



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. E008 OF 2020[MURDER]

STATE.....PROSECUTION

VERSUS

THOMAS OWUOR OLUOCH.....ACCUSED

JUDGMENT

1. The accused person **THOMAS OWUOR OLUOCH** 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 charge are that on the 26th day of October 2020 at around 1700hrs at Tingare village, Uloma sub-location in Unguja sub-county within Siaya County murdered one **Charles Oloo Ayienga**.
2. The accused pleaded not guilty to the charge. The prosecution called nine (9) witnesses to establish a prima facie case against the accused person.
3. The evidence adduced by the prosecution witnesses is summarized as follows:
4. **PW1 Colleta Aoko Adhiambo**, the deceased's widow testified that the deceased had left home on the 26.10.2020 at 5pm when it was raining heavily and never returned. She testified that the following morning, she got worried as the deceased was not in the habit of sleeping outside so she called his phone but there was no response. She further stated that she then proceeded to where the deceased used to drink but the brewer informed her that the deceased had been there but left.
5. It was her testimony that the brewer, Rose Auma, informed her that she heard screams from the upper part of her house so PW1 went to check and on reaching a deserted home, she found the deceased who was still alive. She testified that she noticed that the deceased's trousers were pulled down. She stated that the deceased raised his hand and she saw a cut wound on his wrist and the deceased told her that he had been cut.
6. PW1 testified that she ran away screaming and people went and assisted her take the deceased to Sigomere Police Station where they were issued with a note to take the deceased to hospital where the deceased was given first aid and stitched then referred to Siaya County Referral Hospital where the deceased was x-rayed and treated before they returned home. She further testified that the deceased had a follow up at Sigomere Hospital although he used to complain of chest pains and he could not eat.
7. PW1 testified that on the 14.11.2020 after returning from debt collection, the deceased was preparing to go and attend a funeral when he started vomiting blood which led PW1 to call her neighbour but as the deceased could not sit on a motor cycle, they got a vehicle and took him to Sigomere Hospital where they were told that the deceased had less blood so he was referred to Siaya Hospital where he was placed on a drip awaiting blood transfusion.
8. PW1 testified that the deceased was unable to sit or stand and was restless and that when she took him to the toilet, the deceased vomited blood so she took him to his bed where the vomiting continued. She testified that at about 3am on 15.11.2020, the doctor came and informed her that the deceased had passed on so they took the body to the mortuary.
9. It was her testimony that they returned home and found that the person who had assaulted the deceased had gone to the police for protection as the public wanted to lynch him upon learning that the deceased had passed on.
10. She further testified that as the deceased was on treatment, he had revealed to her that it was Tom who had cut him with a panga and even threatened to finish him if the deceased reported the assault to the police to which the deceased responded by saying that he would not report the assault. PW1 identified Tom as the accused in the dock before court. She further testified that the deceased told her that he had pain all over his body and could not tell what the accused had used to hit him in the chest. She further stated that the deceased informed her that he knew the accused by his voice.
11. It was her further testimony that on the 24.11.2020, she attended the deceased's post-mortem where she identified the deceased's body to

the doctor who performed the post-mortem. She further stated that the accused took the deceased's phone and sold it which phone she was able to recover from the buyer, Eric, whom the accused had previously led PW1's son to. PW1 was able to identify the deceased's black phone in court and it was marked as MFI 1, later produced as an exhibit.

12. In cross-examination, PW1 reiterated that the deceased owned MFI 1 and that the same had been recovered from Eric prior to the deceased's passing. She further stated that on the 26.10.2020, the deceased left home, although he had not been drinking for the past 4 months and had thus not been leaving home. She reiterated that the first place she went to look for the deceased was at the chang'aa den where Rose Auma informed her that the deceased had been at the den the previous evening.

13. PW1 further stated that she found her husband looking confused so she did not talk to him but after he was taken to the hospital, he recovered and continued treatment as an outpatient until the 14.11.2020 when his condition deteriorated. She testified that for the 2 weeks prior to his death, the deceased used to take medication and completed the dosage.

14. She further stated that she had known the accused since his childhood and that she was not aware whether the panga used to cut the deceased was recovered.

15. In re-examination, PW1 stated that the deceased told her that Tom cut him and asked the deceased whether he would report him to the police and so he heard Tom's voice.

16. **PW2 Sylvester Ouma Oloo**, the deceased's son testified that on the 27.10.2020 at around 7am whilst at work, he received a call from his mother, PW1, who informed him that his father, the deceased had not slept at home and upon searching, she found him seriously injured. He testified that before he travelled from Kisumu, he spoke to his father on phone who told him that "Atom" had cut him on the hand and hit him on the chest before taking his mobile phone. It was his testimony that "Atom" was the accused herein. PW2 further testified that on the 28.10.2020 he arrived home and found his parents. He stated that his father reiterated his statement that "Atom" was the one who attacked him and that he did not want to report the assault to the police as he was not comfortable causing his nephew's arrest and that he told PW2 that all he wanted was his mobile phone back as it had information.

17. PW2 testified that he then went to the accused person's home where he confronted the accused on the issue of taking of the deceased's phone which the accused denied before they returned back to PW2's home together. He further testified that the accused's mother who followed them back to PW2'S home insisted that the accused produces the phone which he had shown her the previous night claiming that the deceased had given it to him.

18. He further testified that they then proceeded to Sigomere where the accused had stated that he had sold the phone in issue to one Eric but they did not find Eric at his home. That they found Eric's wife and she called Eric on phone and Eric responded and told PW2 that he had the phone which the accused had sold to him at Kshs. 300. It was his testimony that the following day, his mother went and collected the phone from Eric and that Eric called PW2 and informed PW2 of the same.

19. It was PW2's testimony that his mother called him while he was in Kisumu informing him of the deceased's failing health and that he took the deceased to Jaramogi Hospital twice prior to his death. He reiterated that the deceased used to be treated as an outpatient and that the last time he was with him was on the 7.11.2020 in Hospital and that the deceased died on the 14.11.2020.

20. He further testified that he learnt that when the deceased passed on, the accused ran to the police station seeking protection. He testified that his father's body was taken to the mortuary where his mother witnessed the post-mortem. PW2 identified the accused in the dock as Tom.

21. In cross-examination, PW2 stated that upon receipt of information that his father was assaulted, he went home on the 28.10.2020 where he found the deceased seated but not talking, with his hand bandaged. He stated that the deceased was not energetic and appeared weak and that the deceased continued ailing after the assault so he took him to Kisumu Jaramogi Hospital for treatment where the deceased was treated and told to return after a week but passed away before his return date was due.

22. It was his testimony that the deceased used to take chang'aa but had stopped for a while. He stated that he did not know whether the deceased had died due to chang'aa destroying his internal organs. He further stated that he did not know Eric prior to the 28.10.2020 but learnt that Eric used to repair and charge phones. It was his testimony that Eric told him that he had bought the phone and as such wanted his money before releasing it forcing the accused to surrender his own phone in exchange for the deceased's phone.

23. He further testified that on the 28.10.2020 he spoke to the deceased in the presence of many other people and the deceased said that it was the accused who cut him but did not reveal where the incident had taken place only that it happened at night.

24. **PW3 Margaret Awour Ayienga** the deceased's sister testified that on the 27.10.2020 at 11.20am, PW1 called her and informed her that the deceased had been cut on the hand and that PW1 was taking him to Sigomere Hospital, where she went and found the deceased's hand already stitched and was advised to proceed to Siaya District Hospital for X-ray.

25. It was her testimony that the deceased went to Siaya District Hospital where he was treated and they were informed that the cut had not penetrated to the bone. She further testified that the deceased was released and used to go for dressing of the wound at Sigomere. She further testified that on the 14.11.2020 PW1 called her at 4pm saying that the deceased was ill and vomiting blood so they took him to Sigomere but the deceased was transferred to Siaya Hospital.

26. She further testified that the deceased told her that "*this thing is killing me.*" It was her testimony that the deceased was talking with a lot of difficulty. She stated that the doctor informed them that the deceased needed blood transfusion so she returned home as there was no one to donate blood. It was her testimony that at 3pm, PW1 called her and informed her that the deceased had passed on which prompted

PW3 to go to Siaya Hospital from where they took the deceased's body to Sega Mortuary.

27. In cross-examination, PW3 reiterated that on the 14.11.2020 she went to Siaya Hospital and found the deceased, her brother, who told her that *"this thing is killing me"*.

28. When referred to her witness statement by the accused's advocate, PW3 stated that she told the police that her brother told her that he was dying because he had been bleeding from his private parts for a year. PW3 admitted that she could not recall when she recorded her statement but that she was then still under stress and mourning. It was her testimony that the deceased had been of poor health for some time and that he also used to take chang'aa but later stopped because of ill health and because he was on medication.

29. **PW4 Dr. Griffins Atika** of Busia County Referral Hospital testified that he carried out the autopsy on the body of Charles Oloo Ayienga which was at Sega Mission Funeral Home on the 24.11.2020. It was his testimony that on observation, the body was naked, about 50 years, well-nourished and of an African male of 5:6 feet. He stated that externally, there were severe parLOUR with old facial bruises on the left cheek and blood clots on the nostrils.

30. He further testified that there was an obvious right hand deep cut which was septic with stitches in it. It was his testimony that there were no injuries on the head, chest or abdomen of the deceased or any signs of any fractures.

31. On the respiratory system, Dr. Atika testified that there were no foreign bodies found in the trachi but the lungs were soot black with no signs of injuries. He noted that the cardiovascular system showed that there was cardiomegaly. He further testified that the digestive system revealed that there was pus pocket at the right ascending collar. He stated that the liver, spleen and stomach were normal.

32. PW4 further testified that the genital-urinary system was intact as well as the head. He further testified that the spinal column and cord was not accessed.

33. It was his testimony that as a result of his examination he opined that the cause of death was heart failure secondary to severe anemia due to haemorrhage from a deep cut on the hand. He signed a death certificate no. 1556248 on 24.11.2020 and produced it as PEx 1.

34. In cross-examination PW4 stated that his role was only to do a post-mortem which was conducted 9 days after the deceased's death. He stated that he could tell the age of the injuries. He further denied stating that the deceased had underlying injuries. It was his testimony in cross that from his observation of the wounds, they were caused by a sharp object. He further confirmed the cause of death as stated in his report.

35. **PW5 Eric Omondi Mululu** testified that he lived at Sigomere and that he repairs phones and hires out public address system. It was his testimony that on 27.10.2020 at 6am that he was in his house when the accused, who identified himself as "Atom" knocked at his door so he opened as he knew him well as the accused had earlier on made him seats.

36. It was his testimony that the accused was accompanied by another young man and that they both looked drunk. It was his testimony that the accused asked him for Kshs. 300 to enable him go to his home and promised to payback in the evening with an interest of Kshs. 50. He further testified that "Atom" then gave him a black phone to hold until he repays the debt. PW5 identified the phone as MFI 1 and stated that it was the black phone with the red battery with two IMEI numbers 359926022357290 and 359926022357308.

37. It was his testimony that after taking the phone, he gave the accused Kshs. 300 after which the accused and his friend left while PW5 left for Kisumu. He testified that at about 9am, he received a call from his wife informing him that people had come to the workshop asking for the phone which "Atom" had given him to which PW5 responded by telling them to wait until he returned.

38. PW5 testified that upon his return at 8pm, his wife gave him PW2's phone number and informed him that PW2's mother would collect the said phone the following day. He testified that the following day, the deceased's wife, whom he had not known before, went and after verifying her identity from Ouma who was with Atom, he gave her the phone. He testified that he was not informed as to why the deceased's family were looking for the phone.

39. It was his testimony that on 29.10.2020, Ouma and the deceased visited him. He stated that he noticed that the deceased had a bandage on the right hand which the deceased said that the injury was occasioned by "Atom" who had cut him but that he had forgiven the said Atom. PW5 further testified that the deceased told him that he had received his phone which "Atom" had pawned to PW5.

40. PW5 testified that on 15.11.2020, he received information from Ouma that the deceased had passed on and that the accused had been attacked and was seeking refuge at the police station. PW5 identified the accused in court as "Atom".

41. In cross-examination, PW5 reiterated that he repaired phones and leased out a public address system. He further stated that he had no license to operate the phone repair shop. It was his testimony that he knew the accused as a seat repairer while he knew the deceased the day the deceased visited PW5, a day when he noticed that the deceased had an injury on his right hand.

42. PW5 further stated that he gave the accused Kshs. 300 and the accused gave PW5 the phone to hold. He denied the suggestion that he was a money lender but that he chose to help the accused as the accused told PW5 that he-the accused had a problem. He stated that he accepted to keep the phone because the accused told him it was his and that he would pick it up later as he refunds the money.

43. PW5 stated that he did not have a written record of phones that he repairs as he kept phones for different persons who brought them for repair. He further stated that he could not remember the phone number that he communicated with PW2. He further stated that he released the phone to a different person, not the accused as they said the phone was theirs. He stated that he did not see the accused kill the deceased.

44. **PW6 Perminus Owele Oluoch** a farmer and caretaker at Osogo Busaa Club testified that on the 27.10.2020 at about 7am, he was in house that is close to the club when the accused approached him and told him that he wanted to sell a phone to PW6. PW6 stated that he told the accused that he had no money to buy the phone which he identified as MFI 1.
45. PW6 testified that they both left as he was heading to the shops to buy cigarettes but the accused who was ahead of him branched towards PW5'S house. He stated that he saw the accused enter PW5's house after which he returned when he had returned to his house and bought more Busaa which he drunk after which he left.
46. It was his testimony that after some days, Ouma went and asked him to go and do some work with him before leading him to the DCI Ugenya where 2 officers interviewed him and he told them what he knew about the phone that the accused had tried to sell to him. He further testified that the accused was a customer at the Busaa club where PW6 regularly saw him.
47. PW6 identified the accused in court and stated that he could not buy the phone as he had no money. He further stated that as times drinkers pawn their items for Busaa only to create problems.
48. In cross-examination, PW6 reiterated that he usually sees the accused taking Busaa at the club. He testified that Ouma Oloo Ayenga was the one who wanted him to accompany him to some work before leading PW6 to the police. He stated that he did not see what happened to the deceased.
49. **PW7 Benard Ochieng Oyenga** the deceased's son testified that on the 1.11.2020 he was at school when he called his mother to find out if they were well and she informed him that his father was bedridden after an attack by the accused and that he had cuts on his body.
50. He further testified that on the 6.11.2020 he went home had a conversation with his bedridden father who told him that he was assaulted by the accused who also took his phone which was all that the deceased wanted. It was his testimony that he saw a deep cut on his father's right hand and that his father also complained of pain in the chest and that he had difficulties breathing.
51. PW7 testified that he knew the accused as they were related. He further stated that on 14.11.2020 at about 2pm, his father's condition worsened as he started vomiting blood and so they rushed him to Sigomere Hospital where he was referred to Siaya County Referral Hospital from where at about 3am he received news that his father had passed on. PW7 identified the accused in court as "Atom".
52. In cross-examination, PW7 stated that he did not see the deceased being assaulted but that the deceased told him what "Atom" had done to him. He further stated that his mother narrated to him what had happened to his father. He stated that after vomiting blood his father almost fainted.
53. In re-examination, PW7 reiterated that the deceased told him that he was assaulted by "Atom" and that all that the deceased wanted was his phone that "Atom" had taken. He stated that his also mother narrated to him what had happened to the deceased.
54. **PW8 Rose Auma Onyango** testified that she sold omena and previously sold Busaa which she had stopped. It was her testimony that on 26.10.2020 at about 7pm, she was at her home when he cousin "Ouru" went to her house and asked for Busaa for Kshs. 30, which he took and left.
55. It was her testimony that she then closed the door and slept. She stated that in the morning, the deceased's wife went to her house, inquiring about the deceased to which PW8 replied that she had seen him the previous night at her Busaa place but that he had left at 8pm. She testified that the deceased's wife told her that he did not reach home and PW8 responded by saying that at about 5am she heard someone saying "nisaidieni"—"help me".
56. She further testified that the deceased's wife left and went along the road and after a while, PW8 heard her screaming saying that 'they have killed him, here he is' in Swahili before running back to PW8's house. It was her testimony that she accompanied the deceased's wife to the scene where they found the deceased injured on the hand bleeding which she tied with her turban after which they got a motorcycle and took him to hospital.
57. It was her testimony that she did not know what hospital the deceased was taken to but that he was discharged in the evening and she visited him upon which the accused told her that the person who cut him was "Atom", his sister's son. She further stated that the deceased told her that Atom had taken his phone and that he only wanted his phone back.
58. PW8 testified that Ouma and another boy then brought Atom whom they asked to produce the phone of the deceased which Atom denied taking but Atom's mother, Jennipher Ndongy confronted him stating that she had seen him with a black phone belonging to the deceased, her brother. She testified that she later learnt that they recovered the deceased's phone and that after 2 weeks, the deceased passed on.
59. In cross-examination, PW8 stated that the deceased was her cousin and that he went to her house at 7pm and left at 8pm when it was a bit dark. She further stated that the deceased used to drink Busaa and that at the time he went to her house, he asked her for more worth Kshs. 30, he had taken some Busaa.
60. She further stated that at about 5am, she heard a shout from someone saying "nisaidieni" coming from a bushy area near her home. She stated that when they went to the scene, they found the deceased lying on his right side. She further stated that after the deceased returned from hospital, Ouma came with the accused and the accused was asked to produce the deceased's phone but he denied it. She stated that she did not see the person assaulting the deceased.
61. **PW9 No. 70534 Sgt James Ochola** testified that on the 16.11.2018 he was in the office at DCI Ugenya when the DCIO Chief Inspector

Nyambache called him to his office where he found CIP Mwamburi, the OCS Sigomere. He testified that he was instructed to accompany the OCS to Sega Mission Hospital Morgue to see the deceased's body in the company of the deceased's son, Sylvester Ouma Oyenga.

62. PW9 testified that he saw a fresh cut on the deceased left hand and further that Ouma confirmed that the deceased was his father after which they returned to the station. He testified that from there he recorded statements of witnesses after which he carried out investigations and found that the accused, nicknamed Atom, assaulted the deceased and that the accused took the deceased's phone after assaulting him.

63. It was his testimony that the phone was brought to him by Ouma, the deceased's son. PW9 produced the phone as PEx 2. He further testified that the accused surrendered himself to the police station at Sigomere after he was threatened with death by the public. He further testified that once the accused was in his custody, he investigated the chain of events leading up to the deceased's death before charging the accused with the deceased's murder. He identified the accused before court.

64. PW9 testified that he recorded the deceased's wife statement who told him how the deceased left home on the 26.10.2020 to go for liquor refreshment but never returned and that the deceased was found the next morning near a bush injured. It was his testimony that he did not have any documentary proof to show that the phone in court belonged to the deceased however he testified that when taken to the deceased, the deceased accepted it. PW9 admitted not doing any forensic examination on the phone.

The Defence Case

65. Placed on his defence, the accused elected to give sworn evidence. It was his testimony that the deceased was his uncle and that on 26.10.2020 he was at Sigomere at his workshop which he closed at 2pm before proceeding to Uloma where he was to remove the charcoal which he was burning at Green village.

66. It was his testimony that he returned at 6pm and on his way back to Uloma, he met the deceased at Uloma dispensary who asked him whether he was going to Sigomere to which he responded in the negative telling him that he was taking charcoal to St. Peter's Secondary School Mumias, the following day.

67. The accused testified that he inquired from the deceased what he wanted and the deceased told him to give him his phone so that he could take it to Sigomere for charging to which the accused responded by saying he would go there in the morning. He further testified that the deceased gave him his phone plus Kshs. 100 and told him to go charge it for him. The accused testified that the deceased also requested him to take his simcard from the phone and place it in his phone and call one Lawi, a welder and battery charger at Sigomere, informing him that Charles would go to his workshop at 2pm the following day.

68. It was his testimony that the deceased told him to buy Safari cigarettes for him from Mumias using the Kshs. 100. The accused stated that he left the deceased drinking Simba Waragi in a bottle and warned him from over drinking as the deceased had been sickly. He further testified that when he reached home that evening, it had rained heavily and that he took out his simcard and called Lawi and informed him what Charles had told him.

69. He further testified that in the morning he took the phone to Peli, a witness herein, to charge the phone who referred him to Eric Mululu where he left the phone after which he proceeded to where he had left his motorbike. It was his testimony that he requested Eric to give him Kshs. 300 to fuel his motorbike which he would return in the evening.

70. The accused testified that when he returned that evening, he got information that the deceased had been beaten when he went drinking and when he spoke to the deceased, whom he found at home, the deceased told him that he left the home of Rose Auma at about 8 – 8:30pm and met people who greeted him and pushed him on iron sheets at the dispensary fence.

71. The accused denied assaulting the deceased occasioning him fatal injuries and stated that the prosecution witnesses were telling lies. He further stated that he left the deceased when he was alive.

72. In cross-examination, the accused stated that he had never had a disagreement with the deceased who had known him since he was born and further that the deceased was expected to say the truth concerning him. He further stated that when he went home on the 26 at 6.30pm, he met his mother and his wife.

73. The accused further stated that he returned the simcard to the deceased's phone and that he took the phone to Eric for charging and later requested Eric for Kshs. 300. He stated that he went to Eric twice. The accused further stated that the deceased's wife was present when he returned and that she said that the deceased was beaten by unknown people.

74. In re-examination, the accused stated that it was the deceased's wife who went to collect the phone from Eric after he had told her that he had left it at Eric's place and that he would have to pay Kshs. 350 before picking it up.

Analysis & Determination

75. From the above prosecution and defence evidence which I have carefully considered, the issue for determination is whether the prosecution have proved beyond reasonable doubt all the elements of the offence of murder against the accused person.

76. The offence of murder carries three ingredients which are:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the ‘actus reus’ of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.

77. From the evidence adduced before this court, there is no doubt that the deceased died. That was evidenced by the testimonies of PW1, the deceased’s wife who was present when the deceased passed on as well as PW3 who was present when the deceased’s body was being taken to the mortuary. Thus the first limb is answered in the affirmative.

78. As to the cause of the death of the deceased, PW4 produced a Post Mortem Report, PEx 1 which he filled when he conducted the deceased’s autopsy. The report opined that the possible cause of the death of the deceased was heart failure secondary to severe anemia due to haemorrhage from a deep cut on the hand.

79. As to whether there was proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person, the accused person denied killing the deceased. The evidence pointing to the accused person was mainly by PW1, PW2, PW7 and PW8 who relied on a dying declaration by the deceased.

80. Under section 33(a) of the Evidence Act, a statement made by a deceased person relating to his cause of death is admissible in evidence:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

81. In **Philip Nzaka Watu vs Republic [2016] eKLR**, the Court of Appeal stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

82. In this case, the deceased was found in a bush by PW1 and PW8 found a serious cut wound on his right hand. Four witnesses, that is, PW1, PW2, PW7 AND PW8 all testified that they each talked to the deceased before he died, and the deceased told them that it was the accused, “Atom” who had attacked him and taken his phone. All the witnesses maintained that “Atom” was an alias name for the accused. Therefore, it was clear that the deceased was referring to the accused as the person who had assaulted him. Further, it is noteworthy that the deceased was well accustomed and familiar to the accused who was his nephew that he had seen since birth. The dying declaration having been consistently repeated to several witnesses, and it being clear that the accused was identified as the person who assaulted the deceased, it is my opinion that the dying declaration was sufficiently corroborated and was safe to rely upon.

83. As regards the accused defence, the evidence of the accused is that the deceased gave him his phone to take to a charging place at Sigomere. The accused further states that he took the phone to Peli who referred him to Eric Mululu, PW5, where he left the phone to charge. Juxtaposed against the evidence adduced by PW5 which was that the accused sought his help of Kshs. 300 and used the deceased’s phone as security as well as the testimony of PW6 who testified that the accused attempted to sell the phone PEx 2 to him but he declined as he had no money, it becomes clear that the evidence of the accused was an afterthought. In addition, there is uncontroverted evidence that it was the accused who eventually led PW2 to the home of PW5 whom he had sold the deceased’s phone. The dying declaration was also clear that the deceased clearly identified the accused by voice when the accused threatened the deceased not to report the assault or the accused would kill the deceased. The deceased repeatedly told the witnesses that what he wanted from the accused who was his nephew was his phone which had information and not reporting the assault by the accused.

84. The defence by the accused was discounted by the dying declaration made by the deceased to the 4 witnesses who gave similar accounts of the said declaration. In the circumstances, I reject the defence by the accused as being a mere denial. I am satisfied that the death of the deceased was due to an unlawful act committed by the accused person herein as there is no justification for the accused assaulting the deceased who was his uncle. The defence by the accused also in material particulars, corroborated the evidence by the prosecution witnesses that the accused gave the deceased’s phone to Eric and in return, Eric gave the accused kshs 300. There was therefore sufficient evidence to prove that the phone which the accused gave to Eric belonged to the deceased. The explanation given by the accused on how he came into possession of the deceased’s phone is not convincing, taking into account the testimonies of the witnesses who were with the accused when he took the phone to Eric and how the accused had attempted to sell the said phone before taking it to Eric and receiving kshs 300 from Eric.

85. I am satisfied that the prosecution established beyond reasonable doubt that it was the accused person who unlawfully killed the deceased by inflicting on him the serious cut on the hand which led to heavy bleeding and eventual death.

86. As to proof that the said unlawful act was committed with malice aforethought, from the evidence of the doctor, PW4, who performed the post mortem examination, the deceased suffered an obvious right hand deep cut which was septic and that as a result of his examination he opined that the cause of death was heart failure secondary to severe anemia due to haemorrhage from a deep cut on the hand. The investigating officer stated that the cut was on the left hand but from the evidence of all the witnesses who saw the injuries on the deceased,

including PW4, the injury was on the right hand.

87. Section 206(b) of the Penal Code provides that:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances

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(a)

(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.”

88. In **Daniel Muthee vs Republic [2007] eKLR**, the Court of Appeal addressing the issue of malice aforethought stated:

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

89. In the circumstances of this case, it can also be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause death or grievous harm and therefore malice aforethought can be inferred under section 206(b) of the Penal Code. The deceased suffered a deep cut wound which bled leading to his being anaemic. This is what caused his demise. I find that the accused unlawfully killed the deceased with malice aforethought.

90. On the whole, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused and not any other person who unlawfully killed the deceased with malice aforethought. I find the accused herein Thomas Owuor Oluoch Guilty of the murder of the deceased Charles Oloo Ayienga. I convict him for the offence of murder as charged under section 203 of the Penal Code. Sentence shall be after mitigation and pre-sentence report to be filed by the probation officer.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF JANUARY, 2022

R.E. ABURILI

JUDGE