

KENYA / JUDGMENT

Republic v Odongo

[2026] KEHC 13643 (KLR)

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COURT

High Court

CASE / FILE NUMBER

Criminal Case E033 of 2023

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REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT SIAYA CRIMINAL CASE NO. E033 OF 2023
REPUBLIC PROSECUTION -VERSUS- MARY ODONGO.....ACCUSED

JUDGMENT

1. The accused herein, Mary Odongo is charged with an offence of murder contrary to section 203 as read with section 204 of Penal Code. The particulars of the charge are that on the 30th day of September 2023 at Siger Sub- location, Rarieda Sub-County within Siaya County she murdered Tobias Odongo. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 1
2. The accused denied the charge and thus warranting a trial wherein the prosecution called seven witnesses in support of its case.
3. Risper Aoko Ogutu (PW1) stated that she was an elderly Luo woman residing at Siger Rarieda. She testified that on September 30, 2023 at approximately 9:30 PM, she was preparing to sleep because she was not feeling well when she heard Rose Otieno, the wife of her grandson calling her. She explained that when she opened the door, Rose asked her to allow Mary to sleep in her house that night and return to her own home the next day which she permitted. She added that she slept in her bedroom while Mary and her granddaughter slept in the sitting room. She stated that her granddaughter Salome later woke her up to inform her that Mary was missing from where she had been sleeping having apparently woken up and left for JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 2 work. She clarified that Mary was the wife of Tobias Odongo, who was her grandchild and is now deceased. She added that the family used to live in Kisumu but had come home to the village for a funeral. The witness was not cross-examined.
4. Marcela Achieng Mollo (PW2) stated that she was from Kanyikela and was familiar with the case. She testified that on September 30, 2023 around 10:00 PM, her son left his house and she subsequently heard noise coming from his home. She explained that she stepped outside and found a large crowd and when she enquired about what had happened, she saw

blood flowing from her son's nose and ears. She noted that the deceased's wife had previously threatened them and it was decided that the wife should go to sleep at her mother-in-law's house. She asserted that the accused had a habit of assaulting her husband, who was her son, and that they had lived JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 3 together for twenty years. She further stated that the deceased was later rushed to hospital on October 3, 2023 where he passed away prior to arrival. She stated that the weapon used was a stick which was recovered with bloodstains and that the police took away the bloody clothes and the stick. During cross-examination, she denied that the deceased was always domestic. She confirmed that Isdor had visited the deceased prior to the incident but noted that he had already left the house by the time she arrived. She stated that the assault had already taken place by the time she encountered the noise and that the deceased had previously told her that he had been beaten up in the past and that the accused had now accomplished her mission to finish him. She confirmed that they reported the matter to the police.

5. Rose Atieno Achieng (PW3) stated that she was a peasant farmer living in Asembo. She testified that she JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 4 remembered the incident and was at home because there was a funeral for her in-law. She explained that on Saturday around 9:00 PM, she had gone back to sleep but was woken up by her daughter who alerted her about noises. She stated that she recognized the voice of the accused shouting, went outside, found the accused standing outside the gate and asked what the problem was. She testified that the accused claimed that she was fighting with her husband Tobias who was standing there and who informed her that his wife had hit him. She stated that she requested the couple to go into their house to resolve their issues and that she together with Mama Clinton went to find out what the problem was noting that the deceased claimed the issue was about food. She stated that she did not see any physical injuries on the deceased at that time. During cross-examination, she stated that she arrived at the accused's gate around 9:00 JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 5 PM and remained outside. She confirmed that she saw Isdor Anyango at the gate and that they remained there for about thirty minutes. She testified that the deceased had requested her to tell the accused to let him sleep. She noted that she escorted the accused to a neighbor's house where the accused spent the night (specifically at Risper's house) while the husband and others remained at the gate.
6. James Otieno Mollo (PW4) a resident of the Rarieda area, testified regarding the incident involving his late brother Tobias Odongo. He recalled that on the evening of September 30, 2023 at around 9:00 PM, he was at home when he heard commotion and raised voices coming from the deceased's residence. He recognized the voices and rushed over and found a gathering of neighbors present alongside both the accused and the deceased who were engaged in an argument. According to him, the accused JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 6 claimed that the deceased had been causing problems. A person named Jared e escorted the deceased inside the house while the accused followed them, after which he returned to his home. The following morning (Sunday), his mother

called for him while he was preparing to leave for work. He learned that his brother had been injured and rushed to a local hospital. He went to check on him and due to the severity of the injuries, they were directed to Kisumu for a CT scan. The deceased later succumbed to his injuries. During cross-examination, he confirmed that the noise came from the residence, where the accused and deceased appeared to be exchanging words. He admitted that Jared escorted the deceased into the house while the wife followed immediately. He stated that he did not know what transpired in the house since he himself did not enter. He noted that the deceased used to take JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 7 alcohol and had been drinking the previous day with him and that Hezron Onyango was not present.

7. Andrew Otieno Odongo (PW5) a son of the accused testified that he attended the autopsy at the mortuary on October 9, 2023 to identify the body. He was not cross- examined.
8. Dr. Ombok Lucy (PW6) stated that she was a medical officer attached to the Jaramogi Oginga Odinga Teaching and Referral Hospital where she had served for three years and that she had performed several autopsies. She testified that she conducted an autopsy on the body of Tobias Odongo Omollo on October 9 2023 at 1:30 PM noting that the matter originated from Rarieda DCI. She reported the general observations of the body: the deceased was a male of around 49 years of age in good nutritional status, the body was well preserved in formalin with rigor mortis already established and blood was JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 8 observed to be oozing from the ears. She reported the internal findings: there was a skull fracture accompanied by increased pressure in the head, massive internal bleeding and blood clots on the side of the brain while other bodily systems were essentially normal. She stated her professional opinion that the cause of death was a severe head injury resulting from blunt force trauma and noted that death certificate number 1553749 was issued. She produced the postmortem report dated October 9 2023 as an exhibit. During cross-examination, she stated that injuries of such a nature cannot be sustained from a regular fall unless the person is pushed. In re- examination, she noted that a fall could sustain such an injury and that there were no signs of intoxication by the deceased.
9. No. 240663 IP Delison Mwamobe (PW7) was the investigation officer currently attached to DCI Rarieda. He JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 9 testified that on 2nd October 2023, an incident was reported that a woman was at risk of being lynched by a mob after being accused of murdering her husband by pushing him and who hit a metallic box after the two had fought. That they commenced investigation and established that on 30th September 2023, the deceased was at his mother's house and later left for his house. Later, the mother heard screams emanating from the deceased's house and she responded to the distress call, finding the deceased had been assaulted and was bleeding heavily from his nose and ears. Following the incident, the accused spent the night at her mother-in- law's house. The following day (October 1, 2023), the deceased's father went to check on him. He stated that their findings pointed to the accused being responsible

for her husband's death. Police visited and processed the scene, recovered physical evidence and recorded witness JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 10 statements. The victim was initially taken to a nearby hospital before being transferred to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOTRH), where he passed away on 2nd October 2023. An autopsy revealed that the cause of death was blunt force trauma. The accused was subsequently taken into police custody. During cross-examination, he confirmed that none of the witnesses were eye witnesses. He confirmed that he recorded a statement from the accused. He confirmed that the deceased was with his brother and the brother to the deceased wanted to record a statement but he had a defilement case to attend in court on that said date. He had persuaded the deceased's brother to record a statement to no avail. The accused had previously lodged a report with the police though the Occurrence Book (OB) entry was not availed in court. He noted that the accused in her statement stated that she pushed the deceased JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 11 onto a metal box. He stated that the deceased died on 2/10/2023 three days after the incident, He established that the accused had malice aforethought. He stated that the deceased was drunk at the time. He noted the accused's claim that the deceased attacked her for not giving him food. The state closed its case at that juncture. 10. At the close of the Prosecutor's case, the court established that a prima facie case had been made against the accused herein to require her to be put on her defence. The accused opted to tender sworn testimony and called one witness. 11. Mary Akinyi Odongo (DW1) testified that she was a hawker and the wife of the deceased Tobias Odongo noting that they had been married for 28 years since she was 15 years old and had five children together. She claimed that her husband had been alcohol-dependent since 2005 which caused him to become quiet at home JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 12 and led to the onset of quarrels. She recalled that on September 30 2023 she was attending the funeral of an in-law when the deceased called to say he was on his way and asked if food was available and requested her to go to the house. She stated that the deceased arrived with his brother Isdor Onyango who was drinking alcohol and that she served his brother Isdor who later left. She testified that the deceased demanded that she washes his hands which she declined to do because the cooking gas had run out and she asked him to take the food as she went to sleep. That suddenly, the deceased hit her on the head at the entry of the house and thus she went and took refuge at the home of Jared's mother. That on the following morning, she went to their house and knocked the doors and windows but there was no response. She stated that she managed to push open the door and found the accused person snoring while seated. That she tried JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 13 waking him up but it was all in vain. She stated that Jared arrived and suggested that she gives the deceased some sugar as we had thought that there was too much alcohol but he vomited. She stated that she alongside Jared rushed the deceased to a nearby health center for treatment. She stated that the doctors claimed that the deceased had pressure and blood sugar problems. It was then that they took the deceased to Bondo sub county hospital where they managed the blood pressure and blood sugar but later referred him to Siaya County Referral Hospital. She testified that she proposed the deceased be taken to Jaramogi

teaching and referral hospital where the deceased was attended to. She stated that later around 1.00p.m the deceased passed away and this prompted her to call the parents who came to the hospital. She claimed that the family members then turned against her, accused her of killing him and had her arrested and charged. She JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 14 asserted that the allegations against her were false, that the deceased made no claims against her at the time and that the deceased's mother had a "single story" and was framing her to prevent her from accessing her matrimonial property. On cross examination by the state, she confirmed they had five children with one present in court and the rest in school and noted the children were in Kisumu at the time of the incident. She admitted she had previously sought refuge with neighbors in Kanyikela village but acknowledged she had no official assault reports against the deceased. She reiterated that they had an argument that expanded over food and the deceased was drunk at the time. She stated that that the deceased hit her with a bottle on the head but admitted she did not seek medical treatment or possess medical evidence of her injuries. She stated she did not see blood oozing from the deceased's head or ears at the time and claimed she JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 15 did not know why her mother-in-law turned against her. She stated that they first went to Church of Hope hospital and then to Bondo District hospital but did not avail the medical documents in court. She noted that the villagers became hostile and wanted to torch her house forcing the police to intervene and rescue her. She maintained that she did not hit the deceased with a bottle but merely pushed him away and stated she did not understand the pathological injuries outlined in the autopsy. During cross- examination by the Court, she admitted that her husband fell after she pushed him but maintained she had no intention of killing him. During re-examination, she confirmed she found the deceased with Isdor but Isdor had left before the physical incident occurred. She also clarified that she raised the alarm alongside James (PW3) and Rose (PW4) to take the deceased to the hospital. She confirmed that they later met the deceased at the gate. At JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 16 that juncture, they did not take the deceased to the hospital as he looked physically alright. She confirmed that the police officers came and picked up and took her to Lwak police station and that the investigation officer and the arrested officer were different. 12. Veronica Atieno (DW2) stated that she was a business lady from the Siger area and the older sister of the accused. She testified that on 30th September 2023, they were at a funeral venue when the deceased called the accused to request that she prepare food prompting the accused to leave for her house. She explained that her sister Susan later called to alert her that the deceased was in his house in bad shape prompting them to rush to the scene. She stated that she found that the deceased had been rushed to the dispensary and later to Bondo Sub-County Hospital where she stayed until 3:00 AM. She noted that when the doctors indicated the patient's JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 17 condition was worsening, he was transferred to the Jaramogi Oginga Odinga Teaching and Referral Hospital in Kisumu where they were advised to buy medicine and spent the night on the verandah before the deceased passed away. She testified that upon returning home, they met a hostile crowd blaming her sister which forced the accused to seek refuge at the police

station. She observed that the accused and the deceased had been involved in arguments in the past. During cross-examination, she provided her identity card number as 1512541761 and confirmed her occupation. She stated that she was not present at the exact scene when the physical incident occurred. She acknowledged that the deceased had visible injuries on his head as disclosed by the autopsy report. 13. After the close of the defence case, Counsel for the accused tendered her written submissions. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 18 14. Counsel submitted that there was only one issue before the court for determination: whether the prosecution had proved the offense of murder against the accused herein. 15. It was submitted at the outset that the accused was charged with the offense of murder contrary to Section 203 as read with Section 204 of the Penal Code. Counsel submitted that for the charge of murder to be established three key elements had to be proven: the death of the deceased; proof that the accused committed the unlawful act causing the death of the deceased and proof that the act was committed with malice aforethought. 16. Regarding the first issue, counsel submits that it was not in dispute that the deceased had died. This fact was confirmed by the post-mortem report produced in court and by various witnesses who identified the body. Counsel JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 19 acknowledged that the prosecution had tendered sufficient evidence to prove this element. 17. Regarding the second element, counsel argued that no prosecution witness was able to prove that the accused committed the unlawful act. PW-1: Testified that on the night of September 30 2023 the accused was brought to her house by one Rose Atieno. Rose requested that the accused be allowed to sleep there due to a disagreement with her husband (the deceased). PW-1 allowed her to sleep there. During cross-examination, PW-1 confirmed she was not at the scene where the deceased sustained injuries. PW-2 testified that on the night in question at around 2200 hours she heard noise and went to her son's (the deceased's) compound where she found a crowd. She testified that her son told her "My mother my wife is killing me". Counsel submitted that PW-2 was attempting to rely on an alleged dying declaration but argued there was no JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 20 evidence confirming the deceased ever uttered those words. None of the other prosecution witnesses present at the scene confirmed hearing the statement. Furthermore, counsel submitted that even if the statement had been made, it did not legally qualify as an admissible dying declaration under Section 33(a) of the Evidence Act. Citing Republic v Njoroge & 2 others [2024] KEHC 3710 (KLR) counsel outlined the mandatory criteria for dying declarations: contemplation of certain death, cogency, credibility, competency and corroboration. 18. Counsel asserted the statement failed these tests; Credibility: A dying declaration requires the declarant to be in a fit clear state of mind. In this case, evidence indicated the deceased was intoxicated from drinking alcohol with his brother that night which compromised the credibility of the statement; Corroboration: The statement was not corroborated by any of the other witnesses JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 21 present at the scene nor was there direct or circumstantial evidence proving the accused committed the act. It was submitted that in this case, PW-3 and PW-4 both testified to hearing noise at around 2030 hours and finding the deceased and accused discussing a dispute over food. Neither witness

observed any physical attack nor could they purport to be eyewitnesses to a murder. PW-5 only testified to witnessing the post-mortem examination. 19. Citing *Nzuki vs Republic* [1993] KLR 171 and Section 206 of the Penal Code, counsel emphasized that malice aforethought requires proof of intent to cause death, intent to cause grievous bodily harm or knowledge that death/grievous harm would likely result from the act. Counsel submitted that the prosecution completely failed to prove mens rea. 20. Counsel submitted that according to the accused's account: on 30th September 2023, the deceased called her JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 22 at around 1830 hours asking her to bring him food. She arrived home around 2130 hours with food and found the deceased drinking alcohol (Chrome) with his brother Isdor Onyango; after an argument arose over the food, the accused went to the bedroom to sleep. The deceased followed her and struck her with an alcohol bottle; as the deceased attempted to hit her a second time, the accused pushed him away in self-defense and fled the house for her safety; the accused sought help from her mother-in-law (PW-2) and later slept at a neighbor's (Risper's) house. Upon returning the next morning, she found the deceased sitting in the living room, sweating and having difficulty breathing. She raised the alarm and they arranged for his admission to hospital where he succumbed to his condition on 2nd October 2023. 21. Counsel contended that an assumption was being wrongly made that pushing the deceased while escaping JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 23 caused the fatal trauma. Counsel argued that a simple push while fleeing could not account for such a severe injury. 22. Counsel also pointed out significant medical inconsistencies noting that hospital records from Bondo and Church of Christ indicated the deceased suffered from high blood pressure and diabetes creating reasonable doubt regarding the exact cause of death. 23. Finally, counsel highlighted a critical investigative failure: the deceased's brother, Isdor Onyango was inside the house drinking with the deceased and remained behind after the accused fled. Despite being the last person known to be with the deceased, the investigating officer failed to record his statement or call him as a witness. 24. Counsel concluded by submitting that the prosecution's evidence was insufficient to establish the JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 24 accused person's guilt on the charge of murder beyond reasonable doubt. Defense counsel prayed that the charges against the accused person be dismissed and that she be acquitted. 25. I have considered the evidence adduced by both prosecution and defence as well as submissions presented. The issue for determination is whether the prosecution has proved its case against the accused herein beyond reasonable doubt. 26. It is noted that the accused has been charged under Section 203 as read with Section 204 of the Penal Code, which provide as follows: Section 203 Any person who of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 25 Section 204 – Any person convicted of murder shall be sentenced to death. 27. The burden of proof in all criminal cases is always upon the prosecution to discharge and that the standard is one of beyond any reasonable doubt. See *Woolmington vs DPP* [1935] AC 462 which laid down the guiding principles regarding the issue of burden of proof which is placed on the shoulders of the prosecution to discharge and that the standard is one of

beyond any reasonable doubt. The court stated in the Woolmington case as follows:

"Throughout the web of the English criminal law, one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 26 guilt, subject to the qualification involving the defence of insanity and to any statutory exception. If at the end and on the evidence of the case, there is a reasonable doubt created by the evidence given either by the prosecution, or the prisoner fails to rebut the defence was committed by him, the prosecution has not made out a case and the prisoner is entitled to an acquittal. 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." 28. In order to sustain a charge of murder, the prosecution is under obligation to prove certain essential ingredients inter alia; that there was death of the deceased; that the death was caused by an unlawful act JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 27 or omission; that there was malice aforethought; that the accused is/are the perpetrator/s of the crime.

29. As regards the aspect of death, this is a straightforward question of fact. In this case, the death of Tobias Odongo is established by PW5, the Post-Mortem Report produced by PW6 and the Death Certificate. The pathologist (PW6) formed the opinion that the cause of death was severe head injury resulting from blunt force trauma accompanied by internal skull fractures and intracranial hemorrhage. This element is therefore satisfied. 30. As regards the unlawfulness of the death, it is trite law that all homicides are unlawful unless circumstances exist to render it excusable or justified as was established in the case of *R vs Guzambizi S/o Wesonga* 2 [1948]15 EACA 65. I find no such circumstance has been demonstrated in this case. The prosecution's case on this JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 28 element hinges on circumstantial evidence and the accused's own admission. The accused's testimony is crucial in establishing the actus reus. She admitted that during an argument, the deceased struck her and in response she "pushed him away" causing him to fall. This admission was corroborated by the Investigating Officer (PW7) who testified that in her recorded police statement, the accused stated that she pushed the deceased causing him to fall onto a metallic box. This act of pushing the deceased which resulted in his fall and subsequent fatal head injury constitutes an unlawful act. The defence submission argued that no prosecution witness was an eyewitness to the act of killing. While this is true, it is a trite principle of law that murder can be proved by circumstantial evidence where the evidence is so strong that it points irresistibly to the guilt of the accused. In this case, the circumstantial evidence is compelling. The JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 29 deceased was last seen alive arguing with the accused. She was the only person present in the house with him during the physical confrontation. The deceased was found with a severe head injury consistent with a fall onto a hard object and the accused confirmed that she pushed him, causing him to fall onto a metallic box. All other witnesses (PW2, PW3, PW4) arrived after the assault had taken place and did not witness the actual infliction of the injury. 31. The defence also attempts to downplay the dying declaration made to PW2 ("my mother, my wife is killing me"). While this court may not place significant weight on this statement as a dying declaration due to

concerns about the state of mind of the deceased given his alcohol consumption, as per the stringent guidelines set out in *Republic v Njoroge & 2 others*

[2024] KEHC 3710 (KLR) its existence coupled with the accused's own JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 30 admission further confirms the sequence of events and the identity of the perpetrator. 32. I am therefore satisfied that the prosecution has proved beyond a reasonable doubt that the accused committed the unlawful act of pushing the deceased which caused his death. The accused's own testimony and her police statement as confirmed by PW7 leave no doubt that her actions directly led to the fatal injury. 33. On whether there was malice aforethought, section 206 of the Penal Code provides the appropriate explanation of what constitutes the same as the intention or knowledge of causing death or grievous harm and can be inferred from circumstances *inter alia*; an intention to cause death of any person; an intention to cause grievous bodily harm which leads to the death of such person; reckless disregard of life where a perpetrator is aware of the possibility that their actions could lead to death of JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 31 such a person; intentional commission of a criminal act where death is a natural consequence of the act; evidence of prior planning or premeditation. Under Section 203 of the Penal Code, murder is described as the unlawful killing of a person with malice aforethought and that the perpetrator had the intention, knowledge or recklessness which indicates his awareness that his/her actions are likely to result in death or serious bodily harm. 34. The Court of Appeal in *Nzuki v Republic* [1993] KLR 171 held that malice aforethought is a subjective test requiring proof of an intention to cause death, an intention to cause grievous bodily harm or knowledge that there is a serious risk that death or grievous bodily harm will ensue from the accused's acts. 35. In *Joseph Kimani Njau -vs- Republic* [2014] eKLR the Court of Appeal stated that: JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 32 “In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution...In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that *mens rea* for murder was not proved. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 33 Failure to prove *mens rea* for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.” 36. A charge of murder may therefore not be sustained unless the *mens rea* for murder is proved. The element of intention in committing the offence was examined in the English case of *Hyam -vs- DPP* [1974] 2 ALL ER 41 where Lord Diplock observed as follows: “No distinction is to be drawn in English law between

the state of mind of one who does an act because he desires it to produce a particular evil consequent and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 34 37. In *Mungai V. Republic* [1984] KLR 85 at page 98, Kneller, Hancox JJA and Nyarangi Ag. J.A. held: "However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English Common Law, it does appear that the doctrine is recognized in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter: see *R v Ngoilale* (supra) and *R v. Shaushi* [1951] 18 EACA 198, the latter of which was cited with approval in *Hau s/o Akonaay v R* [1954] 21 EACA 276 in which, at pages 277 and 278, the following passage occurs: "In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 35 elements of both self-defence and provocation. This Court has already in *R v Ngoilale* and *R v. Shaushi s/o Miya* [1951] 18 EACA 164 and 198 indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter said (at p 200): - 38. The question is whether at the moment she pushed the deceased, the accused possessed the requisite malice aforethought. The prosecution did not present direct evidence of an intention to kill. The court must look at the circumstances of the case including the nature of the weapon (if any), the part of the body targeted and the manner of the attack. The accused did not use a weapon. She pushed the deceased in the heat of an argument after she claims she was first assaulted by him. While she did admit to pushing him and causing him to fall onto a JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 36 metallic box, the accused's actions appear to have been a sudden reaction to a perceived provocation rather than a calculated act intended to cause death or grievous harm. 39. However, the accused's act of pushing a person causing them to fall and strike their head against a metallic object must be assessed as a reckless act. The standard is whether the accused knew that there was a serious risk that death or grievous bodily harm would ensue from her act. In such a domestic altercation, one may not intend a fatal outcome but they must be taken to have knowledge of the serious risk of injury from a push that causes a fall onto a hard object. 40. The accused's counsel has submitted that the statement made by the deceased to PW2 ("my mother, my wife is killing me") does not qualify as a dying declaration. Even if this Court disregards the dying declaration, the accused's own testimony and her police JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 37 statement confirm she pushed the deceased causing him to fall onto a metallic box. The question of whether she intended the consequences of that fall is central to the determination of whether malice aforethought is established. Given the subjective test, the court is not satisfied that there is evidence beyond a reasonable doubt that the accused had the intention to kill or cause grievous harm to the deceased. Her actions were a reckless response to a domestic altercation and she may not have foreseen

the fatal outcome. The fact that she raised the alarm the following morning when she found the deceased unresponsive and actively participated in taking him to the hospital is indicative of her lack of intent to cause his death. 41. The prosecution has successfully proved that the accused caused the death of the deceased by an unlawful act. However, the prosecution has not proved beyond a JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 38 reasonable doubt that the accused had the requisite malice aforethought as defined under Section 206 of the Penal Code. The circumstances of the case point more to a sudden reckless act in the context of a heated domestic dispute rather than a calculated act with the intention to kill or cause grievous bodily harm. 42. The evidence adduced by the prosecution particularly when weighed against the accused's testimony of being provoked and pushed to react and her subsequent efforts to seek help for the deceased leaves a reasonable doubt as to the presence of malice aforethought. 43. On whether the accused herein was the perpetrator of the crime, the issue of her identity is crucial. In the case of *R v Turnbull & Others* [1976] 3 ALL ER 549, Lord Widgery CJ it was held as follows: "First, whether the case against an accused depends wholly or substantially on the correctness JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 39 of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of one identification or other. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the Judge need not use any particular form of words. Secondly, 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 the accused under observation? At what distance? Was the observation impeded in any way, JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 40 as for example by passing traffic or a crowd of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reasons 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 alleged accused given to the police by the witness when first seen by them and his actual appearance. In any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of such description, the prosecution should supply them. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 41 Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and

remains good at the close of the accused's case, the danger in our judgement when the quality is poor, as for example when the identification is made after a long period of observation, or in unsatisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 42 is no other evidence to support it, provided always however that an adequate warning has been given about the special need for caution. In evaluating identification evidence, particularly when it emanates from a single witness, the court must exercise great caution." 44. In the case of *Wamunga v R* [1989] KLR 424 the court held that where the only evidence against a defendant is evidence of identification, the court must examine such evidence carefully and be satisfied that the circumstances of identification were favorable and free from the possibility of error. The court went on to state as follows: "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 JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 43 circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction. 45. In the case of *Maitanyi Vs. Republic* [1986] KLR 198 the court held as follows " 1. Although this court has held that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring a correct identification were difficult.

2. When testing the evidence of a single witness, a careful inquiry ought to be made into the nature of the light available and the conditions and whether the witness was able to make a true impression and description. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 44
3. The trial court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after deciding. It must do so when the evidence is being considered and before the decision is made." 46. The most compelling evidence against the accused comes from her own testimony and her recorded statement to the police. In her sworn testimony before this Court, the accused admitted that during a physical altercation with the deceased, she "pushed him away," causing him to fall. Under cross-examination, she confirmed that after she pushed him, he fell down. 47. More significantly, the Investigating Officer, PW7 testified that in her statement to the police, the accused stated that she pushed the deceased causing him to fall onto a metallic box. This admission is a crucial piece of evidence because it directly links the accused's actions to JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 45 the mechanism of injury. The post-mortem report produced by the pathologist (PW6) confirmed that the deceased died from a severe head injury caused by blunt force trauma, an injury entirely consistent with a fall onto a hard metallic object. 48. The accused's own words, both in court and to the police place her as the sole actor who physically interacted with the deceased in a manner that caused his fatal fall. She does not claim that anyone else was present in the house or

that any third party caused the deceased to fall. Her defence is one of self-defence not denial of the act itself. 49. The principle on circumstantial evidence was well stated in the case of *Abanga alias Onyango v Republic*

[1990] KLR 1, where the Court of Appeal held that for circumstantial evidence to form the basis of a conviction, the incriminating facts must be incompatible JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 46 with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstantial evidence in this case is compelling. The accused was the only person in the house with the deceased at the time the fatal injury was inflicted. All other witnesses (PW2, PW3, PW4) arrived after the fact. The deceased was last seen alive arguing with the accused and she was the last person to be with him before he was found injured. After the incident, the accused did not raise an alarm or seek immediate help. Instead, she left the house and went to sleep at her mother-in-law's house (PW1). It was only the following morning that she returned and raised an alarm upon finding the deceased unresponsive. This conduct is inconsistent with that of an innocent person who had just witnessed an accident; it is more consistent with someone who was aware that she had caused harm and was avoiding the immediate JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 47 consequences. The pathologist (PW6), confirmed that the deceased suffered a skull fracture and massive internal bleeding. She testified that such an injury could not be sustained from a "regular fall" unless the person was pushed. The accused's admission that she pushed the deceased causing him to fall onto a metallic box perfectly matches the medical evidence. 50. The defence suggests that the accused was framed by the deceased's mother to prevent her from accessing her matrimonial property. However, this allegation is entirely unsupported by any evidence. The deceased's mother (PW2) may have a motive but that does not explain the accused's own admissions nor does it explain the medical evidence. The accused's claim of being framed is not sufficient to raise a reasonable doubt in the face of the overwhelming evidence. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 48 51. The defence further argued that no eyewitness saw the accused inflict the injury. While true, this is not fatal to the prosecution's case. Murder can be and often is proved by circumstantial evidence. The combination of the accused's own admissions, the medical evidence, her subsequent conduct and the circumstantial evidence point irresistibly to the accused as the perpetrator. 52. I am therefore satisfied that the prosecution has proved beyond a reasonable doubt that the accused was the perpetrator of the unlawful act that caused the death of the deceased. 53. The prosecution has successfully proved that the accused was the perpetrator of the unlawful act that caused the death of the deceased. The evidence particularly the accused's own admission that she pushed the deceased causing him to fall onto a metallic box, places her squarely as the author of the fatal injury. JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 49 54. However, the prosecution has not proved beyond a reasonable doubt that the accused had the requisite malice aforethought as defined under Section 206 of the Penal Code. The circumstances of the case point more to a sudden reckless act in the context of

a heated domestic dispute rather than a calculated act with the intention to kill or cause grievous bodily harm. 55. The evidence adduced by the prosecution particularly when weighed against the accused's testimony of being provoked and pushed to react and her subsequent efforts to seek help for the deceased leaves a reasonable doubt as to the presence of malice aforethought. 56. In view of the foregoing observations, in accordance with the principle in the case of Robert Mungai (supra) the prosecution has fallen short of proof of the element on malice aforethought to establish that the accused is guilty of murder contrary to Section 203 of the Penal Code. In JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 50 my view it is evident that the accused is guilty of a lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. 57. In view of the foregoing observations, it is my finding that the prosecution has not proved the charge of murder against the accused beyond reasonable doubt. However, it is my finding that the prosecution has proved an offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code against the accused beyond any reasonable doubt. Consequently, I find the accused guilty of the offence of manslaughter and is convicted thereby accordingly. It so ordered Dated and delivered at Siaya this 18th day of September 2026 JUDGMENT SIAYA HIGH COURT CRIMINAL NO. E033 OF 2023 51
D.KEMEI JUDGE In the presence: Mary Odongo.....Accused Ooro
F.....for Accused .Soita.....for Prosecution
Maurine.....Court Assistant JUDGMENT SIAYA HIGH COURT
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