



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAAYA

CRIMINAL CASE NO. 12 OF 2020 [MURDER]

CORAM: HON R.E. ABURILIJ

STATE.....PROSECUTION

VERSUS

MICHAEL ONYANGO AWICH.....ACCUSED

JUDGMENT

1. The accused person, **Michael Onyango Awich** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the offence are that on the night of 11th and 12th January 2020 at an unknown place in Siaya sub-county within Siaya County, the accused person, jointly with others not before court murdered one **Charles Oduor Awich**.

2. The accused pleaded not guilty to the Information. The prosecution called fourteen witnesses to establish a prima facie case against the accused person, warranting him to be placed on his defence.

3. The accused testified on oath denying any involvement in the murder of the deceased who, from the undisputed facts placed before this court, was his blood brother. The evidence adduced was as follows:

4. PW1, Lawrence Oduori Bwire testified that on 17.1.2020, he received one Boniface Oloo who was accompanied by the accused herein, and that the accused had gone seeking for prayers on account that he was not feeling well. PW1 testified that he prophesied to the accused that the accused had a land dispute to which the accused conceded and further that he told the accused that a person had been taken to the riverside by three people and murdered by the said three people which shocked the accused who revealed that he thought that his brother was alive and yet his brother had died.

5. PW1 testified that he informed the accused to return to his home and inform his relatives to look for the deceased who had been killed by three people, which people cut the deceased and that the accused responded by saying that he was afraid because his relatives had already suspected him of the murder of his brother. PW1 further testified that he took his friend Bonface Oloo aside and informed him that the accused knew about the deceased's death after which he gave them some herbs for a ritual to be performed but that the accused did not return the following day as instructed. He later recorded his statement at Siaya Police Station.

6. On cross-examination, PW1 stated that he was a farmer and a traditional medicine practitioner and that the ritual he performed on the accused was done at the home of Boniface Oloo and further that the accused informed him that he was a suspect in the deceased's murder. He testified that he was not called to identify the accused whom he had seen on the 10.1.2020. In re-examination PW1 stated that he saw the accused first on 17.1.2020 at about 7 p.m. when the accused went to PW1's house accompanied by Bonface Oloo, and not on 10.1.2020 as earlier stated.

7. PW2 Dr. Angira Stephen from Port Victoria Sub-County Hospital in Bunyala testified that On 4.3.2020 at 11.30am he was called to conduct an autopsy on the body of the deceased Charles Oduor Awich. He testified that upon examination of the body, there was gross mobbing and putrefaction (body was decomposing and greening - forming blisters) of the body and further that there was washer woman appearance on both lower limbs and the right upper limb. There was a cut wound on the midline of the abdomen and multiple 5cm stab wounds on the abdomen. There was decapitation of right skin of neck holding which was hanging and that the left upper limb including shoulder blade was missing. There was skinning of the right and left chest involving all ribs up to the back and that there were multiple 1cm stab wounds on the thighs and anterior leg.

8. Internally, the lungs were present but not baggy signifying that no water got into the lungs. The cardiovascular system was normal whereas in the digestive system, he noticed the intestines were perforated and the liver and gall bladder were missing. The spinal column vertebrae

were severed and the C cord was also severed.

9. Dr. Angira testified that as a result of his examination, he formed the opinion that the cause of death was decapitation and severe haemorrhage and he issued Death Certificate No. 729167 and signed the postmortem on 4.3.2020 which he produced as exhibit P. Ex 1.

10. PW3 Hellen Auma Oduor, the deceased's wife testified that on the 11.1.2020 at midnight he was in the house with the deceased and their two sons and that the children had been studying but the deceased told them to go and sleep at the home of Maurice Oduor Akoyo where they used to sleep. It was her testimony that as the children were on their way, they met 2 motorcyclists who told the children to return to their parents' house and wake them up so when she was awakened, she opened the door and was confronted by two people, one standing by the motorbike and another standing near PW3 who informed her that they were policemen and had come to take the deceased so he could go and record a statement at Ndere Centre. PW3 further testified that she inquired as to the crime that the deceased had committed to which she was told to follow them to Ndere Police to find out.

11. PW3 testified that she and one of her sons followed the people who had now taken the deceased with them on the motorbike to Ndere but they followed a shorter route but upon reaching Ndere Police Station, they did not find anyone despite waiting for 15 minutes. She stated that the following day, she went back to the Police Station but she was informed that the officers there did not carry out any patrols the previous night and they directed her to Siaya Police Station where she was also unsuccessful in tracing the deceased.

12. She testified that at Siaya Police Station, the police inquired from her whether the deceased was in conflict with anyone to which she responded by stating that the deceased was in conflict with his brother, the accused, over land after which she spoke with the area assistant chief to call the accused to the station but the accused never showed up despite indicating that he would. She testified that they later left for the accused's home but did not find him.

13. It was her testimony that she was not able to trace the deceased until she received a report from a lady called Nyamrith who informed her that she had dreamt that the deceased spoke to her telling her that he was killed and was at Olango River where she was informed of the presence of a body in a sack with a red pant. She stated that they went to Nzoia River and they were told that a body had been removed and taken to the mortuary at Port Victoria. They proceeded to Port Victoria Mortuary and were informed that the body had been recovered on a Wednesday.

14. PW3 stated that she identified the body as her husband's using his left toe and his teeth and noted that he had been slaughtered on the neck and stomach – abdomen with the inner organs recovered. She also noted that his left hand was also cut off. It was her testimony that she could not identify the people who had abducted the deceased as they were facing down and standing sideways whereas the one on the motorcycle was holding a big bag and lying on it. She identified the accused before court and further stated that when the accused was called by the police, he disappeared. It was her testimony that the accused was a threat to her life and that of her children because of the land dispute.

15. In cross-examination, PW3 stated that she had never met the individuals who abducted the deceased and further that she did not ask them for identification when they alleged to be policemen. She further stated that her other in-laws went to the police station when they received the information of the deceased missing but the accused did not. She further stated that her husband was a watchman at a nearby school and would go to patrol it at 8 p.m., return home then go back at around midnight and return because the school was nearby.

16. PW4, the deceased's 16-year-old son and being a minor, his name is hereby withheld was taken through a *voire dire* examination and satisfied the court that he possessed sufficient intelligence and understanding of the meaning of an oath and telling the truth. He testified and corroborated the testimony of his mother PW3. It was his testimony further that he saw his father's body at the mortuary at Port Victoria. He further identified the accused in the dock whom he knew as his uncle.

17. PW4 further testified that when the deceased vanished, the accused went to their home and asked them why they did not inform him of the disappearance of their father after which they took him to their mother, PW3, who had gone to church. It was his testimony further that on that very day when the accused was called and told to go to Siaya Police Station to record a statement, he boarded a motor cycle and disappeared hence raising suspicion that he was involved in the deceased's death. PW4 testified that he was aware that the accused had a land dispute at Nyalgunga with his father, the deceased.

18. In cross-examination, PW4 reiterated that they met the 2 people as they were leaving their house going to sleep at the neighbour's place and that they had never met the people in question before. He stated that the accused went to their home on a Sunday looking for his mother and PW4 took him to where his mother was. It was his testimony that the accused was with another person who was unfamiliar to him. He further stated that the accused was called to the Police station to make a statement but he disappeared. He stated that the deceased's body was traced in March 2020. PW4 further stated that there was a land issue among the brothers as they were cultivating the land given by his grandfather when the deceased discovered that it had been sold by the accused so the deceased started following it up.

19. **PW5 Consolata Achieng Otieno** a teacher at Oseno Komollo Primary School along Siaya-Ndere Road where the deceased used to work as a guard identified the accused before court and stated that on the 13.1.2020, the accused who was a parent at the school approached her seeking information on what the upcoming parents meeting would decide regarding some fees to be paid as examination fees. She testified that she was not in a position to preempt what decision other parents would make and that the accused then gave her Kshs. 1000 and informed her that he would be away for a long time and that she could use the money for examination fees for his children schooling in that school when the parents would finally make the decision.

20. In cross-examination, PW5 stated that the parents' meeting date had not been fixed yet as schools had just opened. She further stated that the accused left at 11.30 a.m. on the 13.1.2020 and when she went to class, she found the accused's child, Luka, absent. She stated that the money the accused paid was to cater for any required payments for both his children Luka and Quinter.

21. **PW6 No.67625 Police Constable Aboud Hassan** who previously served at Port Victoria in Busia County handling Kenya Coast guard

services testified that on the 21.2.2020, he was at the station when he got a report that there was a dead body seen at Sango Beach. He testified that they left the station with his colleagues at 10 a.m. and arrived at Sango Beach in the waters where they found a dead body with a missing left hand with injuries on the neck. They removed the body to the mortuary at Port Victoria for further investigations to be undertaken.

22. **PW7 Killion Richard Mbeya** testified that the deceased was his cousin, brother-in-law and a neighbour who lived 50 metres away from PW7's home. He identified the accused in the dock, whom he knew, as the deceased's brother. It was his testimony that on the 11.8.2014 he met the deceased on his way to Kobare where he had been summoned by the Chief. PW7 stated that when he reached the Chief's office, he found the 8 family members of Awich family dispersing and the deceased informed him that they had been summoned and asked whether they knew some lady and a man, who it was alleged had bought the land of Mzee Awich and paid the family Kshs. 300,000.

23. It was his testimony that on 13.8.2014, the deceased informed him that his grandmother Peres Ragot Orodo had died on 12.8.2014 and was found by the Chief Thomas Ojiello and that they reported the death to Siaya Police Station vide O.B. No. 29/13/8/2014. He further testified that on 11.9.2014, the deceased carried out a search at the Lands Offices and found that the entry had been reversed from Peres Ragot Orodo who was found dead and the deceased, back to Wilson Orodo. He testified that he advised the deceased to consult a lawyer which resulted in Civil Case No. 324/2016 filed at Kisumu High Court and later it was referred to Siaya.

24. It was his testimony that the deceased later met his other family members at the lawyer's offices where it emerged that the whole family but for the deceased, were for the sale of the land given to the deceased by his grandfather. He further testified that the accused had been bringing buyers to the land trying to sell it.

25. PW7 testified that on the 14.1.2020, he saw Peter Onyango Oyugi riding a white G.K. motor bike going to the home of Awich Olar where the accused resided. He stated that at that time, he, PW7 and others were searching for the deceased who had disappeared. It was his testimony that the family land No. 491 was later to be transferred from the deceased Peres Ragot Orodo to the names of Jennifer Juma Awich, the mother of the deceased and the accused, to Janet Lorna Adhiambo, the wife of Peter Onyango Oyugi. He further testified that from the appearance of the deceased's body as recovered at Port Victoria, he appeared to have been killed by more than one person.

26. He testified that he noticed that the left arm was missing, that the deceased had been slaughtered open from the chest to the abdomen, the internal organs were missing and that the neck was cut off with only a piece of flesh holding the head and neck. He stated that both thighs were pierced nine times on each thigh and that the head was spongy. He further stated that since the accused person was arrested, they had been sleeping well as there was no cattle stealing as the accused used to be a cattle thief and that the community wrote a letter complaining against the accused.

27. In cross-examination, PW7 stated that the buyers of the land were Peter Onyango and his wife whereas the sellers were the accused and his other brothers to the exclusion of Charles Oduor the deceased herein and that Thomas Ojiello, the area Chief, was bribed to manipulate the sale of the Awich land. He stated that the Police did not take action in the murder of Peres Orodo and that the Owner/rider of the motor cycle was Peter Onyango.

28. **PW8 Janet Lorna Adhiambo** testified that in mid-2014, her husband and herself searched for land to purchase and were shown land at Nyalgunga owned by one Caleb Awich who had died. She testified that they did a search at the lands office and found it registered in the name of Wilson Orodo and that the seller was one Jennipher Awich. She testified that after obtaining title, she went to the land and found maize crop and was told that it belonged to the deceased and that she notified the deceased not to cultivate the land as she wanted to use the land. It was her testimony that subsequently, she reported the matter to the police and that on 5.12.2016 she received a letter summoning her to appear in Kisumu court on 16/3/2017 in a case involving the land that she had bought. She produced the 1st sale agreement dated 14.8.2014 as P Exhibit 2 and the 1st search carried out on the 11.8.2014 as P Exhibit 3 and the 2nd search dated 10.9.2014 as P Exhibit 4.

29. In cross-examination, she stated that it was Caleb Awich who introduced her to the land. She stated that she cultivated the land but did not live on it as she lived 4-5 kilometers away. She stated that neither the deceased nor the accused were her neighbours. She further stated that when she bought the land, she found maize crop there and was told that it belonged to the deceased in this case. She stated that she did not harvest the maize but that a neighbour harvested it. She stated that she was not aware of any dispute over the said land and that the accused was present during the process of negotiations for sale of the land to her.

30. **PW9 Peter Ochieng' Keya** the Assistant Chief of Nyalgunga Sub-location testified that on the 1.3.2016, the deceased went to PW9's office seeking help claiming that his portion of land, Central Alego 491, given to him by Wilson Orodo, his grandfather, was being sold out by some of his family members. He testified that he introduced the deceased as a beneficiary to the land in issue to the Land Registrar by a letter dated 1/3/2016 which he produced as P Exhibit 8. He further produced a letter dated 29.2.2016 as P Exhibit 9 confirming the 3 wives of Wilson Orodo.

31. It was his testimony that the deceased showed him an official search dated 10.1.2014 showing the owner of the land to be Peres Ragot Orodo and Charles Oduor Awich. He further stated that a dispute arose between the Awich family members as the lower portion had been given to Peter Oloo Odongo and the deceased because Peter was residing on the same while the deceased only cultivated the said land when he received a directive to remove his crop which he had planted thereon.

32. **PW10 Joshua Ochieng Awich**, a brother to both the accused and the deceased testified that on 11.1.2020, he received a phone call at about 11pm from Habil Otieno his other brother who also lived in Busia to the effect that the deceased had been arrested the previous night at 11pm but that no report was available at the police station. He testified that he rung the deceased's phone and the deceased's wife picked the phone which was unusual as the deceased always picked his own personally. It was his testimony that the following day, he and his brother Habil went to look for the deceased but they were not successful and thus he returned to his home in Busia. He stated that while at his home, the accused called him saying that the deceased had been arrested by police yet people were alleging that it was him- the accused who had taken the deceased away.

33. PW10 testified that the accused later blocked his phone and could not be reached yet he used to live at home with the deceased Charles. He stated that the accused was later found at Bumala. He testified that the deceased and the accused never saw eye to eye unless PW10 was around which disagreement started when their mother used the accused to sell off a portion of land which belonged to the deceased. He further testified that the accused often sold off family items.

34. In cross-examination, PW10 stated that he had lived in Busia since 1999 and only went to his rural home whenever there was a funeral. He further stated that the accused used to visit Habil in Busia but not him and that he knew the accused used to operate a restaurant at Ndere. PW10 further stated that when the deceased went missing, the accused called PW10 on the Monday of 13.1.2020 at 11.00 a.m. He admitted that he did not know the number of the land being sold.

35. **PW11 Alex Mutua** the Land Registrar, Siaya County from December 2020 testified that he took over from Machora Mong'are who had since died. It was his testimony that from the green card for Central Alego/Nyalgunga/491, the first proprietor was Wilson Orodo on 17.8.1978 and on 6.1.2009 there was an erroneous registration of Peres Ragot Orodo and Charles Oduor Awich as proprietors.

36. He further stated that on 9.9.2014, a restriction was registered by Charles Oduor Awich to await succession process in court, which restriction was later removed on 8.5.2015 vide succession cause No. 17/2014 and Jennipher Juma Awich was registered as an administrator.

37. PW11 testified that on 8.5.2015 Jennipher Juma Awich was registered upon confirmation of grant and on 8.6.2015, she was issued with a Title Deed. He stated that on 23.10.2015, Jennipher transferred the land to Janet Lorna Adhiambo. He stated that there was an erroneous registration where the Land Registrar just stated that it was an error and cancelled the registration. PW11 testified that the information in the green card was accurate. He produced a certified copy of the register as P Exhibit 10.

38. In cross-examination, PW11 stated that the entry number was cancelled with a remark that it was an erroneous entry but that all other entries were accurate. He stated that there was no entry for Michael Awich.

39. **PW12 No. 66783 CPL Simon Likony**, the crime scenes investigator, Siaya County testified that on 26.2.2020 at about 2 p.m. while at Siaya Office, the D.C.I.O. Siaya Mr. Muhaya requested him to accompany him to Port Victoria Referral Hospital and take photographs of a body discovered in Lake Victoria by Coast Guards and preserved in the Port Victoria Morgue. He testified that they went and on arrival they were led by an Officer from Port Victoria Police Station P.C. Kiptor in the company of the deceased's relatives and Family members.

40. It was his testimony that before taking photographs, he was told that the deceased went missing from 11.1.2020 and later the body was found floating at Sango in Lake Victoria on the 19th February 2020 by coast guard officers from Port Victoria Police Station. He stated that on arrival at the morgue, he was shown a decomposing body of a male adult lying on the floor and on observation he noticed that the deceased's left hand had been amputated, he had a deep cut on the abdomen area, throat slaughtered, disfigured face and a swollen head. He testified that he took seven photographs as follows:

- a) General view of the Port Victoria Hospital Morgue.
- b) Closer view of the wrapped body in yellow and red plastic bags.
- c) Closer full length view of the deceased.
- d) Closer Lower view of the deceased showing a deep cut on the abdomen
- e) Closer Lower view of the deceased`.
- f) Closer view of the amputated left hand.
- g) Closer facial view of the deceased for identification purposes.

41. It was his testimony that the photographs were printed under his supervision and films were preserved with no interference. He produced the photographs as P. Exhibit No. 11 (a) – (g) and the certificate of production of photographic evidence as P. Exhibit 11(h).

42. In cross-examination, he stated that his report and certificate are both dated 30.1.2021.

43. **PW13 Leah Akoth Oloo** a resident of Murende in Busia County and a casual worker-stone crusher testified that on the 13/1/2020 at 10.00 am she was crushing stones when she saw "*Jaduong Lango*" arrive on a motorcycle and on reaching near a tree, at her mother in-law's homestead, he sat under the tree. She testified that he was dressed in shorts, with a T-shirt and a jacket with red strips whilst carrying a metal bar for removing stones. It was her testimony that she went to where he was and greeted him and questioned him why he was dressed the way he was to which he responded by saying in Kiswahili that 'Naburi', "inabidi." *English translation Naburi, it has to* "...*'Naburi' is the name that Jaduong Lango used to call the witness by.*

44. It was her testimony that Jduong Lango whom she identified to be the accused herein appeared disturbed to the point that he was unable to eat despite PW13's husband coaxing him. She testified that the accused-"*Jaduong Lang'o*" slept in her house until the following day but he lacked any peace and that he informed them that he had gone there to make stones so that he could fend for his family. It was her testimony that she knew the accused as a pastor through their Holy Spirit Church at Busia town and that she had known him for many years as he occasionally visited their home.

45. It was her testimony that the following day a Tuesday, as the accused slept in her sitting room, the accused never had sleep but had nightmares and made movements and talked to himself throughout the night until morning. She further testified that on a Friday, the accused asked her husband to escort him to a prayer man and they went. Upon their return, her husband told her that the prayer man told the accused that there was a shadow of his brother following the accused. She further stated that she recalled her husband inquiring from the accused about his home but that the accused was evasive.

46. PW13 testified that she discussed with her husband whether to chase the accused but he declined and said that he would inform the police which he did and the police came and arrested the accused on a Sunday. She testified that the accused never told her what was happening to him. She further stated that her husband had since vanished from home, and she had learnt that he only returned when she was away. She further identified the accused, whom she referred to as Jaduong Lang'o, in the dock.

47. In cross-examination, PW13 stated that she had known the accused for many years. She stated that the accused visited them saying that he had gone to work and stayed in her house for the whole week prior to being arrested on a Sunday. She stated that the accused went to be prayed for by Lawrence Odhiambo Bwire, PW1 a traditional seer and that while at her house, the accused was sleepless and restless. She further stated that she had never been arrested in connection with this case and that her husband ran away on 19/1/2020 and had never returned.

48. **PW14 No. 58242 Sgt. John Nzebe** attached to DCI Siaya, the Investigating Officer in this matter testified that on the 13/1/2020 in the morning, he was tasked to investigate a case of a missing person as reported by the wife Hellen Auma Oduor. He testified that it was alleged that the person had gone missing the previous day and in the course of investigations, PW14 established that the person's younger brother Michael Onyango Awich was suspected to have abducted him and that the said Michael Onyango Awich had disappeared from his home to unknown place.

49. He testified that he also learnt of an existing land dispute between Michael Awich and the deceased Charles Oduor concerning land in Nyalgunga which was sold by their mother in collaboration with the accused and the deceased had filed a civil suit in court to recover the said land. It was his testimony that on 19/1/2020, they received a report that the accused was in Murende village in Busia County in the home of Bonface Oloo who had leaked information on the whereabouts of the accused and police officers were dispatched to go and arrest him. PW14 testified that upon interrogation, the accused stated that he was scared of being linked to the vanishing of his brother so he escaped for his life and that prior to the kidnapping of his brother, two people went to his home saying they would do something to the deceased.

50. PW14 testified that the accused told him that he suspected that his brother who was a watchman at Oseno Komollo Primary School was kidnapped, killed and thrown in River Nyathi and he offered to take the police there. He further testified that on arrival, the accused changed the story and said that he was told by a pastor that his brother was killed and thrown in River Nyathi between two big trees, but they could not find the body so the officer returned and charged the accused with the offence of abduction.

51. It was his testimony that on 21/2/2020, they received a report of a body of a male adult retrieved from Sango Sand harvesting site in Port Victoria and the body taken to Port Victoria Mortuary and the relatives went and identified the body to be that of the deceased Charles Oduor Awich. He testified that on 4/3/2020, he accompanied the widow, son and a brother and other relatives of the deceased to Port Victoria Mortuary and they positively identified a disfigured and decomposing body of the deceased and a postmortem was done.

52. PW14 also recalled that on 16/3/2020, he received information that the person who had housed the accused and who escaped out of fear, had been cited and arrested and upon interrogation, he revealed to the police that the accused had told him that his brother was kidnapped and killed and further that the accused had sought to be taken to a healer who told them that the accused had killed his brother the deceased. The statement of Bonface Oloo who had vanished and could not be traced to come to court and testify despite summons and warrant of arrest being issued by this court, was produced in evidence by PW14 as P. Exhibit 12. The accused and his counsel did not object to the production of the said statement.

53. PW14 further testified that he also recorded the statement of the head teacher of Koseno Komollo Primary school Consolata Achieng who informed him that on 10/1/2020 the accused had gone to her school and told her that he was going on a long journey and gave her KShs. 1,000 for his 2 children who were in Class eight saying he was to be away so, if anything was required, the money would be used by the school, a clear indication of what the accused was planning to do the following day.

The Defence Case

54. Placed on his defence, the accused gave a sworn testimony. He stated that he was a jua kali worker who lived in Luanda village, Komollo sub-location and was a brother to the deceased with whose murder he was charged with. It was his testimony that on the 11/1/2020 he was at their home and that he did not know that his brother had gone missing until the Assistant Chief, Felix Oruenyo, called him at 9.00 am telling him that his brother had allegedly been arrested the previous night by 2 policemen and taken to Nderi.

55. He testified that he then proceeded to the deceased's home as they did not live together, a distance of about 500 metres from his home, a distance that took him 8 – 10 minutes while walking.

56. The accused testified that he went to the home of Tabu a village elder near his home and informed him of what the Assistant Chief had told him. He testified that he went with Tabu to his late brother's house where they found the deceased's children preparing to go to church who explained to him what had transpired.

57. It was his testimony that he accompanied the said children of the deceased to church where their mother had gone for prayers and called her out of the church. That the deceased's wife explained to him what had transpired the previous night saying she went to find out from Ndere Police Station but had not traced her husband and that she did not know the people who took away her husband claiming he was under arrest. The accused testified that he went to the home of the Assistant Chief and explained himself.

58. The accused testified that on the 13/1/2020 he left home to go look for employment. He stated that a friend of his had called him for a jua kali job of mining stones. He testified that he knew his brother could be safe in custody. It was his testimony that he sold his chips box for Kshs. 1,000/= and took to school the proceeds to pay fees for his 2 children then he proceeded to Bumala to meet Bonface Oloo his friend whom he used to work with. He testified that he had known Bonface for 5 years as they used to pray together.

59. The accused testified that he was arrested on 19/1/2020 at a quarry in Bumala Mining Stones and that those who arrested him told him to go and show them where his brother was. He testified that at the time, he did not know if his brother's body had been discovered until he was arraigned and the charges read to him.

60. The accused testified that he had never had any disagreement with any of his brothers. It was his testimony that the land in issue was at their maternal uncle's place and that he never had any issue about the land. He testified that his mother's portion was sold in 2015 by his mother and he could not concern himself with it in 2020. He further testified that he never claimed any portion of it.

61. He further testified that upon his arrest, he was taken to Siaya Police Station and he was not told to record any statement and when he was asked to record his statement, he told them to call his brothers first.

62. He testified that he was shown photographs but he could not recognize his brother's body because it was mutilated. He stated that he had a motorcycle belonging to someone but he returned it to him. He stated that he could not kill his brother.

63. In cross-examination, the accused testified that he had a good relationship with his late brother and that when the Nyalgunga Land was being sold, he was only a witness. He stated that he learnt of a pending land case in court involving Nyalgunga. He denied selling the land and when he was shown PExhibit 2 that showed that he and Jennifer Awich were the sellers of the land in issue, the accused stated that the land was not his so he could not sell it. The accused admitted that the agreement PEx2 had his identity card number and signature.

64. It was his testimony that on the 22/1/2020 he recorded his statement at Siaya Police Station which he signed. He testified that the Police pressed his private parts and that is when he agreed to sign the statement. The accused testified that he had never complained before the court upon his arraignment, that he was assaulted by the police or forced to sign the statement.

65. The accused testified that he went to Ndere Police Station inquiring about his brother and found one police officer. He further stated that he had not informed the police that he decided to run away to Bumala after receiving a call from Felix who told him to go to Ndere Police Station to record a statement concerning his brother's disappearance. He stated that he went to Bumala because he had children and when he heard that his brother was arrested, he knew that he was in the hands of the Government. He testified that he had to fend for his family and that his other brother, Joshua, told him that that he was following up on the issue of their missing brother.

66. The accused denied disappearing from home on account of his brother's death. He further stated that upon his arrest on the 22/1/2020, he took the police to Nyathi River to look for the body of his brother but when they reached there, they did not find the body. He testified that someone told them that his brother's body was at Nyathi River. He stated that he was one of those who told the police that his brother was at Nyathi River. He stated that he told the police officers that for the past three years, he had no differences with his late brother.

67. In re-examination, the accused stated that in PEx 2, the seller was Jennifer Juma and the buyer was Janet Lorna and that there was nowhere in the agreement indicating that he had sold the land. The accused admitted that he went with the police to Nyathi River and was in fact the one who took them to Nyathi River.

Defence Submissions

68. It was submitted that the case against the accused was a matter of suspicion as the deceased's wife did not testify to the fact that the accused and his brother were of bad blood or always in a fight for land. It was further submitted that the nexus between the land sold in 2015 (PEx 2 was between PW 8 and Jennifer Awich, the proprietor) and when the alleged abduction and murder happened in 2019 was so wide to infer that the accused was involved in the deceased's death because of such disagreement.

69. The accused person's counsel submitted that this was a case of suspicion and circumstantial evidence, and that to convict on this evidence or testimonies, the court must be extremely careful. Reliance was placed on the case of **Republic v Moses Otala Digolo [2018] eKLR** where the court stated *inter alia* that though *suspicion may be strong, the prosecution must prove the case against the accused beyond any reasonable doubt.*

70. On the circumstantial nature of the evidence against the accused, reliance was placed on the case of **Rex v Kipkerring Arap Koske & 2 Others [1949] EACA 135** where it was held that:

“In order to justify a conviction 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 and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

71. The accused further relied on the case of the case of **Republic v Richard Itweka Wahiti [2020] eKLR** where it was held that:

“ before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence, (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 the 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”

72. . The accused further relied on the case of **Dhalay Singh v Republic, Cr. App. No. 10 of 1997**, where the court stated that *if there are other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.*

73. It was submitted that the accused had a good alibi that was not shaken by the prosecution. Reliance was placed on the case of **Yusuf Kiogora Gitonga v Republic [2017] eKLR** where the court cited the Court of Appeal case of **Kiarie v Republic [1984] KLR** where it was held that *the Judge had erred in accepting the trial Magistrate’s finding on the alibi because the finding was not supported by any reasons as an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.*

74. The accused further relied on the case of **May v O’Sullivan (1955) 92 CLR 654**, where it was held that, “*when at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not “whether the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands, he could lawfully be convicted.*”

Analysis & Determination

75. I have considered the evidence adduced by both the prosecution and the defence herein. The main issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of murder against the accused person herein. These elements are: the fact of the death of the deceased, the cause of that death, that the death was occasioned by an unlawful act or omission, that it was the accused person Michael Onyango Awich and no other person who caused the unlawful death of the deceased and finally, that the accused had malice aforethought when he unlawfully killed the deceased.

76. There is no doubt that there was death of a person in the name of Charles Oduorv Awich. The testimonies of PW3 and PW4, the deceased’s wife and son respectively, was that they saw the deceased’s body at the mortuary at Port Victoria. This was sufficient to demonstrate death. Further, PW2, Dr. Angira, who carried out the post mortem on the deceased’s body testified that as a result of his examination, he formed the opinion that the cause of death was decapitation and severe haemorrhage. Accordingly, the prosecution proved beyond reasonable doubt that indeed the deceased passed on and the cause thereof proved beyond reasonable doubt.

77. As to whether the deceased’s death was caused by an unlawful act or omission, Article 26 (1) of the Constitution guarantees every person the right to life. The postmortem report prepared by PW2 and produced as PEx 1 showed that the cause of death was decapitation and severe haemorrhage. There is no lawful basis for the aforementioned cause of death. The deceased could not have cut off his own head and also cut his limbs and other parts of the body into pieces. In the circumstances, it is my finding that indeed the deceased’s death was unlawfully caused.

78. On the question of whether it was the accused who caused the deceased’s unlawful death, in this case, there is no direct evidence from the prosecution linking the accused to the death of the deceased. The prosecution relied on circumstantial evidence.

79. The Court of Appeal in the case of **Pon v Republic (2019) eKLR** stated that when faced with circumstantial evidence, a court should consider the following;

“Though not direct, circumstantial evidence, as this Court stated in MUSILI TULO V. REPUBLIC Criminal Appeal No. 30 of 2013:-

“... 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.”

To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are REX V KIPKERRING ARAP KOSKE & 2 OTHERS [1949] EACA 135 and SIMONI MUSOKE V R [1958] EA 71.

..... It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:-

(i) the circumstances from which an inference of guilty is 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”

80. The circumstantial evidence in this case is found in the statement recorded from Boniface Martin Oloo, which was admitted as PEx 12. It is this Boniface Oloo’s house from which the accused was arrested. Boniface then went at large and as stated by his wife who testified, he disappeared from home and would only appear in her absence. This court also issued witness summons to the said witness but he did not attend court. A warrant of arrest issued by this court could not be executed against him as he could not be traced. In his statement to the

police, Mr. Oloo stated that the accused sought him out initially, in early January, for prayers after the passing of the accused's mother that occasioned the accused sleepless nights. Mr. Oloo stated that he and his local pastor one Odinga proceeded to Ndere where the accused stayed and prayed for him.

81. Mr. Oloo further stated that a week later, the accused went to Oloo's home area seeking for a job at his quarry site to enable him make ends meet. Mr. Oloo stated that in addition to securing the accused the work, Mr. Oloo stayed with the accused and it is during their stay together that the accused revealed that his mind and heart were disturbed and thus wanted divine prayers.

82. Mr. Oloo stated that he led the accused to church where the accused was prayed for but the accused subsequently stated that he wanted more powerful prayers which led Mr. Oloo to take the accused to Oduori, PW1, where the accused upon inquiry by PW1 stated "Nitengeneze kama mtu ameua" meaning "treat me like someone who has killed." Mr. Oloo further stated that PW1 further inquired from the accused, "Huyo ni nani wako amekufa?" meaning "Which relative of yours has died?" to which the accused replied that it was his brother. Oloo further stated that the accused was given some herbs wrapped in a nylon bag after which they returned home.

83. Oloo further stated that the next day he inquired from the accused of the truth to which the accused revealed that he had been in a bitter land dispute with his eldest brother after the family had sold family land without involving his eldest brother. Oloo further stated that the accused revealed that he and his younger wife, Achieng as well as the land buyer then hatched a plan to eliminate his elder brother who was a stumbling block and Achieng was given the task of bringing killers who later went and picked his brother from his house using a boda boda and the accused and the land buyer remained near a school.

84. Oloo stated that the accused narrated to him that the brother was taken to River Nyathi by the group who tied him using a chain and onto a rock before throwing him in the river and after some days, the accused returned home where his in-laws started accusing him of causing the deceased's death forcing the accused to flee to Oloo's place. Oloo further stated that the accused revealed to him that there were 3 other people following the land case, his other brother and the area Assistant Chief whom he also planned to eliminate. Oloo stated that upon this revelation, he spoke with the Ndere Assistant Chief who later sent Siaya Police Officers to arrest the accused. He further stated that he then left for Emanyuria after getting information that people from Ndere were planning to torch his house.

85. I note that the accused herein admitted in his testimony that Oloo was his friend and that despite numerous attempts by the investigating officer PW14, Oloo could not be traced to come and give evidence in court and be cross examined.

86. The statement of Oloo was corroborated by PW1, the traditional doctor who attended to the accused when the accused sought more powerful prayers, as well as the evidence tendered by Oloo's wife PW13 Leah Akoth Oloo who testified of the accused's sudden visit at their home and his appearance which was that of a person disturbed to the point that he was unable to eat despite PW13's husband coaxing him, his inability to sleep and the accused and PW13's husband's visit to PW1 and the subsequent arrest of the accused from the home of PW13. PW13 further testified that her husband, Oloo had since vanished from home and only appeared when PW13 was not in.

87. In his defense, the accused denied killing the deceased. He also contradicted the statement by Oloo by stating that Oloo was the one who called him for a job which forced him to leave on the 13/1/2020. The accused also initially testified that after his arrest, someone told him that the deceased's body had been found at River Nyathi and so when questioned by the police, he revealed the same to them. He however, in his testimony, immediately changed and stated that he was the one who told the police to go to River Nyathi. He repeated this in his evidence in re examination by his advocate Mr. Mirembe.

88. From the above evidence, it is clear that the accused knew that the deceased's body was at River Nyathi. It is clear from the statement of Oloo produced as PEx 12 that the accused knew where the body of the deceased was because he was present when the deceased's body was thrown into the river. The said body of the deceased was recovered from the lake and taken to the mortuary at Port Victoria Hospital. In his statement, Oloo said that the accused revealed to him that he and his companions tied up the deceased with a chain and to a rock before throwing him into the river.

89. Further, the manner of the deceased's abduction as stated by Oloo was the same as that testified by PW3 and PW4, the deceased's wife and son who testified that the deceased was abducted by people on a motorbike pretending to be police officers. These people were unknown to the deceased's wife and son. I have considered the accused's defence and juxtaposed against the totality of the evidence adduced by the prosecution. I am persuaded beyond reasonable doubt that the accused took part in the deceased's abduction and eventual unlawful killing. I find the defence proffered by the accused to be made up. There is no substance in it and neither does the alleged alibi make any sense to this court. That alibi is displaced by the evidence of PW1, the statement of Oloo and PW13 Oloo's wife.

90. I am further persuaded beyond reasonable doubt that the evidence adduced by the prosecution form a tight link and point towards the accused as the one who in the company of others not before court, caused the unlawful death of the deceased.

91. On whether the accused had malice aforethought when he and others unlawfully killed the deceased, the Court of Appeal in the case of **Peter Kiambi Muriuki v Republic [2013] eKLR** reiterated its previous holding regarding malice aforethought in the case of **Nzuki v Republic (1993) KLR 171**, where it stated that:

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

The intention to cause death;

The intention to cause grievous bodily harm;

Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits

those acts deliberately and without lawful excuse with 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 none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.(see Hyman – v- Director of Public Prosecutions, {1975} AC 55.”

92. In this case, the PEx 12, the statement by Boniface Oloo was clear that the accused and the deceased were in conflict over the sale of the family land without the involvement of the deceased. According to Oloo, the accused revealed that he and his younger wife, Achieng as well as the land buyer hatched a plan to eliminate his elder brother who was a stumbling block and Achieng was given the task of bringing killers who later went and picked the deceased from his house using a bodaboda as the accused and the land buyer remained near a school.

93. This statement matches to a tee the manner in which the deceased was abducted as described by his wife and son and killed and later his body discovered.

94. The case of **Rex v Tubere S/O Ochen 1945 12EACA 63** lays down the guidelines for trial Judges in consideration of malice aforethought where the court held that:

“To determine whether malice aforethought has been established to consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

95. In the cases of **Ernest Asami Bwire Abang Alias Onyango v republic Ndumbe CACKA No. 32 of 1990, Karani and three others v Republic 1991 KLR 622, Republic v Godfrey Ngotho Mutiso 2008 eKLR** and **James Masomo Mbacha v republic 2015 eKLR** the courts have sufficiently inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries to the victim.

96. In this case apart from the accused's motive as emerges from PEx 12, PW2, Dr. Angira who carried out the deceased's post-mortem noted that the deceased's body had a cut wound on the midline of the abdomen and multiple 5cm stab wounds on the abdomen as well as decapitation of right skin of the neck holding and a missing left upper limb all which led him to the conclusion that the cause of death was decapitation and severe haemorrhage.

97. Taking all the circumstances into account, there is a clear manifestation of malice aforethought on the part of the accused person. The accused person pre-planned to kill the deceased. That is the reason why he went to the school where his children learnt, paid money which was not required, in anticipation that he would be away for long so that should the school need any money from the parents, his children would be well taken care of. I thus find and hold that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the accused person.

98. In the end, I find and hold that the accused person Michael Onyango Awich is guilty of the offence of murder of the deceased Charles Oduor Awich and I convict him accordingly, for the offence of murder under section 203 of the Penal Code.

99. Sentence shall be after mitigation and presentence report and victim impact statement.

Dated, Signed and Delivered virtually at Mombasa this 18th Day of January, 2022

R.E. ABURILI

JUDGE