REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 29 OF 2013

REPUBLIC……...PROSECUTOR

VERSUS

HILLARY KOECH MAIYO……..ACCUSED

JUDGMENT

[1] The accused stands charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Chapter 63 of the Laws of Kenya**. It was alleged that on the **10th March, 2013** at Kobir Village, within Elgeyo Marakwet County, jointly with others not before court, he murdered **Timothy Kemboi Chirchir.** He was arraigned before court and pleaded not guilty on the **30th April, 2013.** The prosecution thereafter presented five witnesses who testified between **6th June, 2017** and **2nd July, 2018** in proof of the allegations against the accused. The defence case was then made on **26th May, 2021**. The accused was represented by **Mr. Komen** while the state was represented by **Mr. Mugun.**

[2] The Prosecution's first witness was **Doris Cherotich Kimaiyo** (**PW1**), who testified on **10th March, 2013**. Her evidence was that she was at home at Kobil in Elgeyo Marakwet at about 1.00 pm when she heard the sound of a tractor coming from the direction of their shamba. She went to see who it was that had intruded into their shamba and found **Jonathan** and **Kiprotich** who, to her knowledge had been restrained from cultivating the farm. They were with the deceased, **Kemboi,** who was her brother. She told court that the tractor was being driven by **Jonathan**; and that she asked **Kiprotich** why they were ploughing against her mother's instructions. It was further the evidence of **PW1** that **Jonathan** proceeded to drive the tractor on the farm and in the process knocked **Kemboi** (the deceased) with it; whereupon **Hillary Koech**, the accused herein, appeared at the scene and proceeded hit **Kemboi** several times on the back of his head. She also stated that **Kiprotich,** a brother to the accused, who had been riding atop the tractor came down and proceeded to cut **Kemboi**'s leg with a panga.

[3] PW1 further stated that, instantaneously, Jonathan's father, **John Williams**, came to the scene and ordered **Jonathan** to drive the tractor away from the shamba; and that **Jonathan** did as instructed and drove the tractor away. She stated that she went to lift **Kemboi** up and saw that his tongue was out and noted that he was bleeding from the head. She told the court that she screamed and their neighbour **Kiprop** and her brother **Kiptoo** came to the scene and took **Kemboi** to hospital as she went to change her blood-stained clothes, before joining them at the hospital. She added that, **Kemboi** was referred to **Moi Teaching and Referral Hospital** as he was still bleeding; and that on the way he succumbed to his injuries. She concluded her evidence by stating that at 8.00 p.m. that very day, she received a call from the Police at Iten requiring her to go and record a statement; which she did the following day.

[4] PW2 was **John Erick Butter Williams,** an uncle to the accused and father to **Jonathan**, who was driving the subject tractor on the material day. He testified that on **10th March, 2013 Kiprotich**, who is a brother to the accused, asked for permission to use his tractor and plough on behalf of their father. He explained that he knew there were family feuds over the subject piece of land and so he asked **Kiprotich** for assurance that it would be in order to go and plough as proposed. **PW2** added that **Kiprotich** left and later called him on the phone to reassure him that it was okay. He then gave approval for diesel to be bought and for his son **Jonathan Kibet** to drive the tractor. He also mentioned that he cautioned **Jonathan** to confirm that it was okay to plough the shamba before commencing the task.

[5] PW2 further testified that he also took it upon himself and talked to **Kiprotich's** father to confirm that it was okay to plough; and that when he came out of the house, after five to seven minutes, he saw a big crowd shouting at the scene and drew the conclusion that the feud was still on. He stated that he walked to the scene and instructed **Jonathan** to remove the tractor from the shamba; but that **Jonathan** did not act with promptitude. He therefore confirmed that the disagreement quickly degenerated and that, in no time, he saw a young man who he identified as **Kipkemboi** son of **Philomena**, slashing the tractor. Fearing serious damage to the tractor, particularly damage to the fuel line, he moved towards the tractor with a view of intervening to prevent further damage. He added that, before he could reach the tractor, **PW1** intercepted him. As he was trying to overcome the obstruction presented by **PW1**, he heard a loud noise and when he turned, he saw **Kipkemboi** (the deceased) on the ground and the accused was standing over him with some object in his hand.

[6] PW2 further told the Court that they ultimately got to remove the tractor from the shamba; and that on the way he decided to go back to

check on the condition of the victim. He added that he found **Kemboi**, lying under a shade in a bad state. He witnessed as the victim was taken away on a motorcycle. He later learned that the victim died; and added that he was not surprised by that turn of events because of the condition in which the victim was. He also mentioned that the tractor was later taken to Iten Police Station and was photographed.

[7] Margaret Toroitich, a relative of the deceased and a clinical officer at Kaptarakwa Hospital, testified as **PW3**. She told the court that on **10th March 2013** she went to church; and that, while there, at about 1.00 p.m., she received a call from her husband, **William Kiptoo**, to the effect that **Kemboi** had been wounded. She proceeded to Iten District hospital with her daughters, **Michelle** and **Sharon,** and found **Kemboi** being attended to. She confirmed that **Kemboi** was thereafter referred to **Moi Teaching and Referral Hospital**; and added that he succumbed to his injuries on the way. His body was then returned to Iten District and the issue was reported to the Police Station. She concluded her evidence by stating that she was present for the post-mortem examination on the deceased's body, and that the cause of death was found to be the head injuries.

[8] PW4 was **Edwin Kipchumba Koech**, a brother to the deceased. His evidence was that he was present and witnessed the post-mortem examination on the body of the deceased, **Timothy Kemboi Chirchir,** conducted on **15th March, 2013** at Iten District Hospital. He too mentioned that the deceased had suffered head injuries. The last prosecution witness was **William Kiptoo Kurgat** who testified as **PW5**. He told the court that on **10th March, 2013** at 1.00 p.m. he was at home when he heard screams from the side of Kobir Village which was about three to four kilometres away. He proceeded there on his motor cycle and found people gathered at the home of **Lazaro Juma**. He found the deceased, who was his younger brother, lying unconscious on the ground, and his body was drenched in blood. He then put him on his motorcycle and took him to Iten District Hospital, from where the deceased was referred to Moi Teaching and Referral Hospital. He confirmed that the deceased died on the way and that they had to return to Iten and had the body taken to Iten District Hospital Mortuary.

[9] In his defence the accused told the court that on **10th March, 2013** at about 12.00 noon, he was washing clothes at the river at Mengich in Kobil Village. He told the court that he knew the deceased as they were cousins. His version of the events was that he went to the scene of murder at 2.00 p.m. He found many people gathered at the scene and was told that the deceased had been hit by a tractor and had been taken to hospital. He added that he thereafter went back to the river to continue with his chores. He further stated that he was arrested on **11th March, 2013** at 4.00 p.m. at Iten Police Station when he went to see his brother who had been arrested. He urged the Court to note that neither the murder weapon nor the clothes the deceased wore on the fateful day, were brought to court as exhibits. He accordingly denied that he attacked the deceased with a blunt object as alleged.

[10] Pursuant to the directions of the Court dated **27th May 2021, Mr. Komen**, learned counsel for the defence filed his written submissions herein on **8th July 2021**. Thus, in his written submissions, **Mr. Komen** pointed out that, in addition to the fact of death, which was not disputed, the Prosecution was under duty to prove the cause of death and to demonstrate that the act or omission causing death was attributable to an unlawful act of assault on the part of the accused person. He urged the Court to find the Prosecution evidence deficient in so far as it is full of gaps and inconsistencies; and therefore that it falls short of the requisite standard of proof. **Mr. Komen** singled out the evidence of **PW1** and **PW2** for criticism; arguing that the two witnesses contradicted each other in material respects. For instance, he pointed out that whereas **PW1** testified that **Jonathan** knocked down the deceased with the tractor he was driving, **PW2** took a contrary position and denied that any such thing occurred.

[11] It was further the submission of **Mr. Komen** that, having failed to call the pathologist, **Dr. Akiruga** of Iten District Hospital, who performed post-mortem on the body of the deceased, it cannot be said that the Prosecution had proved the cause of death of the deceased beyond reasonable doubt. In his submission, it was imperative that the post-mortem form be produced in evidence, and for clear and direct evidence to be adduced as to the cause of death of the deceased, **Timothy Kemboi Chirchir**. He further questioned why neither the investigating officer, **Cpl. Wilfred Maroko**, nor **Jonathan** who was alleged to have hit the deceased with a tractor, was called to testify. He urged the Court to draw an adverse inference from the omission. He made reference to **Irene Chebet Korir vs. Republic** [2017] eKLR, among other authorities, to buttress his argument. He also blamed **PW4** for having compounded the deceased's injuries, in that he chose to transport him to Iten District Hospital and thereafter to Moi Teaching and Referral Hospital on a motor cycle.

[12] Counsel further submitted that, since no attempt was made by the Prosecution to disprove the accused's *alibi*, he is by law entitled to an acquittal. He relied on **Victor Mwendwa Mulinge vs. Republic** [2014] eKLR; **Sentale vs. Uganda** [1968] EA 365 and **Kiarie vs. Republic** [1984] eKLR, among other precedents, to support this argument and to show that the circumstantial evidence presented herein is insufficient to satisfy the conditions set out in **Rex vs. Kipkering Arap Koskei & 2 Others** [1949] EACA 135; **Criminal Appeal No. 56 of 1998: Omar Mzungu Chimera vs. Republic** and **Sawe vs. Republic** [2003] KLR 364 with regard to circumstantial evidence. Thus, it was the submission of **Mr. Komen** that the circumstantial evidence tendered by the Prosecution does not meet the threshold of **Article 50** of the **Constitution**. He consequently urged for the acquittal of the accused person.

[13] The Court has considered the evidence adduced herein by the Prosecution as well as the sworn statement made by the accused person. The Information herein was laid pursuant to **Section 203** as read with **Section 204** of the **Penal Code. Section 203** provides that:

> **"any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."**

[14] Hence, the Prosecution was under obligation to prove the following essential elements beyond reasonable doubt:

[a] The death of the deceased and its cause.

[b] That the accused person committed the unlawful act(s) which caused the death, and

[c] That the accused person(s) had malice aforethought in so acting.

[15] Hence, in **Republic vs. Andrew Omwenga** [2009] eKLR, the above provision was given consideration thus:

> **"...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-**
>
> **(a) The death of the deceased and the cause of that death.**
>
> **(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."**

[16] There is on record credible evidence to prove that **Timothy Kemboi Chirchir** died on the **10th March, 2013**. **PW1**, a sister to the deceased, testified that he was first knocked by a tractor, then cut on the leg, before being hit severally by the accused on the back of the head by the accused person. **PW2** also confirmed that he was at the scene of crime where he heard a thud; and on turning he saw that the deceased lying on the ground and the accused was standing over him with something in his hands. **PW2** indicated that observed the deceased after the incident noted that his condition was critical. He added that he was not surprised that the deceased did not survive, given the injuries he suffered and the condition in which he was when he was taken to hospital. Moreover, **PW3, PW4 and PW5** all confirmed the death and their presence during post-mortem examination. Indeed, at page 4 of his written submissions dated **7th July 2021, Mr. Komen** conceded that the fact of death of **Timothy Kemboi Chirchir,** had been proved beyond reasonable doubt by the Prosecution; and I so find.

[17] As to the cause of the deceased's death, it is now settled that, save for instances where the cause of death is obvious, the best evidence in this connection is the evidence of the pathologist who examined the body for purposes of ascertaining the cause of death in terms of the post-mortem report. This was emphasized by the Court of Appeal in **Ndungu vs. Republic** [1985] eKLR thus:

> **"…Where the body is available and the body has been examined a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means or seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the postmortem examination is cross-examined…"**

[18] In the instant case, it was alleged that post-mortem examination was conducted on the body of the deceased; and that it was witnessed by **PW3** and **PW4**. The post-mortem report was however not produced before the Court as was expected. This was because the pathologist who conducted the post-mortem examination was never availed to testify, in spite of numerous adjournments for that purpose. The question to pose, therefore, is whether this omission is fatal to the Prosecution case.

[19] In **Bernard Reuta Masake vs. Republic [2019] eKLR** the Court of Appeal took the following view:

> **"We note that it is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Comparatively, in the Tanzania case of Republic v Cheya & another (1973) EA 500, it was stated:**
>
> > ***"The absence of medical evidence as to death and the cause of it is not fatal because a post mortem report primarily is evidence of two things; the fact of death and the cause of it. However, the fact of death and the cause of it could be established otherwise than by medical evidence."***
> >
> > **(See also Chengo Nickson Kalama v Republic [2015] eKLR, Ndungu v Republic [1985] eKLR and Republic v Frankline Mugendi Miriti & another [2019] eKLR)."**

[20] The Court of Appeal proceeded to add, at paragraphs 39 and 40 of its Judgment, that:

> **"Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by a death without the opportunity for a *novus actus interveniens*, a court is entitled to accept such evidence as an indication that the assault caused the death. (See Kashenda Njunga, Francis Kandonga Kangeya, George Musenga Chikatu, Chimunga Kangol Shamuzala and Oscar Maseke Makuwa v The People (1988-1989) Z.R. 1 (S.C.). It is not the requirement of the law that the cause of death must be established in every murder case. It is now established law that homicide can be satisfactorily proved without first establishing the cause of death. (See Seif Selemani v The Republic in the Court of Appeal of Tanzania at Tanga Criminal Appeal No. 130 of 2005). In a recent decision by the Tanzania Court of Appeal in the case of Mathias Bundala v Republic, Criminal Appeal No 62 of 2004 (unreported) the court stated:-**
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> > ***"…….it is not the requirement of the law that the cause of death must be established in every murder case. We are aware of the practice that death may be proved by circumstantial evidence even without the production of the body of the alleged dead person: (See for instance, LEONARD MPOMA v REPUBLIC (1978) T L R 58).***
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> **Persuaded by the merits of the above cited comparative decisions, we find that the absence of a post mortem report in this matter did not dent the prosecution case."**

[21] Clearly therefore, failure by the Prosecution to avail the pathologist to produce the post-mortem form is not necessarily fatal. It is now trite that where the cause of death is obvious, such as where the deceased was stabbed through the heart or where the head is crushed, a conclusion as to the cause of death can be drawn accordingly (see **Ndungu vs. Republic**, supra). In this case, **PW1**, **PW3,** and **PW4** were

consistent in their evidence that the deceased had suffered severe head injuries after he was hit several times by the accused with a blunt object on the back of his head. In the account by **PW1,** the head injury resulting in the protrusion of the deceased tongue as well excessive bleeding; and that it was as a direct outcome of it that the deceased quickly slipped into unconsciousness.

[22] Likewise, although he did not see the accused hit the deceased on the head, **PW2** told the Court that he heard a thud; and on turning his attention to its direction, he saw the deceased lying on the ground and the accused was standing over him with some object in his hand. Additionally, both **PW3 and PW4** who attended the post-mortem were resolute that the cause of the deceased's death was found to be the head injuries. It is to be recalled that **PW4** is a clinical officer and was therefore in a position to better appreciate the nature of the deceased's injuries and their co-relation to the cause of his death.

[23] It is therefore manifest that the head injuries suffered by the deceased on the **10th March, 2013** were the direct cause of his death. It matters not that the deceased had been hit by a tractor at the instance of Jonathan and cut with a panga by **Kiprotich** prior to the infliction by the accused of the head injuries. I am guided in this regard by the decision of the Court of Appeal **Njoroge vs. Republic** [1983] KLR 197, 204 that:

> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."**

[24] And, for purposes of common intention, it was held in **Dickson Mwangi Munene & Another vs. Republic** [2014] eKLR, that:

> **"56. ...common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia v R [1963] EA 363 where "there was no evidence of any agreement formed by the appellants prior to the attack made by each" it was held that "that is not necessary if an intention to act in concert can be inferred from their actions" like "where a number of persons took part in beating a thief."**

[25] It is therefore my finding that this is one of those special circumstances where the cause of death can be, and has been, established without production of the post mortem report. The evidence adduced herein by the Prosecution's eye witnesses proves beyond reasonable doubt that the deceased person was assaulted as he attempted to resist the ploughing of his parent's piece of land by the family of the accused. The events occurred in broad daylight at about 1.00 p.m. and there was therefore no difficulty in **PW1** and **PW2** identifying the accused as the assailant. Moreover, it is not in dispute that all the individuals involved in this matter are all close relatives and therefore, it is unquestionable that the accused was well-known to both **PW1** and **PW2**.

[26] It is also significant, from the evidence of **PW1** and **PW2**, that there was an underlying land dispute between the family of the deceased and the family of the accused; that, on the fateful day, the accused's brother had caused **PW2**'s tractor to be taken to the disputed land with a view of ploughing it. It appears, from the evidence of **PW2** that the deceased was on the farm to stop the proposed activity; and that he had a panga with which he cut the tractor. Be that as it may, it is clear that the accused went to the scene where **Jonathan, Kiprotich** and the deceased were quarrelling and assaulted the deceased by hitting him on the head several times, thereby causing him debilitating injuries from which he succumbed. Hence, although the accused denied any existence of such a dispute, the account presented by **PW1** and **PW2** is credible enough on this aspect of the case; and I accept it as the truth about what happened. I am satisfied therefore that, in assaulting the deceased as he did, the accused acted unlawfully.

[27] Thus, having carefully scrutinized the evidence before court, it is my finding that the identification of the accused herein was positive and free from error. The positive identification of the accused therefore is a complete displacement of his *alibi* defence in so far as it places him at the scene of crime at the exact time of its occurrence. It is noteworthy too that in his statement, the accused talked of 12.00 p.m. as opposed to 1.00 p.m. He also conceded to having been at the scene at 2.00 p.m. before going back to the river. He therefore had the opportunity to commit the crime.

[28] In arriving at the conclusions aforestated, I have taken into account the argument by **Mr. Komen** that not all the witnesses lined up by the Prosecution were called. In particular counsel urged the Court to draw an adverse inference from the fact that the Prosecution failed to call the investigating officer, **Jonathan,** as well as the pathologist. Indeed, there were many others at the scene, including a neighbour known as **Kiprop,** who were not availed. What is the effect of such an omission and what is the Court to conclude in such situations?

[29] The guiding principles were well restated by the Court of Appeal in Sahali Omar vs. Republic [2017] eKLR thus:

> **"The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda (1972 E.A; where the court held that: -**
>
> > **i. "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
> >
> > **ii. The court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**
> >
> > **iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

[30] The Court however made it clear that:

> **"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

[31] In the premises, having found that the Prosecution has presented credible evidence linking the accused with the murder of the deceased, I take the view that the failure to call the aforementioned witnesses has no adverse effect on the Prosecution case. Likewise, the submission by **Mr. Komen** that the Prosecution case was riddled with contradictions and inconsistencies lacks basis. The only single issue raised by him in this regard was that whereas **PW1** testified that **Jonathan** knocked down the deceased with the tractor he was driving, **PW2** took a contrary position and denied this. I did not find that contradiction to be material. Indeed, in **John Nyaga Njuki & 4 Others vs. Republic**, Cr. App. No. 160 of 2000, the Court of Appeal explained that:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."**

[32] Likewise, ***in Philip Nzaka Watu vs. R*** [2016] eKLR the Court of Appeal acknowledged that human recollection is not infallible. Here is what it had to say in this regard:

> ***"...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

[33] It is also of no consequence, in my considered view, that the deceased was transported to hospital on a motor cycle. The fact remains that the assault by the accused person is what caused the deceased to be in the state in which he was before his demise.

[34] That said, the last issue to consider is whether the Prosecution proved malice aforethought on the part of the accused. Malice aforethought has been defined under **Section 206** of the **Penal Code** in the following as hereunder:

> **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.**

[35] Thus, in the case **Nzuki vs. Republic** [1993] KLR 171 the Court of Appeal held that:

> **"...murder is the unlawful killing of a human being with malice aforethought. '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...Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused:**
>
> **(i) The intention to cause death;**
>
> **(ii) The intention to cause grievous bodily harm;**
>
> **(iii)Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.**

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in one of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed."

[36] In this case it is clear that the deceased was caught off guard by the accused. There is no indication that he fought back in self-defence or otherwise. It is instructive therefore that malice aforethought is not just the intention to cause death, but includes the 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; and it matters not that 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. Hence, the circumstances of the vicious attack of the deceased by the accused discloses malice aforethought for purposes of **Section 206** of the **Penal Code.**

[37] I am guided, in this respect, by the decision of the Court of Appeal in **Daniel Muthee vs. Republic Criminal Appeal No. 218 of 2005 (UR)** wherein it was held that:

"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."

[38] The accused in his defence took issue with the fact that no murder weapon was brought before court. Suffice it to say that it is not a must that the murder weapon be produced before court, and authorities abound to support this viewpoint. For instance, in **Karani vs. Republic** [2010] 1 KLR 73 it was held thus:

"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering convictions without the weapon being produced as an exhibit."

[39] In the result, it is my finding that the Prosecution has proved all the ingredients of the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code** beyond reasonable doubt. I accordingly find the accused guilty thereof and convict him accordingly.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JANUARY 2022.

OLGA SEWE

JUDGE