



**Republic v Odiwuor (Criminal Appeal E026 of 2023)
[2025] KEHC 16021 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E026 OF 2023
ACA ONG'INJO, J
NOVEMBER 6, 2025**

BETWEEN

THE REPUBLIC PROSECUTION

AND

CHARLES ODIWUOR RESPONDENT

JUDGMENT

- 1 The Respondent herein Charles Odiwuor Ngoje with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.
- 2 The particulars were that the Accused person on 9th day of August 2018 in Rongo Township in Migori County unlawfully killed Johnson Okach Ngoje.
- 3 Upon consideration of the evidence of 8 prosecution witnesses and the Respondent's sworn statement the trial magistrate found that the prosecution did not adduce any evidence as to exactly what happened at the scene and it would be unsafe to convict the Respondent based on the evidence on record. The Respondent was therefore acquitted on the benefit of doubt raised in the prosecution evidence.
- 4 The Appellant (state) was aggrieved by the acquittal and they preferred the Appeal herein vide Petition dated 30th May 2023 on the following grounds: -
 - 1) That the Learned Trial Magistrate erred both in law and facts by misdirecting himself on the defense raised by the accused that he found the deceased stealing, and a fight ensued, a claim that was not substantiated.
 - 2) That the Learned Trial Magistrate erred both in law and facts by finding that there was no eye witness to the incident despite overwhelming evidence presented by the prosecution witnesses who witnessed the incident.



3) That the Learned Trial Magistrate erred in fact by failing to appreciate that the prosecution proved the elements of the offence of manslaughter.

Reasons Wherefore the Appellant/prays that the court exercises its appellate powers as follows:

- a. Set aside the order acquitting the Respondent.
- b. Proceed and convict the Respondent for the offence of manslaughter as proved.
- c. Proceed and sentence the Respondent as per the law.
- d. Any other order the court deems fit.

5 The brief background of the case is that on 29/8/2018 at 5.30pm, PW1 Edwin Ochieng Owuor he was within Rongo town. When he received a phone call from his mother Truphena Anyango who told him that he should rush home as 2 of his cousins Charles and Johnson were fighting. That when he took time to go home he received another phone call and his mother told him that fight was still going on. That he rushed to home and found a crowd of people and when he met Charles and spoke to him, Charles told him that he caught Johnson stealing some sufurias and he beat him. PW1 found Johnson was bleeding from his forehead. That he called his brother Orondo who came and assisted take the deceased to Royal Hospital using a motorbike as he was seriously bleeding. PW1 said relatives accompanied them to hospital. PW1 said he spoke to Charles and to the deceased spoke while on the ground and requested to be taken to the hospital. That at Royal Hospital the doctor in charge referred them to Tabaka mission hospital. That he took a taxi to Tabaka. While entering the Tabaka the deceased stopped talking. That initial the deceased was talking and asking why he had been assaulted that way. That he kept saying “why has Atoli beat him that way.” That when they entered the hospital the deceased was rushed to emergency ward but he died in less than an hour and the body was taken to rosewood and the matter reported at Kamagambo police station. That after reporting, police officer visited the scene and the accused was arrested the following day by the Chief. PW1 said he had good relationship with the accused. PW1 said that the accused was the eldest brother to the deceased and they had cordial relationship.

6 In Cross – examination by Mr. Ken Omollo Advocate PW1 said that he did not witness the alleged fight and what he told the court is what was narrated by his mother and he also spoke with the deceased who was lamenting why accused person had to beat him like that. He said he recorded his statement on 30/8/2018 and he told the police what he knew about the incident.

7 The police recorded statement. I was regarding to what I was asked by the police. I was grieving as at time I recorded statement. In my statement I indicated I spoke to the deceased. I have told the court what I saw.

8 Pw2 Yusuf Odera Ngoje testified that on 29/8/2018 at 7pm he was at his residence when he saw several missed calls from his elder sister Elizabeth who stays in Kisumu. That when he called her back she told him something terrible had happened at home. That when he rushed home and when he arrived there at around 7pm he found his younger brother lying on the ground on his back and he was bleeding from the forehead and some blood oozing from the mouth but was still speaking. He said he found a crowd of people and among them were Edwin Ochieng and Orondo.

9 PW2 said Postmortem was done on 4/9/2018 at Rosewood Hospital after he identified the body. He said he did not witness the assault (beating) but the deceased told him “Atok is killing me because of land”



- 10 PW2 said Atok is nick name of the accused person and that they had dispute over land which dispute the deceased had reported to the police. PW1 said Charles was his step brother and he had no issues with him. He said Charles was at around 20 meters form the scene inside his mother’s house and he saw him through the window as Curtains were pushed a part and it was not yet dark.
- 11 PW3 Kenneth Ojwang Otieno testified that on 29/8/2018 at 4pm he was at home when Charles who is his cousin called and asked where he was. That when PW3 told him he was at home Charles told him to rush home. That he heard them quarreling. That when he rushed home he found Johnson lying down bleeding. Charles was holding a stick. He hit Johnson with stick and step on him. When I arrived there he hit Johnson with stick once and stepped on him on his head. I talked with Charles. He told us that he has caught a thief. He is at the dock.
- 12 In Cross examination by Mr. Omollo Advocate PW3 said he arrived at home with Abel and he saw the accused hit Johnson with stick and also stepping on the head.
- 13 Pw4 Roseline Acheing Awol testified that on 29/8/2018, at 5pm, he heard Johnson crying and when she rushed there found him lying down crying saying “Atok why have you killed me.” She said Atok is the accused person. She said she found Atok holding a stick and asked Atok why he was killing Johnson. That Charles told her to leave and go to her house and she left. PW4 said she knew the accused who was ger relative. She said that she only saw Charles holding a stick.
- 14 PW5 Polycarp Luther Kweyu from Government Chemist in Kisumu said he received samples to analyze sample and generate report in DNA section. I heard MCC in mechanical chemistry farm JKUAT , 2008. I am gazzetted Analyst. He said that on 13/9/2018 police constable Thomas Mutegi DCI Rongo submitted the following item for analysis.
- a. White large jeans trouser with blood stains – W1
 - b. Blood stained black cap – W2
 - c. Blood stained wooden pole – W3
 - d. Blood of samples of Charles Oduor Ngoje – O1
 - e. Finger nails form Johnson Okech Ngoje (deceased) – O2
- 15 I He was to ascertain if blood stains belong to human being and source of blood stains.
- 16 On analysis. He found out that blood stain was submitted thus belongs to human being and when he did DNA analysis profile generated and Comparison of DNA generated, he made the following conclusion:
1. DNA profile from white jeans, black cap and blood from wooden pole matched DNA profile of the deceased person
 2. DNA profile of Charles Ngoje did not match the profile in any of the stains on submitted items. He produced the Government chemist report as Ex P 3a and Exihbit Memo form as Ex P3b
- 17 PW6 Ochieng Philip Dado testified that on 29/8/2018 he got information from boda boda riders that Johnson Okech had been killed. That he rushed to the homestead of Ngoje and he found Johnson crying. PW6 said he knew both the accused and the deceased as his cousins. He said that he summoned the accused person to come and he also called the O.C.S and took the accused person to Kamagambo



- police station where he handed him to the police and he later recorded his statement. PW6 said he had known the accused since childhood and he had no grudge with him.
- 18 In cross examination by Mr. Ken Omollo PW6 said he went to the scene after incident had occurred. PW7 Dr. Sammy Arwa a Medical Officer at Migori county hospital examined the body of the deceased on 4/9/2018 at Rosewood Memorial Hospital in Rongo Sub- County. He established that the cause of death was hemorrhagic shock due to blunt force trauma. The Doctor observed lacerations on the facial region and fracture on the left side of the head with blood clot under the skin. Left and right scapula had blood collection under the skin and the left hand had closed fracture on the lateral 3rd with blood collection with skin and muscle. He also observed lacerations on the skull. Postmortem report was produced as Ex P1
- 19 PW8 NO. 87085 PC Thomas Mutege was the investigating officer in the matter. He testified that on 30/8/2018 in the morning while in the office, he was tasked to carry out investigation in a case of murder that was reported at Kamagambo police station. It was reported that on the 29/8/2018 one Charles Odero --- had killed his stepbrother by name Johnson Ngoje. That he met family members in the office. On inquiring where the suspect was he was told that he was not at home.
- 20 PW8 visited the scene at Kanyawanga. That as they were preparing to leave, the area chief came with the accused person and they took him back to the scene where he had beaten his brother with a view of recovering the murder weapon. That on interrogation of the accused he said he had beaten the deceased because he found him stealing from the store at deceased parental home. He said they did not find the murder weapon. That the accused took them to the store where the deceased had alleged broken into and where the fight broke out between the 2.
- 21 PW8 said they recovered a jeans trouser that was blood stained inside the man house. PW8 said the accused was residing in the house where the jeans trouser was found. It was produced as Ex P 2a). PW8 also said that the house belonged to the parents of the accused and that they were deceased.
- 22 That the accused had another home. They also went with the accused to the scene of the fight outside the house and he found a black cap that was allegedly worn by the deceased Ex P 2(d) That the actual home of accused person was also visited but nothing was recovered and they went back to the station.
- 23 PW8 interviewed witnesses including one lady known as Truphena who is the relative to the accused person narrated that she received phone call from accused person who informed her that he had beaten the deceased and removed all his teeth out of anger.
- 24 PW8 also arranged for autopsy which was conducted on 4/9/2018 after the body was identified by family members and a report prepared Ex P1. He said that specimen was taken from the body of deceased for DNA analysis. He also received a metal bar from one witness Kennedy Ogony who told them that was the weapon the accused person had used to beat the deceased. The statement of Kennedy Ogony was recorded and he testified. That after mental assessment was done for accused person and he was found fit to stand trial he was arraigned in court and charged with the offence of manslaughter.
- 25 In Cross examination by Mr. Omollo advocate PW8 said there was a fight between the accused and the deceased. That the accused person got the deceased stealing from accused person parent's store. He said the accuse led them to where deceased broke into. He said he did not recover any weapon in accused person's home. Someone brought an alleged weapon at the police station.
- 26 Accused murdered the deceased but the ODPP recommended that the accused person be charged for manslaughter.



- 27 When placed on defense the Respondent in sworn statement said that he did not kill the deceased. He said that on 29th August 2018 he was at SONY Sugar where he had gone to look for money. That he returned home when it was raining and that on arrival he saw a cow eating his nappier grass.
- 28 That he took the cow and went home. That when he opened his mother's house he heard some noise at the back in the store and he went to check what was making noise. That when he entered the store someone emerged and held him by the throat. That they struggled as he tried to free himself from the assailant's grip but the assailant said he was going to finish the Respondent. That he raised alarm as he pushed the person to the wall and he fell down and the person came back and held him again. That when he raised alarm again bodaboda came and rescued him. That as the assailant pulled him the said assailant fell on an object and that the Respondent did not beat him using a wooden stick. The Respondent said it was that assailant who had a stick and. That it is later he learnt the assailant was his younger brother. That he saw him when he was chasing him out of the house while armed
- 29 The appeal herein was heard by way of written submission.
- 30 The Appellants in submissions dated 2nd May 2024 argued that the elements of the offence of manslaughter were proved by the prosecution to the required standards. It was submitted that PW1 was called and informed that the Respondent and the deceased were fighting and on going home found the deceased lying down with blood oozing from his mouth and the Respondent told them that he found the deceased stealing and a fight ensued. That PW3 also testified that he found the deceased lying on the ground and the Respondent told him that he found the deceased stealing. PW4 also rushed to the scene when he heard the deceased crying and found the deceased lying on the ground while the Respondent was holding a stick. It was also submitted that the stick which was recovered as murder weapon was examined and the DNA profile on the blood stains on the stick matched the DNA profile of the deceased and therefore the prosecution evidence was sufficient to infer that it was the accused who caused the deceased's death.
- 31 The Prosecution counsel submitted that the Trial magistrate failed to take into consideration the circumstantial evidence present in the case as was stated in the case of *Ahamad Abolfathi Mohamed & Another Vs Republic* [2018] Eklr.
- 32 On whether the death was lawful it was submitted that the Respondent claimed he found the deceased stealing and a fight ensued. That if this was the cause the Respondent had other legal recourse such as detaining the deceased under citizens arrest and delivering him to the nearest police station instead of being the judge, the jury and executioner of the deceased fate.
- 33 The Appellant/ prosecution submitted that the deceased life was unlawfully snuffed out by the Respondent and the Trial Magistrate failed to take the prosecution evidence into consideration and arrived at a wrong conclusion. It was prayed that the judgement be set aside and the Respondent be convicted for the offence of manslaughter and be sentenced accordingly.
- 34 The Respondent's submissions are dated 25th March 2025 and submitted that none of the Prosecution witnesses witnessed the Respondent assault the deceased and causing his death and PW1 did not indicate in the statement that the deceased spoke and said it is the Respondent who assaulted him. It was submitted that deviation from the statement recorded with the police during examination in chief is an ambush and violation of the right to fair trial/ hearing.
- 36 The Respondent's counsel also submitted that the evidence that the Respondent told him that he found the deceased stealing sufurias and he beat him was inadmissible as it went against the mandatory provisions of Section 25 as read with Section 25A of the *Evidence Act* as it amounted to a confession and could not be relied upon to convict.



37 It was further submitted that PW2 did not also witness the incident and he told the court what he had been told. The Respondent's counsel also contended that PW3 also said he was not there when the offence was taking place. That other witnesses who were said to be at scene were also not called to corroborate what the prosecution witnesses said in court.

Further the Respondent counsel submitted that the murder weapon was not recovered and the prosecution witness evidence as to the murder weapon was contradictory as PW3 & 4 said it was a stick and the Investigating Officer said it was a metal bar that was taken to the station by one Kennedy Omony. It was submitted that the said Kennedy Omony did not testify and the metal bar was not produced.

The Respondent argued that it was not clear how the deceased met his death and the weapon used and the Respondent was properly acquitted by the Trial Magistrate. The Respondent urged the court to uphold the trial court's verdict as the Appellant did not prove its case beyond reasonable doubt.

38 That the appeal should therefore be dismissed.

Analysis And Determination

39 Having considered the re-evaluate the evidence and judgment of the trial court and having considered the grounds of appeal, the submissions and authorities cited this court is to determine whether the appeal has merit

40 In *Mark Oururi Mose vs. Republic* (2013) eKLR the mandate of the 1st appellate court was restated thus:-

“.....the court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analysed it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

41 Upon re-evaluating the record and submissions, the key issue for determination in this appeal is whether the prosecution proved beyond reasonable doubt that the Respondent unlawfully caused the death of the deceased so as to warrant a conviction for manslaughter under Section 202(1) of the Penal Code.

42 Section 202(1) of the Penal Code defines manslaughter as the unlawful killing of another by an act or omission which does not amount to murder.

The elements to be proved are:

1. The fact and cause of death;
2. That the death was caused by an unlawful act or omission of the accused; and
3. That there was no malice aforethought.

43 On proof of death here is no dispute that the deceased died following injuries sustained in the incident. This element is established.

44 On whether the Respondent caused the death

Unlike the trial court's conclusion that the case was based on circumstantial evidence, this Court finds that the evidence on record was direct and corroborated.



- 45 PW4 expressly saw the Respondent beating the deceased, who lay helpless on the ground, and even stepping on his head. Several other witnesses (PW1, PW2, PW3) testified that the Respondent admitted to them that he had beaten the deceased after finding him stealing sufurias. These statements were made voluntarily to private persons and are admissible under Sections 17 and 18 of the Evidence Act as statements against interest.
- 46 Further, the deceased himself named the Respondent as his assailant before dying. Such a dying declaration is admissible under Section 33(a) of the Evidence Act. It was corroborated by the eyewitness account and the medical evidence of injuries consistent with beating.
- 47 The combination of the eyewitness testimony, the dying declaration, and the Respondent's own admissions forms a consistent and credible chain of direct evidence establishing that the Respondent inflicted the fatal injuries.
- 48 The defence version that the deceased attacked him and fell on an object was displaced by the direct observations of PW4 and by the pattern of injuries.
- 49 On whether the Respondent's claim that he beat the deceased because he caught him stealing does not provide a lawful justification. The law recognizes the right of a citizen to arrest a suspected offender, but not to use excessive or lethal force.
- 50 Once the deceased was subdued and lying down, any further assault, especially stepping on his head, was unnecessary and amounted to excessive and punitive force, making the act unlawful under Section 17 of the Penal Code and common law principles on reasonable self-defence.
- 51 This Court is satisfied that the prosecution proved beyond reasonable doubt that: The Respondent unlawfully assaulted the deceased; The assault caused the deceased's death; and There was no malice aforethought.
- 52 The trial magistrate misdirected himself in treating the prosecution evidence as circumstantial and in failing to give weight to the eyewitness account, the dying declaration, and the Respondent's voluntary admissions.
- 53 In conclusion the appeal herein succeeds. The acquittal of the Respondent by the trial court is hereby set aside, and in its place this Court substitutes a conviction for the offence of manslaughter contrary to Section 202(1) as read with Section 205 of the Penal Code.
- 54 This matter is remitted back to the trial court for mitigation and appropriate sentence upon calling for victim impact statement and pre-sentence report. Mention 13th November 2025 before Hon Oruo M. Respondent remanded in custody.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 6TH DAY OF NOVEMBER 2025.

SIGNED BY/FOR:

HON. LADY JUSTICE ANNE ONG'INJO

THE JUDICIARY OF KENYA.

MIGORI HIGH COURT

HIGH COURT DIV

DATE: 2025-11-06 12:31:15

