submissions on 05/03/2012. However in a turn of events the Counsel indicated that he instead was not

intent on tendering any submissions at that time and left the matter in the discretion of the Court. Again, on 03/11/2014 when the defence closed its case, Counsel indicated that he did not wish to tender any submissions and again left the matter to the discretion of the Court. Mr. Oroni, Learned State Counsel relied on the evidence on record in urging the Court to find that the prosecution had proved the offence of murder facing the Accused. This Court would wish to point out that it is a good practice for Counsels especially in serious crimes facing their clients like in this instant case to endeavour and tender submissions at least after the close of the defence case and put up a spirited defence on behalf of their clients. In this way, Counsels assist the Court in bringing out pertinent issues and inevitably leads to the development of the law and jurisprudence as a whole. It is a duty bestowed upon all players in the legal fraternity.

## **THE FACTS**

6. As indicated earlier on, the prosecution called 6 witnesses. **PW1, PATRICK NANDWA**, who was a Nurse Aid working under Dr. Gideon Ndunde sometimes in April 2011 testified that on the night of 06/04/2011 while at his home in Shiunzu Sub- Location in Kakamega County he was approached by two people namely PETER MWANIKA and CHEPI ESHITEMI with information that their neighbour, the deceased herein, had been stabbed by one EDWIN ODERA and he was requested to go and attend to him at least on a first-aid basis.

7. PW1 in answer to the call of duty and humanity truly accompanied them to the deceased's home which was about a half kilometer away and found the deceased lying on the ground with other people around him. The deceased had a stab wound on the right side of the abdomen and was bleeding profusely as the people were trying to wipe off the blood. PW1 asked the people to carry the deceased into a nearby house where there was some light and on observation he confirmed a deep stab wound. He administered First Aid by applying a gauge bandage to stop the bleeding and asked the people to give the deceased pain killers with advice to take him to hospital the following morning. He then returned home.

8. On 08/04/2011, PW1 went to see the deceased at his home after he had been taken to hospital on 07/04/2011 and he observed that the deceased's condition was still not good as he was too weak and still could not walk. He learnt that the family was not able to purchase the drugs as prescribed at the then Kakamega Provincial General Hospital (hereinafter referred to as '**the hospital**') due to the high cost, but still PW1 advised them to seek ways and purchase the recommended drugs. PW1 kept on visiting the deceased for about seven days, but to him, there was no improvement. He later learnt that the family had bought a cheaper version of the prescribed drugs, but still the deceased had not even taken the same as the wife reportedly said that the deceased did not like swallowing medicine. PW1 advised them to take the deceased back to the hospital. On 17/04/2011 the deceased was taken back to hospital aforesaid and PW1 did not see him again only to learn that the deceased had passed away on 12/05/2011 while still undergoing treatment. He later on recorded his statement with the Police.

9. On cross-examination, PW1 denied stitching the wound when he went to see the deceased for the first time and confirmed that he only gave him first aid to stop the bleeding. It was his view that the wound could not heal easily without proper medication as the stab was deep.

10. **PW2, Dr. JEREMIAH KINUTHIA**, then a Medical Officer of Health at the Hospital produced a Post-Mortem Report on behalf of Dr. DICKSON MCHANA who was then attending another post-mortem in Kisumu. He indicated that he had worked with Dr. Mchana for about one year and he was conversant with his handwriting and signature which he easily identified on the Post-Mortem Report dated 13/05/2011. The Post Mortem on the deceased was conducted on the said 13/05/2011 at 03:10 pm and the Report filed in, dated and stamped by the said Dr. Mchana. A Certificate of Death No. 165022 was issued. The Doctor was of the opinion that the deceased died due to septicemia due to secondary stab wound following assault.

11. On cross-examination, PW2 confirmed that a stab-wound can cause death if it was penetrating and an early medical intervention can treat such a wound. He further confirmed that there was evidence of medical intervention though he did not see the treatment notes. He also noted that there were no defence

injuries on the deceased. Internally there was a sinus 4cm deep cut at the vascular adnominal wall with pockets of pus. He again reiterated that such a deep and penetrating injury was treatable but at the earliest possible intervention.

12. **PW3, DICKSON MWANJE AMBUNDO**, was a farmer hailing from Ingotse and a nephew to the deceased. He informed the Court that the deceased's wife had called him on 08/04/2011 at about 07:00 am and informed him that the deceased had been stabbed by his brother, the Accused herein and that she had taken the deceased to Hospital but they had been refused any medical attention as they had been advised to take the deceased back to the one who had stitched him to remove the said stitches. He advised them to take him back to the Hospital as he would see him later on.

13. After about one week, PW3 visited the deceased at the Hospital. The deceased easily recognized him and they talked. He conversed with the deceased in Kitsotso dialect of the Luhya language where the deceased informed him that EDWIN ODERA MAKOKHA, his step-brother, had stabbed him with a knife on the side of the stomach at around 02:00am when he had gone out of his house to look for his missing cow with his wife. The deceased had met the Accused near the Accused's house and later the Accused stabbed him near the deceased's house. He continued visiting the deceased in Hospital but his health was deteriorating until 12/05/2011 when he died. PW3 identified the deceased's body for post-mortem. He identified the Accused in Court as EDWIN ODERA MAKOKHA as a step-brother to the deceased whom he knew since the Accused's birth.

14. He further testified that the deceased had told him at the Hospital when he went to visit him for the first time that earlier in the day he was stabbed by the Accused, the Accused had quarreled with his wife and the wife ran into the deceased's home for safety. When the Accused followed his wife with a jembe (a hoe), a brief fight broke out between the Accused and the deceased which ended when the Accused retreated to his house.

15. On cross-examination, PW3 said that his statement as recorded by the Police was a brief summary of the events but what he had tendered in Court was the detailed version of the events. He further confirmed having been informed about the stabbing by the deceased's wife over the phone and later by the deceased in the Hospital. According to him, the deceased was sent back home in the first instance at the Hospital because the one who had administered the first aid had not written any accompanying notes. That was what the deceased's wife informed him over the phone. To him, the stabbing took place in the night following the row between the Accused and his wife which the deceased had intervened.

16. **PW4, RISPA AWINJA**, was the deceased's wife. She gave an account of how the events unfolded on 06/04/2011 until the deceased was injured. It was around 07:00 pm when a fight broke out between the Accused and his wife in their house which is in the same homestead with the house of the deceased and PW4. The Accused and the deceased were step brothers. By that time the deceased was with his wife, PW4, in their house. The Accused's wife came running into their house and began telling the deceased in Luhya language that she was indeed fed up with the Accused as the Accused was intent on killing her one day. As the Accused was still briefing the deceased, the Accused came to the deceased's house and stood outside holding a jembe and then moved in and stood at the doorway wanting to cut his wife with the said jembe. It was at this point in time when the deceased intervened and took a stick and beat the Accused who retreated to his house. Thereafter the Accused's wife also left for her house as the deceased and his wife later went to sleep.

17. At around 02:00pm (that very night) PW4 woke up and went out to answer a call of nature. She was however shocked not to see their cow which was tied behind their house. She immediately woke up her husband, the deceased, and both went out to look for the cow which was not in their compound. The deceased had a torch. As they were looking for the cow for around 30 minutes, and as it was dark with no moonlight, the flashlight from the torch shone on someone in the dark. It was the Accused who was holding a knife in his hands. The Accused asked the deceased what he was looking for at that time of the night and the deceased replied that they were looking for their cow which had suddenly disappeared. The Accused responded and said that the cow was borrowed and indeed did not belong to the deceased.

18. In a turn of events, the Accused told the deceased that he wanted to fight him. The Accused was by now standing near the gate leading to the deceased's house clearly blocking their way back to their house. As the deceased approached the gate to their house and where the Accused was standing, the Accused in a flash of a second stabbed the deceased in the stomach below the ribs on the right side and the deceased instantly fell down. PW4 started screaming in the dark and neighbours later came to their rescue. PW4 further stated that she clearly recognized the Accused as the assailant since she saw his face when the deceased shone the torch on him and she even identified the clothes the Accused was wearing being a blue shirt and a white trouser. Further, PW4 was married into the homestead for 11 years where the deceased (being brothers) used to live and their houses were only about 20 metres apart. PW4 knew the Accused so well alongside his wife who had earlier on taken refuge in their house. As close family members, they interacted on a daily basis and PW4 would not be mistaken on the Accused's voice since the deceased and the Accused had actually talked to each other before the stabbing. PW4 identified the Accused in Court as the assailant. She reported the matter to the Police the following day and took the deceased to Hospital. The deceased died on 12/05/2011 while undergoing treatment at the Kakamega Provincial General Hospital and was later on buried at his home. PW4 indicated that the relationship between the deceased and the Accused was generally cordial.

19. On cross-examination, PW4 confirmed that the Accused and the deceased had quarreled on the evening of the material night when the Accused's wife came running for refuge at their house. The deceased intervened and beat the Accused. However the scuffle ended and everyone went back to their houses. She also confirmed taking the deceased to Hospital on 07/04/2011 where the Doctors asked them to have the stitches on the wound removed by the person who had put before going back to the Hospital. PW4 also revealed that the deceased as they were looking for the cow had carried along a rungu which they usually used to keep in the house but it was not the same the deceased used to beat the Accused with during the scuffle. She was the first to raise alarm when the deceased was stabbed by the Accused and a neighbour one Rodgers responded and reached at the scene first. PW4 protested that the deceased did not go to the house of the Accused to separate him from fighting with his wife but it was the wife who ran into their house. Amid some mix-up on the issue of dates, PW4 managed to stabilize and clarified that infact she took the deceased to the Hospital on 07/04/2011 and not 07/05/2011 as so indicated in the Police statement.

20. **PW5, JAPHETH SHILACHE**, a farmer from Shiunzi Sub-Location had visited the deceased and they were seated outside conversing. Suddenly the Accused's wife came and called the deceased outside and as they were talking the Accused appeared holding a jembe and the wife ran away. According to PW5, even without exchanging any word the deceased took a bicycle lock and started beating the Accused who then ran away. It was around 06:30 pm and he decided to leave to his home only to be informed by the deceased's wife on the following day that the Accused had stabbed the deceased. He went to see the deceased injured at home and he advised the wife to take him to Hospital. He visited him at the Hospital on 02/05/2011 and learnt later on that the deceased had passed away.

21. On cross-examination, PW5 confirmed that the deceased was not drunk when he witnessed him beat the Accused and that when he visited the deceased, he did not tell him who had stabbed him.

22. **PW6, PC NJUGUNA KINUTHIA**, was the Investigating Officer in the case. He recalled in May 2011 when he was at the Kakamega Police Station performing general duties when he was assigned the duty to investigate the case where a suspect had been attacked by members of the public and handed over to Administration Police at Lurembe D.O's Office on allegations that the suspect had killed his brother. This was on 13/05/2011 and he proceeded to the said D.O's Office and re-arrested the suspect, the Accused in Court. He also proceeded to see the deceased body at the Hospital. PW6 generally reiterated the evidence of deceased's wife, PW4 except where he stated that in the course of his investigations he learnt that at around 10.00pm to 11.00 pm, on the night the deceased was stabbed, the Accused went to the deceased's home and hurled insults, but the deceased did not respond. The Accused then untethered the deceased's cow and led it go to the deceased's farm. This very evidence however was not led by any of the witnesses who testified before the Court and the Court wonders why the said Officer and or the Prosecutor did not endeavour to avail such evidence. That aside, he recorded statements and later on charged the Accused with the offence. He also recorded the statement of the Accused. He never recovered

any alleged weapon of murder neither did he lay his hands on the on the bicycle cable. He also confirmed that there were no sketches drawn.

23. On cross-examination, PW6 clarified that the stabbing of the deceased by the Accused took place long after the Accused had cooled down from the incident that had taken place during the day. PW6 also revealed that he commenced investigations one month after the stabbing and when the deceased had died hence he was not able to get exhibits and that the statement of the deceased's wife, PW4, mentioned insults by the Accused that the deceased could not afford to buy a cow. He further confirmed that the case of assault had not yet been investigated at the Kakamega Police Station.

24. The prosecution then closed its case and in a ruling made on 26/02/2012, the Accused was placed on his defense.

25. The Accused who opted to give unsworn testimony stated that on 06/04/2011, he left his home in the morning for work and returned at 06:00pm and took a bath. He thereafter took his supper with the family and at around 09:00pm he heard noises outside. He rushed to the scene and met his brother WILSON SHITEMI and PETER MWANIKI together with the deceased's wife outside the deceased's house. The deceased was also there but bleeding. The Accused asked what had happened and he was told that the deceased could not talk hence no one knew what had happened to him. He then called a boda-boda rider who took the deceased to Hospital.

26. The Accused further stated that he went back to the Hospital in the morning of the following day and found the deceased able to talk but could not recall what had happened because the incident happened in the dark. He later on contributed Kshs. 7,000/= being his share of the hospital bill as the rest of the family were to raise the balance of Kshs. 13,000/= making it Kshs. 20,000/=.

27. It was his testimony that the deceased's wife instead insisted on the sale of a portion of the family land so as to pay the hospital bill and they disagreed and that is when he was arrested. The deceased's wife later on sold their part of the land when he was in prison. He denied any knowledge of the charges before Court.

#### ANALYSIS AND DETERMINATIONS:

28. From the above evidence, this Court is now to find out if the ingredients of the offence of murder have been proved in this case. The offence of murder carry three ingredients for determinations which are as follows: -

- (a) Proof of the fact and the cause of death of the deceased;
- (b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '*actus reus*' of the offence;
- (c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the '*mens rea*' of the offence.

I will consider each of the issues independently.

#### **Proof of the fact and cause of death of the deceased:**

29. The information before this Court is to the effect that one JACKTON AMBUNDO MAKOKHA died. All the prosecution witnesses and even the Accused in his defence stated that it was true the deceased died. That was on 12/05/2011.

According to the Post Mortem Report (P. Exhibit 1) by Dr. Mchana, Certificate of Death No. 165022 was issued upon carrying out an autopsy on the said JACKTONE AMBUNDO MAKOKHA. I am therefore

satisfied that the said JACKTONE AMBUNDO MAKOKHA died and I so find.

30. On the cause of death, the prosecution witnesses testified that the deceased was stabbed and though he underwent medical intervention he eventually succumbed to the injuries. According to the Post-Mortem Report, externally the Pathologist observed a 2cm wide stab wound on the posterior aspect of the right lumbar region and a sinus that was 4cm deep into the retroperitoneal tissue with pockets of pus and adhesives. Internally, the Pathologist noted sepsis in the sinus track into the right retroperitoneal tissue and the spleen was enlarged and on the genito-urinary system the capsule had adhesive with septic granules. The cut section showed membranes of septic granules with surrounding red sores.

The Pathologist formed the opinion that the cause of death was:-

***“Septicemia due to stab wound following Assault.”***

31. There being no any other evidence medical or otherwise suggesting another possible cause of the deceased’s death, this Court finds and so holds that the deceased indeed died as a result of the stab wound as opinioned by the Pathologist.

**Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused:**

32. This issue is aimed at establishing whether it was the Accused who actually caused the death of the deceased and if so, whether by an unlawful act or omission.

33. It was the prosecution evidence that the deceased was stabbed at around 02:00am (at night). PW4, the deceased’s wife, described the night that was as without moonlight and very dark, though the deceased had a torch and that they were together. On the other hand, the Accused denies any involvement in the act.

The question that begs an answer is whether the deceased’s wife, PW4, could have positively identified or recognized the assailant in the prevailing circumstances. PW4 testified that she recognized the assailant in two ways; by physical appearance and by his voice. PW4 had been married into the deceased’s homestead for 11 years. It is not controverted that PW4’s house was about 20 metres from that of the Accused the two being brothers. Both brothers were married and they used to live peacefully with daily interaction. As a result of this relationship, PW4 testified that he knew the Accused very well and could easily recognize his voice.

34. The night was dark without moonlight. The deceased and PW4 having come out of their house to find out the whereabouts of their cow which had disappeared were aided by a torch. The deceased carried together with him a rungu. PW4 was following the deceased. Though we are not told of the intensity of the light from the torch, PW4 managed to recognize the person in the dark as the Accused and even the clothes he was wearing being a blue shirt and a white trouser.

35. The other aspect was that of the voice. When the deceased shone the torch upon the Accused who was in the dark, it was the Accused who began asking the deceased what he was finding at that very hour of the night. The deceased and the Accused talked for a while though not cordial. It is the Accused who later told the deceased that he wanted to fight him and went to stand near the gate to the deceased’s house and as PW4 followed the deceased. The Accused stabbed the deceased and immediately PW4 raised alarm, as the deceased fell down. The conversation between the deceased and the Accused did not possibly take a second and hence it again gave PW4 ample time and opportunity to fully and without any doubt recognize that it was the Accused who talked with the deceased. That person who engaged the deceased at that point in time in the night was the one who stabbed the deceased and it cannot be any other person rather than the Accused herein.

36. This Court however wishes to have an in-depth analysis of this very crucial issue. It is on record that the deceased’s told PW3 when he visited him at the hospital that it was the Accused who had stabbed

him with a knife. When PW5 visited the deceased at home, he also found out that the deceased had been stabbed on the stomach. The Post-Mortem Report also confirmed a 2cm wide cut on the posterior aspect of right lumbar region and it was opined that the cause of death was a stab wound following assault. This therefore goes a long way to corroborate what PW4 saw that night - the Accused stabbing the deceased with a knife.

37. The Accused however is of the contrary view. In his unsworn defence, he admits that the day the deceased was stabbed he was at home from his work place and after taking a bath proceeded to take supper with his family. At around 09:00 pm the Accused heard noises outside and rushed there only to find his two brothers and the deceased's wife outside the deceased's house and the deceased lying down bleeding. As no one seemed to know what had happened he quickly arranged for transport and took the deceased to hospital where he was admitted until he died. He also raised the issue of a grudge between the deceased's wife and himself towards the sale of part of the deceased's portion of land to settle the hospital bills and saw his arrest as a scheme to finish him.

38. This Court is sincerely at a loss as to which hospital the Accused took the deceased to. Several witnesses testified on the fact that when the deceased was taken to hospital on 07/04/2011 (and not 06/04/2011), he was returned back home and stayed for sometime before he was taken back to hospital. Again other witnesses saw the deceased while injured at home including PW1 and the Accused's cousin JAPHETH SHILACHE (PW5) and not forgetting the deceased's wife. Both PW1 and PW5 corroborated the evidence of PW4 that when the deceased was injured he stayed home until the following day when he was taken to hospital and returned home where he stayed there until much later when he was taken back to hospital on account of his deteriorating status. This casts doubt on the Accused's version. The allegations of a grudge taken in its totality can be safely described as an afterthought. The issue was never brought up at any point in time during the prosecution's case and none of the witnesses were cross-examined on the issue including the deceased's wife, PW4. Further the Accused (though legally entitled to) opted for an unsworn defence hence denied the prosecution the opportunity to probe his defence. This, ought to be looked into in line with the change of mind by the Accused when he initially indicated to give sworn evidence and was intent on calling a witness. This approach would have assisted this Court further, but as stated the Accused was well within his rights. In taking this line, this Court is alive to the legal position that the burden of proof rests on the prosecution throughout in criminal cases and the Court is not in any attempt to so shift from that settled principle. This Court is only, but analyzing the evidence at hand.

39. In this analysis I will also have a look at various judicial precedents on the above issue and in buttressing the above Court's findings.

This Court is under a legal duty to weigh the evidence of PW4 who is the only identifying witness with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of Wamunga Vs Republic (1989) KLR 426 stated as under:-

***“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”***

It was also held in Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

40. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

***“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***

***“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”***

***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”***

Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

***“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”***

41. Going by the above evaluation of the evidence and being guided accordingly by the precedents, this Court reaffirms its earlier finding that the evidence and the prevailing circumstances taken in totality confirms that PW4 positively recognized the Accused without any possibility of error whatsoever and that it was the Accused who stabbed the deceased.

42. Was the stabbing by the Accused an unlawful act?

The Black’s Law Dictionary defines ‘unlawful’ as under: -

***“Unlawful. That which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law.”***

An 'unlawful act' is described in the Black Law Dictionary as follows:

*“Unlawful act. Act contrary to law, and presupposes that there must be an existing law. A violation of some prohibitory law and includes all willful actionable violations of civil rights, and is not confirmed to criminal acts..... The ‘unlawful acts’ within manslaughter statutes consist of reckless conduct or conduct evincing disregard for safety of others....”*

37. The Penal Code Chapter 63 of the Laws of Kenya under Chapter XXIV creates the offence of assault. The Black Law Dictionary defines 'an assault' as follows: -

*“Assault. Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intended display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another..... Frequently used to describe illegal force which is technically a battery. For crime of assault victim need not to be apprehensive of fear if the outward gesture is menacing and defendant intends to harm.....It is unlawful attempt to commit a battery....’*

From the above analysis, the act of the Accused in stabbing the deceased consists an assault and since it is specifically prohibited by the Penal Code then it amounts to an unlawful act. Simply put, it was contrary to law for the Accused to stab the deceased.

**Proof that the said unlawful act was committed with malice aforethought:**

43. **Section 206** of the Penal Code defines malice aforethought as follows: -

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

*(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

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

*(c) An intent to commit a felony.*

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

The Court of Appeal has on several occasions dealt with this aspect. In the case of **Joseph Kimani Njau vs R (2014) eKLR** in concurring with an earlier finding of the Court, but differently constituted in the case of **Nzuki vs R (1993) KLR 171** held as follows: -

*“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-*

*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 from 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 consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed”.***

The Court in the above case went on to say that: -

***“In the case of Isaac Kimathi Kanuachobi -vs- R (Nyeri) Criminal Appeal No. 96 of 2007(UR), the Court expressed itself on the issue of malice aforethought in terms of Section 206 of the Penal code: -***

***“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought. (See Republic vs Stephen Kiprotich Leting & 3 others (2009) eKLR..”***

44. And in the case of **Mary Wanjiku Gitonga –vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows:-

***“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed....Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.***

***In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.***

***In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.”***

45. In our case, there is evidence that the Accused and his wife had fought and the wife ran into the deceased’s house where she was rescued by the deceased. Indeed the deceased beat the Accused with a bicycle lock and he ran back into his house. That was around 07:00pm. At around 02:00am, that very night, PW4 noted that their cow was missing and went out of their house with her husband, the deceased, to look for it. It was when they met the Accused with a knife in his hands after searching for the cow for about 30 minutes using a torch. Upon the Accused engaging the deceased that the cow was not even his, it is the Accused who told the deceased that he wanted to fight him and went ahead to position himself near

the gate leading to the deceased's house and in essence blocking his way. And, as the deceased was approaching the gate, the Accused stabbed him with the knife and he fell down.

The Accused must have seen the deceased and his wife looking for the cow using the torch since that lasted about 30 minutes. He approached them and interrogated the deceased. He then told the deceased that he wanted a fight. The Accused knew he was armed with a knife and intended to use that very knife in the fight. He therefore knew or ought to have reasonably known that in using the knife, he was likely to kill or cause grievous harm to the deceased. The position of the stab is equally relevant. The Accused further knew that if he managed to cut the deceased's internal organs or the intestines then that would possibly be a perfect kill. He intended to take the life of the deceased. Having been beaten by the deceased earlier, the Accused must have been on a revenge mission and that is why he asked the deceased for a fight. He knew he will finish him. In the circumstances of this case therefore, it is the Court's finding that the Accused's act was well within the umbrella of Section 206 of the Penal Code and as so clearly interrogated by the Court of Appeal in the above cases.

46. Be that as it may, it matters not what motive the Accused had in asking to fight the deceased. This is as so provided for in Section 9(3) of the Penal Code which states: -

***“9(3) Unless otherwise expressly declared, the motive by which a person is induced to do or to omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”***

The Court of Appeal in the case of **George Munyoki Maisange vs R (Mombasa) Criminal Appeal No. 197 of 2006 (UR)** held as follows on the issue of motive: -

***“Whatever motive it was that goaded the appellant to slash the children to death is of no consequence because motive is material so far as regards criminal responsibility (See Section 9(3) of the Penal Code). Malice aforethought was also established by the injuries confirmed in evidence at where the heads of the children were split in half by a heavy blow with a very sharp panga”.***

Malice aforethought is therefore proved against the Accused in this case.

#### **Other issues that arose in the course of the trial:**

46. The Court would wish to consider three other important issues which arose in the course of hearing of this case.

47. **First**, the deceased though assaulted on 07/04/2011 did not die immediately but so passed on 12/05/2011 while undergoing treatment. Section 215 (1) of the Penal Code states as follows: -

***215(1) A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.”***

As the deceased died after about 35 days from the assault, the death is properly within the confines of Section 215(1) of the Penal Code since the assault was the cause of death.

48. **Second**, during cross-examination of various witnesses, the issue of the deceased possibly having not received the appropriate medical intervention also came up. Sections 213(a) and (b) of the Penal Code are quite clear that even in cases where the death was caused by improper or mistaken treatment as long as that medical intervention was in good faith, criminal liability does not attach to such a person who intervened. In this case therefore the purported issue of poor medical intervention lacks any legal basis and is for rejection.

49. **Third, was the Accused legally justified in causing the deceased's death?**

The Accused in this case took the avenue that he was not the author of the action which led to the deceased's death. He therefore never took any of the legal defenses available so as to mitigate the offence. This Court can not attempt to do so on his behalf. In sum therefore there was no legal justification for the Accused to have assaulted the deceased who eventually died from the assault.

### **CONCLUSION**

50. In conclusion, I find that the prosecution has proved its case against the Accused beyond any reasonable doubt. I therefore reject the Accused defence and find the Accused guilty of Murder contrary to Section 203 of the Penal Code. The Accused is accordingly convicted.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2015.**

**A. C. MRIMA**

**JUDGE**