

## OFFENCES AGAINST A PERSON

### Offences covered

- i) Murder
- ii) Manslaughter

### 1. MURDER

Section 203, Penal Code

‘Any person who of *malice aforethought* causes *death* of another person by *an unlawful act or omission* is guilty of murder’

Key elements for murder

- Malice aforethought
- Death
- An unlawful act or omission

#### *Actus reus of murder*

- Causing death through an unlawful actor omission
- Section 214, Penal Code on who is capable of being killed? Compare this provision with article 26 (2) of the Constitution of Kenya 2010.
- What is the current practice though?
- S. 215 Penal Code: The defendant’s conduct must have caused the death within a year and a day to be held responsible
- What about the potential role of medical intervention that is likely to alter this time?
- Section 213, Penal Code, a person is deemed to have caused another’s death “although his act is not the immediate or the sole cause of death”, where:
  - i) The victim dies due to surgery or medical treatment for injuries caused by the defendant, as long as such medical treatment or surgery was employed in good faith with common knowledge and skill.
  - ii) After the injuries inflicted by the defendant, the victim fails to have medical treatment or surgery that would have otherwise saved his life or otherwise fails to observe proper caution as to his way of living.
  - iii) To avoid threatened or actual violence from the defendant, the victim does an act that would appear natural in the circumstances that leads to his death. An example would be when the victim fleeing the defendant, who is shooting at him, gets run over by a car for failing to carefully observe traffic while crossing a road.

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- iv) The defendant hastens or accelerates the death of a victim already suffering a disease or injury which would have otherwise killed the victim. In other words, mercy killing would not relieve the defendant from liability.
- v) The defendant's act or omission would not have caused death unless an act or omission of the victim or other persons otherwise accompanied it.

### ***Mens rea of murder***

- Section 206, Penal Code, malice aforethought is established when the prosecution, through evidence, proves:
  - a) an intention to cause the death or to do grievous harm to any person, whether that person is the person killed or not;
  - b) the knowledge that the act or omission causing death will probably cause the death of or grievous bodily harm to some person, whether that person is the one killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - c) an intent to commit a felony;
  - d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
- Constructive malice, oblique intent, foreseeability in (c) and (d): death occurs in the context of furthering a different offence
- Kenyan courts reluctant to find intent for murder unless it is proved that the accused person intended to kill (express malice), thus excluding incidences that fall under implied and constructive malice
- Factors that courts take into account when considering malice aforethought: ***Stephen Ngila Nthenge v State [2021] eKLR, Criminal Appeal No. E013 of 2021***, where the court noted that intention to cause death 'can be inferred from the overt act where for example the amount of force applied, the type of weapon used and whether the offender repeatedly assaulted or attacked the victim that the attacks clearly evinced an intention to cause the victim death.'
- The failure to prove malice aforethought often means the courts will find the accused guilty of manslaughter if his conduct is responsible for the death of the victim. (***Roba Galma Wario v R [2015] eKLR; Godfrey Ngotho Mutiso v R [2010] eKLR.***)

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## **Punishment for murder**

- Section 204, Penal Code “Any person convicted of murder shall be sentenced to death.”
- See conflicting court jurisprudence on the mandatory nature of the death penalty and the need for court discretion: *Francis Karioko Muruatetu and Another v Republic, SCK Pet. No. 15 of 2015 [2017] eKLR*; *Godfrey Ngotho Mutiso v R[2010]eKLR, Criminal Appeal No. 17 of 2008*; *Joseph Njunguna Mwaura and 2 others v R[2013]eKLR, Criminal Appeal No. 5 of 2008*.

## **2. MANSLAUGHTER**

- Other jurisdictions may refer to it as involuntary murder, second degree murder
- Section 202 (1), Penal Code ‘Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.’
- The mental element here mostly captures conduct carried out recklessly or with gross negligence.
- Manslaughter can also result where the defendant kills with intention or malice aforethought but there are mitigating circumstances which reduce his culpability and are considered to negate malice aforethought; *R v Paul Omondi Ondongo [2019] eKLR Criminal Case No. 22 of 2016*,
- Unlawful omission: section 202(2), Penal Code: ‘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.’
- *Musee Joseph Musyoka v Republic [2014] eKLR, Criminal Appeal 156 of 2013; R vs Bateman 19 Cr. App. R. 8; Republic v Getrude Adhiambo Oneya [2020] eKLR Criminal Case No. 15 of 2018*,
- n/b: take note of manslaughter resulting from mitigating factors for Murder

## **Defenses to murder and manslaughter**

### *Provocation*

- **Section 207, Penal Code** ‘When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.’
- Section 208, Penal Code: ‘The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when

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done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.'

*Self defense*

- Section 17, Penal Code:
- *R v Ann Karimi [2020] eKLR, Criminal Case No. 18 of 2017; Andrew Mueche Omwenga [2009] eKLR, Criminal Case No. 11 of 2008,*
- *Republic v Morrison Mutika Leizar [2020] eKLR HCK at Machakos, Criminal Murder Case No. 59 of 2014*



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