



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL CASE NO. 12 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BWANADI OMAR BWANADI.....1<sup>ST</sup> ACCUSED**

**ABDI ALI MOHAMED.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. Bwanadi Omar Bwanadi and Abdi Ali Mohamed (1<sup>st</sup> and 2<sup>nd</sup> Accused respectively) are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 10<sup>th</sup> day of June, 2016 at Mbwajumali village in Lamu East Sub-County within Lamu County jointly murdered Mohamed Shee Mohamed Omar.
2. The trial proceeded before Ongeri J. who heard 8 witnesses before being transferred to another station. I heard the last two prosecution witnesses. At the conclusion of the prosecution case, I received submissions from both the prosecution and the defence. Upon analysis of the evidence on record and the submissions, I found that the prosecution had established a *prima facie* case warranting the Accused to be put on their defence.
3. At the defence hearing, each Accused gave sworn testimony and did not call any witnesses. Both Accused denied any involvement in the murder of the Chief stating that they only learned of it and responded by going to the scene along with other villagers. They told the court that they had been arrested as a result of a grudge with some of the Prosecution witnesses, and in particular PW8.
4. The standard of proof in a criminal trial is one beyond reasonable doubt. Where upon analysis of the evidence there exist gaps which cast doubt on the prosecution case, the benefit of such doubt must go to the Accused. See **Woolmington V. DPP (1935) AC 462; Republic V. Gachanja 2001 KLR 428**
5. Section 202 of the Penal Code requires specific elements to be proved in a charge of murder. These are death of the deceased; that the death was caused by the unlawful acts or omissions of the Accused, and; that the Accused in causing such death, had malice aforethought. Section 206 of the Penal Code sets out the circumstances in which malice aforethought may be inferred.
6. There is no doubt in this case that the deceased suffered an unlawful death. Evidence from the prosecution witnesses shows that he was the Chief of Mbwajumwali location in Lamu East Sub-County. PW3 Malik Athman She told the court that he received a call at around 9:00 am on the morning of 10<sup>th</sup> June 2016 in which the caller informed him that the Chief had been killed. That when he went to the scene, he recognized him. He was already dead and he (PW3) escorted the body for postmortem. PW5 MwanaHalima Bwanadi testified that she had met the Chief that morning and shortly after learnt that he had been killed. She went to the scene and on identifying his body, covered him with her lesa.
7. Dr. Mohamed Kombo (PW9) conducted the autopsy the same day. He testified that he was on routine supervisions at Faza village on 10<sup>th</sup> June 2016 when he received information that a murder had occurred at Mbwajumali. He responded to a call from the police to go and conduct the postmortem at the local dispensary. He observed that the deceased who was aged about 57 years had multiple cuts on the upper body and had excessive loss of blood. The upper bone of the left arm was cut and the arm severed. There were multiple cuts on the left side of the face and long cuts on the base of the neck extending to the lower back. Dr. Kombo opined that the cause of death was severe haemorrhage due to multiple deep cuts. He produced the Post-Mortem Report as Prosecution Exhibit No. 2.
8. I accepted the pathologist's expert opinion on the cause of death. The postmortem results which were not challenged in any way showed that the deceased died of severe haemorrhage due to multiple cuts on his body. This opinion accords with the account of the witnesses who had seen the body of the deceased. My finding therefore is that the deceased died an unlawful death.

9. The critical issue then is whether the two Accused were the persons who cut the deceased causing him deep injuries from which he bled to death. As in any criminal trial, the positive identification of an accused person is critical. There must be unassailable evidence linking an accused to an offence. See **Republic Vs. Gachanja 2001 KLR 428; Republic Vs. Elizabeth Anyango Ojwang (2018) eKLR**

### **Prosecution Evidence**

10. In this case there were no eye witnesses who saw the two Accused attack and cut the deceased. However, it is the law that a case can be proved by circumstantial evidence. In the case of **Erick Odhiambo Okumu v Republic Criminal Appeal No. 84 of 2014 [2015] eKLR** the Court of Appeal stated with respect to acceptability of circumstantial evidence that: -

***“It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra): “Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”***

11. None of the seven civilian witnesses had an eye account of the death of the deceased. PW1 Mohamed Maulana Habib told the court that he saw Abdi Ramani and Bwanadi running away from the forest towards the village on the fateful morning. PW2 Mwa Amina Mohamed Abushiri a resident of Muyambujini Mwajumali location and a trader at Muyambogo said that she knew the deceased Mohamed Shee Mohamed, as the Chief of Muyambogo location. That she also knew the 1<sup>st</sup> and 2<sup>nd</sup> Accused as the people who had cut her parents' cow in 2015 and were charged in criminal case No. 611/2015 at Lamu court where they were fined Kshs.10,000/= which they paid.

12. PW2 further stated that on 10<sup>th</sup> June, 2016 their cow was cut again and that the Chief had asked them to go and write statements. That they were waiting for the doctor to come and treat the cow when they heard screams from the Chief's home. She ran to inform her parents. She told the court that she had been with the Chief a short while earlier and that the Chief was assisting them to get the people who had cut their cow. PW2 said that she did not see the 1<sup>st</sup> and 2<sup>nd</sup> Accused that day. She also did not witness the Chief being murdered.

13. PW3 Malik Athman Shee of Yambogi, Wajumwali location testified that he was a nephew to the Chief. He was at the shamba together with his brother Mohamed Athman and a neighbour Tarim Manlerai when he was called at 9:00 am and informed that the Chief had been killed. He went to the scene immediately and saw the deceased who had been cut on the side, the head and the back. He took the body to the health centre where he witnessed the post-mortem and thereafter they buried the deceased. PW3 said that he did not see who killed the Chief. He later heard from the mother of Mohamed Maulana that Mohamed (PW1) had seen the two Accused people running from the forest.

14. Mohamed Shee Mohamed (PW4) was the son of the deceased. He testified that his father left home between 8:15 am and 8:30 am for work. That the deceased was accustomed to using the shortcut through the forest between his home at Yambogi and Mbajumwali where his office was. PW4 identified the Islamic cap (MFI 1) that his father wore on that day. He said that he knew the father was killed because of the investigations relating to the neighbours' animals which had been cut. PW4 however said that he did not witness who killed his father.

15. Mwana Halima Bwanadi (PW5) testified that on the day the Chief died (which she could not recall), she left her house at Miyabogi to go to Mwajumwali to collect milk for her children. She met the Chief at Miyabogi on Pwani Road and they conversed about her brother's birth certificate. The Chief told her to go and pick it from his house and he proceeded to work. She went to the Chief's house and while still at the Chief's home with the Chief's wife, they received information from one Kamau that the Chief had been killed. She went to the scene and saw the body of the Chief which she covered with her lessa. He had been killed some 100 metres from where they had met. PW5 said that she did not hear any screams and did not know who killed the Chief.

16. Athman Shamia Barkale also known as Athman Sharkule testified as PW6. He recalled that on 10<sup>th</sup> June 2016 at around 9:00 am, he was on his way from Faza going to Bwajumwali when he saw the 1<sup>st</sup> and 2<sup>nd</sup> Accused in the bush walking away very fast towards Miyabogi. He knew them because they were his fellow fishermen. PW6 said that he was walking on the side of the ocean and that the two Accused saw him. They did not talk to him although they were a short distance of about 200 metres away from him. PW6 said that he learnt about 15 minutes later, that the Chief had been killed. He said that he did not see the two killing the Chief. He later saw that the Chief had been cut. In cross-examination PW6 said that the place where the Chief was killed was the same place that he had seen the two Accused and it was in the short cut that the Chief used regularly.

17. PW7 Yussuf Mohamed Yusuf recalled that he was asleep in his house in Bwajumwali when his wife woke him up with the news that the Chief, who was also his uncle, had been killed. He went to the scene and found the body on a stretcher. He observed cuts on the neck, on the back and on the right hand. He assisted in taking the body to the local dispensary where a post-mortem examination was conducted by Dr. Kombo (PW9).

18. PW7 further told the court that one Mohamed Absir and Amina who were the neighbours of the Chief told him that their cow had been cut at night and that they had reported to the Chief before he left for work. He told the court that the Chief was killed on his way to work. PW7 further told the court that he (PW7) had been assaulted by the 2<sup>nd</sup> Accused and that the 1<sup>st</sup> Accused had been jailed for 6 years. That both Accused had been fined Kshs. 10,000/= for cutting the neighbour's cow. He disclosed that he was married to the sister of the 2<sup>nd</sup> Accused with whom they had 7 children and that he was also related to the 1<sup>st</sup> Accused as their respective grandmothers were sisters. In cross-examination, PW7 said that he did not see the Chief being killed and that it was his wife one Mirma Athman who informed him.

19. PW8 No. 87606 PC Robert Korir testified that he was based at Kizingitini police station. That on 10<sup>th</sup> June 2016 at around 9:00 am, his colleague one Stephen Rono received a call from the deceased who reported that a cow had been cut at Mnyabori. 30 minutes later, PW8 received a call from Chief Inspector Oliech Were who told him that someone had been killed at Mnyabori. They went to the scene and found

the deceased's body which had cuts on the left hand and shoulder. They were joined by their colleagues from the CID and they removed the body to Mbujumali hospital where the post-mortem was done by Dr. Mohamed Kombo (PW9). PW8 said that he was aware that the two Accused had an on-going case where they were reported for having cut a cow. In cross-examination he stated that he did not know who killed the deceased.

20. PW10 was George Ogunda Government analyst. He testified that several exhibits were received at the Government Chemist in Mombasa on 27<sup>th</sup> June 2016 from PC Noah Kiplangat of Lamu DCI. The exhibits were: -

(a) Exhibit A – Blood stained Muslim cap (MFI 3)

(b) Exhibit B – Blood stained soil

(c) Exhibit C – Blood sample of 1<sup>st</sup> Accused

(d) Exhibit D – Blood sample of 2<sup>nd</sup> Accused

(e) Exhibit E – (i) Panga [MFI 5 (a)]

(ii) Panga [MFI 5 (b)]

(f) Exhibit F (1) (i) – Blue T-shirt (MFI 6)

Exhibit F (ii) – Multicoloured pair of short (MFI 7)

Exhibit F (iii) – White vest recovered from 1<sup>st</sup> Accused

(g) Exhibit G (i) – Old dirty white shirt (MFI 9)

Exhibit G (ii) – Piece of nylon bag (MFI 10)

In his findings, PW10 stated that he found blood stains in the items but that the soil (D1) panga (E1) and E2) t-shirt, shorts white Muslim cap and nylon bag did not generate any DNA profiles. He explained that failure may have been due to exposure to a harsh environment. The Muslim cap (Exhibit A) generated DNA profile of a male.

He produced the Report as – Prosecution Exhibit 11.

### **The Defence case**

21. The 1<sup>st</sup> Accused (DW1) stated in his own sworn defence that he knew the Chief. He denied any role in his death. He stated that he was woken up by his wife on the material morning and informed that there was noise outside. He got out and headed in the direction from which the noise was coming. When he got there, he found a crowd, police officers and the body of the deceased in a shrub.

22. The 1<sup>st</sup> Accused stated that he assisted the family including the deceased's son Musa Omar to take the body to Mwajumwali dispensary where a post-mortem was done. He stated that the exhibits were collected from his house but denied that they were his as there were many people living in his house. He said that he had been charged in the PM's Court Lamu for cutting an animal in Criminal Case No. 611 of 2015 and that therefore PW2 and PW8 had a grudge with him.

23. The 1<sup>st</sup> Accused further stated that the government analyst report was negative and that no witness testified to having seen him assault the Chief. Cross-examined, the 1<sup>st</sup> Accused stated that he did not know whether a report was made to the Chief leading to his being charged. He said he had no grudge against the Chief. He denied that he had disappeared after the Chief's murder.

24. The 2<sup>nd</sup> Accused Abdi Ali Mohamed stated in his own defence that he was asleep in his house in Miyabogi village on the material morning when one Mohamed Yussuf (his sister's son) came to inform him that the Chief (who was also his (Yussuf's) grandfather had been killed. That he immediately went to the scene with other villagers and there they found police officers from Kizingitini, Faza and Lamu. He said that he was arrested because of a grudge that PW8 Yussuf Mohammed Yussuf (his brother in law) had against him. That PW8 had even had him charged in a Lamu court but the case was dismissed.

25. The 2<sup>nd</sup> Accused stated that he did not run away but was found at his home and was arrested along with his sister (PW8's wife). He said that none of the witnesses including the police had mentioned him in the case and that the exhibits were not linked to him at all. In cross-examination the 2<sup>nd</sup> Accused admitted that he had previously been charged with cutting a cow but disputed that the Chief (deceased) had handled the case against him. He reiterated that the body was recovered about 10 minutes away from his home.

### **Submissions**

26. In final submissions, filed on 9<sup>th</sup> July 2019 Mr. Gekanana learned Counsel for the Accused submitted that there was no direct evidence

linking the Accused to the offence and that the circumstantial evidence which the Prosecution had weaved was too weak. Counsel submitted that the Prosecution relied on an alleged earlier offence in which the Accused had been charged with the offence of injuring animals to suspect that the Accused were the ones who murdered the deceased.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Accused were linked to the death of the deceased.**

27. I have already found, based on the evidence of the prosecution witnesses and in particular PW1, PW2, PW3, PW4, PW5, PW6 and PW7 that the deceased was brutally murdered on 10<sup>th</sup> June 2016. These witnesses were residents of the locality and they saw the deceased's body that fateful morning. No. 87606 PC Robert Korir who testified as PW8 responded with other police officers to the scene and collected the body. The Post-mortem report (Exhibit No. 2) produced by the Pathologist (PW9) demonstrated that the deceased was brutally cut and bled to death. This evidence shows that the deceased suffered a painful and brutal death.

28. Both the Prosecution and the defence agree that the evidence was circumstantial. The prosecution submitted that the said evidence clearly linked the Accused to the offence while the defence dismissed it as weak.

29. The principles upon which circumstantial evidence must be considered were clearly laid out by the predecessor court of appeal in the case of **R. v. Kipkering Arap Koske & Another, 16 EACA 135 as follows:** -

***'(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;***

***(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.'***

30. The same principles were restated in **Sawe v Republic Criminal Appeal Case No. 2 of 2002**, where the Court of Appeal stated thus: -

***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."***

31. The circumstances relied on by the prosecution revolved around the antecedents of the Accused, the conduct of the two Accused immediately after the incident and the recovery of exhibits from the home of the 1<sup>st</sup> Accused.

32. Following the guidance in **R.V.Kipkering Arap Koske & Anor (Supra)** these circumstances must be cogently and firmly established by the prosecution. I therefore, proceed to test the same against these principles.

33. PW2 Mwa Amina Mohamed Abushiri testified that the two Accused had previously been charged in a Lamu Court with the offence of cutting her family cow. That on the night preceding the death of the Chief, the two Accused had cut the cow again and a report was made to the Chief.

34. The testimony of PW2 that the two Accused had previously been charged with the offence of injury of an animal was corroborated by PW7. PW7 knew both the Accused well. He disclosed to the court that they were related. He testified that both Accused had been fined Kshs 10,000/= for cutting the neighbour's cow.

35. The 1<sup>st</sup> Accused admitted in his defence that he had been charged in the Principal Magistrate's Court Lamu for cutting an animal in Criminal Case No.611 of 2015.

He also stated that there existed a grudge between him and PW2 arising from that case.

36. The 2<sup>nd</sup> Accused stated in his defence that PW8 who was his brother in law had a grudge against him and had even caused him to be in a Lamu Court but the case was dismissed. In Cross Examination, the 2<sup>nd</sup> Accused admitted that he had been charged with the offence of cutting a cow but denied that the deceased Chief was the one who handled the case.

37. From the above, it is apparent that the issue of injury of the cow belonging to PW2's parent was a live issue at the material time. From the evidence of PW2 and PW8, it was the Accused who had cut the animals and the case was live before the Chief who was seized of the report. The 1<sup>st</sup> and 2<sup>nd</sup> Accused materially admitted that they had earlier been charged with the offence.

38. It is my conclusion as posited by the learned Prosecution Counsel that there existed circumstances and motive for the two Accused to harm the Chief. He was following up on an offence allegedly committed by the 1<sup>st</sup> and 2<sup>nd</sup> Accused and they had been prosecuted for a similar offence before.

39. The second set of circumstances relate to the identification of the Accused at the scene. With respect to the evidence of identification, the Court of Appeal in

**Cleophas Otieno Wamunga vs Republic (1989) eKLR**, sounded the caution as follows: -

**‘Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification’.**

40. PW1 testified that while in school on the material morning, he excused himself to answer a call of nature. That the school toilets did not have water and as he was fetching water from the ocean he saw the 1<sup>st</sup> and 2<sup>nd</sup> Accused running from the direction of the forest (meaning shrub) towards the village. They were about 100 metres away. PW1 said that he could identify the both Accused as they came from the same village. PW1 said that shortly, there were screams that the Chief had been killed.

41. Athman Shamia Barkale alias Athman Sharkule (PW6) also stated in his testimony that on 11<sup>th</sup> June, 2016 at around 9.00am he was on his way to Bwajumwali when he saw the Accused walking away very fast towards Miyabogi. That they did not talk to him although they knew each other and a few minutes later there was word that the Chief had been killed.

42. From the two witnesses PW1 and PW6, I find that they placed the two Accused at the area of the crime scene. Their evidence was corroborative. No doubt they could identify the 1<sup>st</sup> and 2<sup>nd</sup> Accused as they lived in the same village. Indeed, in cross examination, the 1<sup>st</sup> and 2<sup>nd</sup> Accused did not dispute that they were known to the 2 witnesses. I also find that the circumstances were favorable the incident having happened at 9.00am, in the morning.

43. The prosecution evidence also showed that the Chief had left his home on the fateful morning and was headed to his office through the short cut which he normally used. This was the evidence of the deceased's son (PW4) Which was corroborated by (PW5) who testified that she had, a few minutes earlier met and conversed with the Chief along the short cut between Yambugi and Mwajumwali. She testified that the body of the Chief was found about 100 metres from the place they had met.

44. I conclude from the evidence above that the two Accused were seen near the scene of the heinous crime. The deceased was also placed at the scene at about the same time. I am satisfied that the identification was free from error.

45. The third circumstance was the conduct of both Accused immediately after the offence. According to prosecution witnesses, both the 1<sup>st</sup> and 2<sup>nd</sup> Accused disappeared after the incident when the rest of the villagers responded and rushed to the scene. The investigating officer PW11 testified that a man hunt was made and the 2<sup>nd</sup> Accused was first arrested in the village on the same day while the 1<sup>st</sup> Accused was the following day arrested with the help of the villagers who traced him in the village.

46. Both Accused denied in their respective defences that they had gone into hiding immediately the Chief was killed. The 2<sup>nd</sup> Accused said that he responded like everyone else when he heard from his wife about the death of the Chief by going to the scene and that he even participated in the burial rites.

46. I have weighed the 1<sup>st</sup> and 2<sup>nd</sup> Accused's respective defences on the aspect of their arrest. They stated that the only reason they were arrested is because of the outstanding respective cases where they were alleged to have cut the neighbours' cows.

47. It is my considered view that the defence does not ring true. They could not have been at the scene, after the incident as according to PW11, a man hunt was launched by the villagers. The conduct of disappearing was inconsistent with innocence and therefore lends credence to the suspicion of their guilt. PW11, testified that in the course of investigation, they visited the home of the 1<sup>st</sup> Accused. That they conducted a search, and recovered 2 blood stained pangas (MFI 5 (a) & (b) concealed in a corner of the house, a pair of shorts ( MFI 7) a blue T-Shirt ( MFI 9) a white vest ( MFI 8) all which were blood stained. PW11 took an inventory of the recovered items. The Inventory was signed by himself, one PC Ewoi and the 1<sup>st</sup> Accused's wife who was present during the search and told them that the clothes recovered had been worn by the 1<sup>st</sup> Accused the previous day. The fourth and critical piece of circumstantial evidence relates to the recovery of the incriminating Exhibits from the home of the 1<sup>st</sup> Accused.

48. The exhibits recovered were transmitted to the Government analyst vide Exhibit Memo (Exhibit No.12) produced by PW11.

49. Government analyst George Ogunda (PW10) testified that he analysed several exhibits delivered by PC Noah Kiplagat of DCI Lamu East. His findings were that the soil ( D1), Pangas E1, and E2 tshirt ( F1), shorts F(ii) and nylon bag ( Gii) did not generate any DNA profile while the Muslim Cap ( Exh.A) generated a male DNA profile. There was no DNA profile from all the exhibits except the Muslim Cap (Exh.A). The said profile did not also match that of the blood sample of the 1<sup>st</sup> and 2<sup>nd</sup> Accused. PW10 explained that the lack of profile may have been due to the harsh weather.

50. It is clear from the expert evidence of PW10 that the DNA analysis of the exhibits did not yield any evidence to link the Accused to the killing of the deceased. His explanation that the harsh weather may have destroyed the genetic material in the exhibits is plausible. This court takes judicial notice that the weather in this jurisdiction is quite harsh with extreme temperatures particularly during the dry season.

51. There was evidence however from the Investigation Officer (PW11) and PW4 that the deceased's son that the muslim cap (Exhibit A) belonged to the deceased and further evidence that it was collected at the scene together with some blood stained soil. For the rest of the exhibits being two pangas and clothing, there was unchallenged evidence that they were recovered from the house of the 1<sup>st</sup> Accused. PW11 testified that the 1<sup>st</sup> Accused's wife was present and even signed the Inventory. That she told them that her husband had worn the blood stained clothes the previous day. PW11 produced the Inventory (Exhibit 14) showing the Exhibits recovered from the 1<sup>st</sup> Accused's house.

He also produced the statement of the 1<sup>st</sup> Accused's wife one Mwanawetu Magi whom he stated had disappeared after giving the statement.

52. I believed the testimony of PW11 that the exhibits were recovered from the 1<sup>st</sup> Accused's house for reason that the incident had just happened and that the Inventory was prepared and signed by the officers and the wife of the 1<sup>st</sup> Accused. I must however disallow the production of the statement of the 1<sup>st</sup> Accused's wife as she was not a compellable witness in law as provided under Section 127 of the Evidence Act.

53. The 1<sup>st</sup> Accused admitted in his defence that the exhibits were recovered from his house. His admission was material and lends credence to the evidence of PW11. The 1<sup>st</sup> Accused however disputed that the items belonged to him. His reason was that there were other people living in the house.

54. The recovery of the exhibits from the 1<sup>st</sup> Accused house brought him within the provisions of Section 111 (1) of the Evidence Act. The Section provides: -

**111 (1) 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:**

55. In this case, the 1<sup>st</sup> Accused had a rebuttable burden to discharge. He had a duty to explain why the items were in his house and whose property it was. He only stated that there were other people living with him. He didn't name who those other people were, how many were they and why they had kept suspicious items in his house. His feeble explanation is therefore not convincing. I am convinced that the exhibits belonged to him and directly linked him and his co-accused to the killing of the deceased.

56. From my careful analysis of the evidence above, I have come to the firm conclusion that the chain of circumstantial evidence pointed to the 1<sup>st</sup> and 2<sup>nd</sup> Accused as the persons who killed the deceased. I find the Prosecution proved that the two accused had motive to harm the Chief.

57. The 2<sup>nd</sup> Accused stated his defence that the exhibits recovered from the 1<sup>st</sup> Accused's house did not link him to the offence. That may well be true because it was impossible to extract DNA from them. His defence does not however, cast doubt on the prosecution case. He was identified running away from the scene together with the 1<sup>st</sup> Accused and he has not controverted the circumstances of his arrest. Further, the prosecution proved that they jointly had motive to harm the Chief. I dismiss his defence as untrue.

58. In the premises I find that the Prosecution has proved the case against the 1<sup>st</sup> and 2<sup>nd</sup> Accused to the required legal standard. The evidence points to the 1<sup>st</sup> and 2<sup>nd</sup> Accused as the persons who unlawfully killed the Chief.

#### **Whether or not the accused had *mens rea*.**

59. A charge of murder cannot be sustained unless the prosecution proves malice aforethought on the part of the accused. Under **Section 206 of the Penal Code**, malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

60. In **Nzuki v Republic [1993] KLR 171**, the Court of Appeal stated that malice aforethought can be inferred from the acts of an accused person. The Court elaborated as follows: -

**“Malice aforethought” is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result.....”**

61. In this case, the evidence of the pathologist (PW9) showed that the deceased suffered fatal injuries. He had multiple cuts on the upper body and the left hand was severed at the shoulder. He had multiple cuts on the left face and neck, penetrating cut on the left cheek exposing the teeth and tongue and a fractured mandible. From the weapons used and the extent of the injuries, it is my finding that the two accused intended to harm the deceased. They had malicious intent to kill him. Their actions come within the provision of Section 206 of the Penal

Code.

62. In the final analysis I have found the charge against the 1<sup>st</sup> and 2<sup>nd</sup> accused proved beyond reasonable doubt. I find the 1<sup>st</sup> and 2<sup>nd</sup> Accused guilty of the charge of Murder Contrary to Section 203 to as read with Section 204. I convict them accordingly under Section 215 of the Criminal Procedure Code.

**Orders Accordingly**

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY,2022.**

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**R. LAGAT KORIR**

**JUDGE**

**JUDGMENT DELIVERED VIRTUALLY IN THE PRESENCE OF 1ST AND 2ND ACCUSED  
(VIRTUALLY PRESENT AT MALINDI GK PRISON) MR. GEKANANA, DEFENCE COUNSEL**

**MR. MWANGI FOR THE PROSECUTION**

**KIPROTICH/JUMA COURT ASSISTANTS**