Republic v Matee (Criminal Case 325 of 2019) [2024] KEMC 41 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEMC 41 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CRIMINAL CASE 325 OF 2019

CN ONDIEKI, PM

MAY 20, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

DENNIS NYAMAI MATEE ..... ACCUSED

JUDGMENT

Part i: Background

1. On 15th May 2019, the Accused was arraigned in Court and charged with the offence of manslaughter contrary to section 202 of the *Penal Code*. The particulars of the offence were that on 2nd May 2019 at Kyaani Village, Mua Location in Machakos Sub-County within Machakos County, the Accused unlawfully killed Dennis Mbuvu John. The Accused denied the truth of the Charge.

Part ii: The Prosecution's Case

2. The state called seven witnesses. PW1, Jecinta Mwende John told the Court that Dennis Mbuvu (hereinafter "the deceased") was his second born son. She recalled that on 2nd May 2019, she woke up at 5 am to prepare children to go to school. She narrated that the deceased informed her that his motor cycle had broken down and requested her to assist him with money to repair it. She narrated that at 12 pm, the deceased's wife inquired from her whether she had seen the deceased and she answered in the negative. She narrated that she reached out to one Munguti inquiring whether he had seen the deceased and he answered in the affirmative that he had seen him at Kenol. She narrated that by 8 pm, neither her nor his wife had seen the deceased. She narrated that they slept and on the following day, they had not seen him. She narrated that on that day, two neighbours namely Wathome and Anastacia came at around 9 am and informed her that they had heard that the deceased was found dead in a certain swamp near Wanyama river. She narrated that the said Wathome assisted her to get to the scene on a motor cycle and found a crowd of people and police milling around the scene. She narrated that the deceased had visible injuries on the head and immersed in water.

3. In cross-examination, PW1 stated that the deceased was 25 years old at the time. She stated that she did not know whether the deceased was drunk on the material date.

4. PW2, Samuel Wambua Francis told the Court that the Accused is his neighbour. He recalled that on 2nd May 2019, at around 8 pm, he received a call from his brother's wife, one Mbete, who informed him that the Accused had come to her house injured. He narrated that when he interviewed the Accused, he narrated that he was being robbed of a motor cycle and that in the process of repulsing the robbery, a scuffle ensued and the deceased lied unconscious. He narrated that he advised him to make a report at the police station and together, they did. He narrated that he also took the Accused to Mitaboni Hospital and later took him to the scene at Wanyama river.

5. In cross-examination, PW2 stated that he did not know the deceased. He stated that the Accused had an injury on the head. He stated that when they went to make the report, the Accused made a report of attempted robbery and that the robber had been injured too.

6. PW3, Paul Lukuma Masilai, recalled that on 2nd May 2019 while in Embakasi Nairobi, he received a call from his wife one Rodah Mbete, who informed him that the Accused had come to their house injured and oozing blood and that his clothes were wet. He narrated that the subject motor cycle, KMES 647H, was his and that he had employed the Accused as a rider. He narrated that he reached PW2 on phone and asked him to make a report to the police. He narrated that he later heard that the robber was found dead on 3rd May 2019 in Wanyama swamp. He narrated that he was told by the Accused that the robber was attempting to rob the Accused after passing off as a customer.

7. In cross-examination, PW3 stated that he did not know the deceased. He stated that the Accused was his employee since 30th April 2019.

8. PW4, Kyeti Mwanza, the chief in charge of Mua Location recalled that on 3rd May 2019 at around 8 am, he was at home when he was informed by his employee that a dead person was found in Wanyama swamp. He narrated that he went to the scene and found a crowd milling round the scene. He narrated that he saw signs of struggle and blood splattered at the scene. He narrated that he called the police who came to the scene and took the body.

9. In cross-examination, PW4 stated that the deceased hailed from a neighbouring location called Mitaboni about 7 kilometres away.

10. PW5, Chief Inspector Charles Wanjohi attached to DCI Machakos, testified that on 5th May 2019, he was informed that the Accused wanted to confess to the offence of Manslaughter. He narrated that he informed the Accused of his rights of having any person of his wish to be present and he advised him that he will call his mother, Damaris Wavinya, Irene, Rodah, Mary and Elizabeth who all attended the confession session. He narrated that he explained the reasons for his arrest and he narrated that on 2nd May 2019 at around 8 pm, at Wanyama Springs in Kyaani, without intention caused the death of Dennis Mbuvu John in the process of repulsing his attempt to steal motor cycle registration number KMES 647H. He narrated that he explained the consequences of the confession that it may be used as evidence and he understood and signed together with all the witnesses. He produced the confession as Exhibit 1.

11. In cross-examination, PW5 stated that it was made pursuant to section 25A of the *Evidence Act* and that he followed all the rules applicable.

12. PW6, Inspector Ndunda Maurice attached to DCI Machakos, narrated that on 3rd May 2019, he accompanied Chief Inspector Maurice Chemesis and Inspector Kigen to the scene at Kyaani, Wanyama

river, and they found the body on a shallow river and he took photos. He produced the photos as 2b (1-10) and the certificate as 2a.

13. In cross-examination, PW6 stated that he was the one who took the photos and prepared the certificate.

14. PW7, Chief Inspector Maurice Chemesis, attached to DCI Machakos was the Investigating Officer. He narrated that upon investigations, he was satisfied that there was sufficient evidence to support the offence of murder but on recommendation of the ODPP, the charge of manslaughter was preferred. He produced the motor cycle as exhibit 3 and the ownership documents as exhibit 5. The P3 Form of the Accused and the autopsy report were marked PMFI 6 and 7 respectively.

15. In cross-examination, PW7 stated that he recommended the charge of murder but upon review of the evidence on record, the ODPP directed that the Accused be charged with the offence of manslaughter. He stated that the Accused wanted to record a confession but he was of the opinion that the Accused was unwell and unable to record a proper confession. He stated that he did not thus sign the confession.

Part iii: The Defence

16. In his sworn statement, the Accused narrated that he was a bodaboda rider and while at Kenol, he was approached by a customer requested to be transported to Ngunyumu village and they agreed that he will pay Kshs. 300. He narrated that while on the way, before reaching Ngunyumu, the customer attacked him while the motor cycle was on motion by hitting him on the head at Ngunyumu River and he suffered a cut. He stated that he did not know the object which the deceased used to hit him on the head. He stated that he abandoned the motor cycle and started to flee for safety but he was caught by the deceased. He stated that the deceased tried to strangle the Accused but he dislodged himself and in the process of struggling with the deceased, the deceased bit the ring finger of the Accused and poked his fingers in the Accused's eyes. He narrated that it is at that point that he realized that the deceased's intention was to steal the motor cycle and he wrestled with him lying on the ground he picked stones and used them to hit the deceased in order to subdue him. The Accused narrated that when he realized that he had subdued the deceased, he rose and mounted the motor cycle and sped straight to his employer's house (the Accused's uncle) to report the incident while bleeding. He narrated that he later went to Kenol Police Station and reported an attempt of robbery and he was issued with a P3 Form which was later filled. He produced the P3 Form as Defence Exhibit 1. He stated that on 5th May 2019, he was forced to record a confession at the DCI on what transpired. He stated that at the time, he was 17 years old. He stated that on 3rd May 2019, he received a call from the Assistant chief who informed him that the robber was found dead at the said river. He stated that he acted in self-defence and had no intention of killing the robber.

17. In cross-examination, he stated that the deceased was his pillion passenger. He stated that he acted in self-defence. He stated that he was treated at Mitaboni Health Centre.

Part iv: Questions for Determination

18. The fact that Dennis Mbuvu John died on or about 2nd May 2019, is not in dispute. What is in dispute is whether the death was caused by the Accused herein and whether the act or omission, whichever applies, which led to his death was unlawful. In this connection, commending themselves for determination, gleaning from the charge and defence, are two questions as follows:

    i. First, whether the prosecution has proved beyond reasonable doubt that the death of Dennis Mbuvu John (hereinafter "the deceased") was caused by an act or omission of the Accused.

ii. Second, whether the prosecution has proved beyond reasonable doubt that the act or omission - whichever is applicable - which caused the death of the deceased was unlawful.

Part v: Analysis of the Law; Examination of Facts; Evaluation of Evidence; and Determination

19. The legal burden of proof (onus probandi incumbit ei qui dicit, non ei qui negat) is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In criminal cases, this duty (otherwise originally known as brocard ei incumbit probatio qui dicit, non qui negat) is on the shoulders of the prosecution. It essentially means that the legal burden of proof rests on who asserts, not on who denies. This said legal burden draws impetus from a fair hearing principle now enshrined in Article 50(2)(a) of *the Constitution* that a person Accused of an offence ought to be presumed innocent until proven guilty. See sections 107, 108 and 109 of the *Evidence Act*.

20. What then amounts to proof? In the Australian case of *Britestone Pte Ltd vs. Smith & Associates Far East Ltd* {2007} 4 SLR 855, which has been adopted in Kenya in inter alia *Paul Thiga Ngamenya v Republic* [2018] eKLR, V.K. Rajah, JA expressed a view that "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."

21. The legal burden of proof in criminal cases never leaves the prosecution's backyard, except in very rare occasions. In fact, acts or conduct or even legislation which has attempted to do has been sternly frowned upon. In *Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others* [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ frowned upon section 96(a) of the Penal Code for shifting the burden of proof to the Accused and consequently declared it as offending the fair trial principle of being presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* and the Constitutional guarantee against self-incrimination as enshrined under Article 49(1)(a)(ii), which act is further in flagrant violation of *the Constitution* which exempts, under Article 25 thereof, from limitation contemplated under Article 24 thereof of inter alia the fair trial principles enshrined under Article 50 thereof. The Court explained that the right to a fair trial was a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which were the right to life and liberty of the person. It was guaranteed under article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). The fundamental importance of the right to fair trial was illustrated not only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

22. Before I invoke an old English decision, it's instructive to observe that our criminal justice system did not start on a clean slate. Kenya built its legal system on the English common law system. In *Peter Wafula Juma & 2 Others vs. Republic* [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

23. In the English cause celebre decision in *Woolmington vs. DPP* [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. He was convicted and sentenced to hang. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

24. It bears underscoring that this golden thread principle is now enshrined in our Constitution of Kenya 2010, under Article 50(2)(a) thereof, as part of the wider package of fair trial principles and in that regard, the holding in that decision holds true in Kenya. In *Mkendeshwo vs. Republic* [2002] 1 KLR 46, the Court of Appeal enunciated thus: "In criminal cases the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally, the Accused assumes no legal burden of establishing his innocence."

25. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus: "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence. (2) Nothing in this section shall - (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or

facts described in subsection (1) do not exist; or (c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

26. What is the standard of proof in criminal cases? In English cases of *Re H* (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the *Home Department vs. Rehman* {2003} 1 AC 153, which was adopted in Kenya in inter alia *Paul Thiga Ngamenya vs. Republic* [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows: "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred. (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

27. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in *Philip Muiruri Ndaruga vs. Republic* [2016] eKLR that "To give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient. The Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An Accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

28. The purport of the words 'beyond reasonable doubt' which define the standard for proof of a criminal offence, has been attempted in manifold decisions of the superior Courts, locally and beyond. The locus classicus English case in this regard is the decision in *Miller vs. Minister of Pensions* [1947] 2 All ER 372, where Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's favour, which can be dismissed with the sentence, 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt. But nothing short of that would suffice."

29. Also, in *Walters vs. R* [1969] 2 AC 26, approved in *R vs. Gray* 58 Cr. App. R. 177 at 183, Lord Diplock attempted to define 'reasonable doubt' as follows: "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other."

30. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in *R vs. Lifchus* [1997] 3 SCR 320, suggested the following explanation: "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty. .....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based

on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the Accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the Accused and acquit because the crown has failed to satisfy you of the guilty of the Accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the Court, you are sure that the Accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

31. The standard is such that, in William Blackstone's formulation (in his seminal work, Commentaries on the Laws of England, published in the 1765) states that "It is better that ten guilty persons escape than that one innocent suffer." Blackstone holds a thesis that "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." Benjamin Franklin (in Benjamin Franklin, Works 293 (1970), Letter from Benjamin Franklin to Benjamin Vaughan [14 March 1785]), subscribes to the same school of thought (and thus echoes Blackstone's jurisprudence) and states that "It is better 100 guilty Persons should escape than that one innocent Person should suffer."

32. While defending British Soldiers who were charged with murder for their role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Formulation when he stated that "It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."

33. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

34. The standard of proof, as I discern it, is that though be some doubt, it should be of such measure that it cannot affect a reasonable person's belief regarding whether or not the Accused is guilty. It does not

therefore mean that the proof must be beyond a shadow of a doubt. If it were so, it would be so high a standard as to be practically unattainable. It certainly does not mean that every peripheral fact has to be established up to this standard.

35. Having laid the broad framework within which this case will be determined, the Court now embarks on analysis of the law, examination and interrogation of facts and evaluation of evidence of each of the two questions.

(i) Whether the prosecution has proved beyond reasonable doubt that the death of Dennis Mbuvu John (hereinafter "the deceased") was caused by an act or omission of the Accused

36. The offence of manslaughter is built on two ingredients namely: (i) causing death of a person; and (ii) by an unlawful act or omission. Only the element of malice aforethought sets it apart from murder.

37. Section 202(1) of the *Penal Code* formulates manslaughter in the following terms: "(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."

38. Although a purported confession was exhibited in this regard (as Exhibit 1), it was retracted by the Accused. In such cases, a Court should proceed with caution if it has to rely on the confession asserted by the prosecution. See *Tuwamoi vs. Uganda* [1967] E.A. 84 where the Court reasoned as follows: "The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial Court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true." This Court having considered the retraction in the context that the Accused was a minor then, this Court has decided to disregard the purported confession.

39. The term "cause" as used in the said section is also not defined by the Penal Code. This Court therefore resorts to secondary sources of law. In the *Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition*), at page 251, the term "cause" is defined as follows: "To bring about or effect..." It is a synonym to occasion or engender. See the said *Black's Law Dictionary*, at page 609, where the term "engender" is defined to mean bringing about or causing or occasioning. See also the same *Black's Law Dictionary*, at page 606, where the term "encheson" is defined to mean occasioning, causing or reason for which something is done. Finally, see Blackstone's Criminal Practice, 2001, where Blackstone states that "occasioning" is equivalent to causing.

40. In R vs. Roberts, (1971) 56 Cr. App. R. 95 CA, at page 102, Stephenson LJ. said that in determining whether the person Accused "occasioned" the injuries, the following test applies: "Was it [the action of the victim which resulted in actual bodily harm] the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? As it was put in one of the old cases, it had got to be shown to be his act, and if of course the victim does something so "daft" in the words of the appellant in this case, or so unexpected, not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury."

41. Was there proof beyond reasonable doubt that the death of the deceased was caused by an act or omission of the Accused?

42. In this regard, there was no direct evidence. The prosecution only led circumstantial evidence. Which leads to the determinative question.

43. What can reasonably be inferred from the circumstances - that the Accused was the last person seen with the deceased - which were presented by PW1, PW2, PW3, PW4, PW6 and PW7?

44. Since the evidence in support of this ingredient is largely circumstantial, it is now imperative that consider the principles governing circumstantial evidence. In R vs. Taylor, Weaner & Donovan [1928] 21 C.A., APP. R. 20, the Court came to a conclusion that circumstantial evidence is the best evidence. The Court went ahead to attempt a definition of circumstantial evidence as the "evidence of the surrounding circumstances which, by intensified examination, is capable of proving a proposition with mathematical accuracy and that it is no derogation of evidence to say that it is circumstantial."

45. What is the test of circumstantial evidence? In R vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, the Court of Appeal for Eastern Africa held "That in order to justify, on circumstantial evidence, the inference of guilt, the inculputory facts must be incompatible with the innocence of the Accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the Accused." Similarly, in the Court of Appeal decision in Bernard Otieno Okello vs. Republic [2019] eKLR, Koome, JA (as she then was) Sichale, Kantai, JJ.A., echoed the tests laid in the decision of Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR) to guide a case determinable on circumstantial evidence as follows: "[18] The tests to be applied in a case determinable on circumstantial evidence were set out in the case of; Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR) as follows; "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; and 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." See also Nahashon Isaac Njenga Njoroge vs. Republic (1969) eKLR, per Newbold, P., Duffus and Spry JJ.A. (as they then were).

46. However, circumstantial calls for a thorough examination because of the danger inherent in this model of evidence. When dealing with circumstantial evidence, the incriminatory facts must point conclusively to the guilt of the appellant and be incompatible with any reasonable hypothesis of his innocence. In Simoni Musoke vs. R [1958] EA 715, the Court quoted with approval the decision of the Privy Council in Teper vs. R [1952] AC 480 at Page 489 where that Court had stated that "It is also necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference." Similarly, in R vs. Mdoe Gwede [2004] eKLR, Maraga J. (as he then was) held that "circumstantial evidence must, however, be thoroughly examined as it is the kind of evidence that can be fabricated..."

47. Do circumstances in this case irresistibly point to the one and only direction that the death of the deceased was caused by an act or omission of the Accused?

48. Section 119 of the *Evidence Act* plays out in this circumstance. In Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ held that section 119 of the *Evidence Act* suggested that a Court can presume the existence of any fact, which it thought likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The learned judges further held that under section 111 and 119 of the *Evidence Act*, presumptions of facts were

inferences that could be drawn upon the establishment of a basic or primary fact. The primary or basic facts had to be established before the presumption could come into play.

49. What is likely to have happened in the common cause of natural events and human conduct in the circumstances afore-described, and in further circumstances where Accused admitted that there was a scuffle and that he used stones to hit the deceased in resisting his attempt to rob him of the subject motor cycle?

50. This Court infers from the circumstances that the death of the deceased must have been caused by an act of the Accused and this Court so concludes.

(ii) Whether the prosecution has proved beyond reasonable doubt that the act or omission - whichever is applicable - which caused the death of the deceased was unlawful

51. Although applied by the Penal Code, the meaning of "unlawful" has not been assigned by the Penal Code. However, the unlawful omission mentioned in section 202(1) thereof is defined by section 202(2) to mean "(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."

52. Limited to the term "unlawful act", this Court thus resorts to secondary sources of law. When a word is applied by statute but not defined by the said statute, it is customary for the Court to construe the word in accord with its ordinary and natural meaning or if it assumes a technical meaning, then the meaning in law as assigned by secondary sources. This word assumes a technical meaning. The said Black's Law Dictionary defines an "unlawful act" to mean "Conduct that is not authorized by law; a violation of a civil or criminal law."

53. In construing acts which may be deemed lawful or unlawful in Guzambizi Wesonga vs. Republic [1948] 15 EACA 63, the Court of Appeal of East Africa laid a principle that "Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property." The same principle was restated in concurrence by the same Court in Sharma Pal Singh vs. R [1962] EA 13.

54. In Victor Nthiga Kiruthu and Another vs. Republic [2017] eKLR, the Court of Appeal laid broad circumstances under which use of force is deemed lawful or unlawful as follows: "The principles that have emerged from these and other authorities are as follows:- (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.(iii) It is not necessary, however, for there to be an actual attack in progress before the Accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.(iv) The danger the Accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case."

55. It follows that it is lawful that which is sanctioned to be so by law or by a Court in line with such law. Was the act of hitting the deceased using stones unlawful? In other words, was the act authorized by law?

56. In his defence, the Accused stated that he was acting in self-defence and in defence of property of his employer namely a motor cycle registration number KMES 647H, against an attempted robbery.

57. In Musee Joseph Musyoka vs. Republic [2014] eKLR, Mutuku J. expressed a judicial that "... the prosecutor who bears the burden of proving a criminal case against the Accused person must, in a crime of manslaughter, prove that the deceased died as a result of unlawful act or omission and that the appellant is responsible for the unlawful act or omission causing the death."

58. Section 17 of the Penal Code provides that "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."

59. And what is the position of the English common law? It is in Palmer vs. Republic [1971] AC 814, where the Court set out both the common law philosophy of and the broad principles on self-defence and defence of property as follows: "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some 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 immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for 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 an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If 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."

60. It can also be gathered from The English and Empire Digest, Vol. 15, 1977 Reissue, at paragraph 1097, where Parke B says the following about the English Common law in this regard: "Where a man strikes at another, within a distance capable of the latter being struck, nature prompts the party struck to resist it, and he is justified in using such a degree of force as will prevent a repetition."

61. Applying the English common law in Republic vs. Joseph Kibet Rotich [2010] eKLR, GBM Kariuki J. (as he then was) reasoned that "In law, one is entitled to protect oneself and one's family as well as one's property. The law recognizes the need and allows the use of reasonable amount of force in self-defence if one believes that the danger of bodily harm is imminent and that force is necessary to avoid the danger. In short, where in self-defence force is necessary and the force used in self-defence is reasonable, one cannot be said to have breached the law. However, self-defence cannot hold good where the use of force is unnecessary to repel an attack if it is used where there is an honest but unreasonable mistake that it is necessary to repel to attack."

62. If there are alternatives to self-defence, the defence will not lie. In an Indian decision in Alingal Kunhinayan vs. R. (1905) I.L.R. 28 Mad. 454, the Court said that "The view that a person should not exercise his right of self defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than what the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger, but on whether there was reasonable apprehension." This principle has been borrowed and adopted in Kenya.

63. In an Australian decision in Bennett vs. Doke [1973] V. R. 239, the Court said that "To raise the issue of self-defence or justification there must be evidence to justify the conclusion that there was an occasion for the Defendant to act in defence of himself. This is a matter for the trial judge to determine. If there is sufficient evidence to put the matter in issue, there must also be evidence to justify a conclusion by the jury that the defendant acted in defence of himself." This principle too has been borrowed and adopted in Kenya.

64. In Alipayo Lol s/o Acuda vs. R., E.A. C.A. Criminal Appeal No. 121 of 1959 (unreported), it was held that "A killing may be manslaughter in spite of an intention to kill if the intention was formed and executed in the heat of passion. For the defence of provocation reduces to manslaughter what would otherwise be murder, that is to say, a killing with malice aforethought, one kind of malice aforethought being an intention to kill. Section 187 of the Penal Code makes this clear."

65. Is the defence of self-defence and/or defence of property an absolute defence in Kenya? This defence is an absolute defence provided two conjunctive circumstances are present. First, if circumstances are such that excessive force or more force than necessary was not used, and second, where further the Accused had no time for reflection.

66. In the Court of Appeal decision in Mokua vs. Republic [1976-80] 1 KLR 1337, it was held that "Self-defence is an absolute defence even on a charge of murder unless, in the circumstances of the case the Accused applies excessive force." See a similar holding of the Court of Appeal in Ahmed Mohammed Omar & 5 others vs. Republic [2014] eKLR.

67. In the said decision in the Mokua case, in reversing the conviction on manslaughter by the trial Judge, the Court of Appeal said that "where self-defence is successfully raised as a defence to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self-defence is only open to the Court if the prosecution discharged the onus of showing that the Accused had time for reflection and that he could have counted and aimed the blows which he inflicted."

68. In this connection, in Republic vs. Erick Odhiambo Onyango [2013] eKLR, the complete defence of self-defence led to acquittal of the appellant of both murder and manslaughter.

69. It follows that if a person was Accused of murder, it may be reduced to manslaughter if malice aforethought is missing but there was excessive use of force by the Accused. See Mungai vs. Republic [1984] KLR 85, where the Court of Appeal of East Africa laid the following principles: "1. It is a doctrine recognized in East Africa that the 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 – R v Ngolaile s/o Lenjaro (1951) 18 EACA 164; R v Shaushi (1951) 18 EACA 198.2. 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 – Palmer v Reginam [1971] 1 ALL ER 1077."

70. It follows that where, in self-defence and/or defence of property it is proved beyond reasonable that excessive force or more force than necessary was used, and further, that the Accused had time for reflection or use of alternative means like fleeing from the scene, then the person should be convicted of manslaughter. See Manzi Mengi vs. R. [1964] E.A. 289, at page 292.

71. Once the Accused raises this defence, the prosecution shoulders the onus to prove or disprove beyond reasonable doubt that the force was excessive or unnecessary. In the said Court of Appeal decision in Ahmed Mohammed Omar & 5 others vs. Republic [2014] eKLR, it was held that "If self defence was raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an

essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the Accused was unlawful." This decision was built on the principle which was enunciated in In Palmer vs. Republic (1971) ALL ER 1079 that" Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the Accused did was not by way of self defence."

72. In sum, as sanctioned by section 17 of the Penal Code, the crunch of unlawfulness turns on the answer to the question whether the Accused was acting in self-defence or defence of property and in particular, excessive force or more force than necessary was used, and whether the Accused had time for reflection or use of alternative means like fleeing from the scene.

73. The Defence Exhibit 1 supported the thesis that there was scuffle between the Accused and the deceased and that from the scuffle, the Accused also picked injuries. Therefore, the question whether force was used both in self-defence and in defence of property namely a motor cycle of his employer KMES 647H, is not in question. What is left to determine is whether it amounted to excessive force or more force than necessary, and whether the Accused had time for reflection or use of alternative means like fleeing from the scene.

74. The prosecution led evidence that the Accused used excessive force resulting in the death.

75. In such a case, commanded by the nature of the requirement and the person ordinarily seized of the knowledge of the facts constituting the lawfulness, the burden of proving that it was so shifts to the defence. Section 111 (1) of the *Evidence Act* provides that "When a person is Accused of any offense, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence."

76. The Accused was supposed to discharge the burden of proof to the effect that the force she applied was reasonable and proportional in the circumstances but she failed to discharge this burden placed on her shoulders Courtesy of section 111 of the *Evidence Act*. The Accused did not deny that he used excessive force. The Accused only asserted that he acted both in self-defence and in defence of property namely a motor cycle of his employer KMES 647H belonging to his employer, by hitting the deceased multiple times on the head.

77. Consequently, the Court reaches a conclusion that the Accused having indicated that he subdued the deceased, the force the Accused applied in countering the robbery attempt by hitting the deceased repeatedly on the head using stones amounted to excessive force, when it was available to the Accused to immobilize or disable the deceased using the same stones by hitting for instance either the hands or legs.

78. Wherefore this Court concludes that the prosecution has proved beyond reasonable doubt that the act or omission - whichever is applicable - which caused the death of the deceased was unlawful.

Part vi: Disposition

79. Consequent upon this Court finds the Accused guilty of a felony known as manslaughter contrary to section 202 as read with section 205 of the Penal Code and accordingly convicted therefor, under section 215 of the Criminal Procedure Code.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 20TH DAY OF MAY, 2024

.....

C.N. Ondieki

Principal Magistrate

In the presence of:

Prosecution Counsel:.....

The Accused:.....

Court Assistant:.....