



REPUBLIC OF KENYA



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**State v Othialo & another (Criminal Case E028 of 2021)
[2022] KEHC 11068 (KLR) (29 June 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E028 OF 2021
RE ABURILI, J
JUNE 29, 2022**

BETWEEN

STATE PROSECUTION

AND

WUOD OTHIALO 1ST ACCUSED

JOSEPH ODHIAMBO WERE ALIAS OKARO 2ND ACCUSED

JUDGMENT

1. The accused persons Austine Otieno Odhiambo alias Othialo and Joseph Odhiambo alia Okaro are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63 Laws of Kenya. The particulars of the offence are that on the night of 7th and 8th September 2021 at unknown time in Liganwa village of Koyeyo sub location, Central Alego location in Siaya sub-county within Siaya County, the accused persons murdered one Jones Dewe alias Otieno
2. The accused persons pleaded not guilty to the charges against them and a full trial followed with the prosecution calling a total of seven (7) witnesses in support of its case whose evidence is summarised below.

The Prosecution's Case

3. PW1 Beatrice Atieno Othenge testified that on the 7/9/2021 at about 6 pm, Austine and Odhiambo, whom she identified by pointing to them as the 1st and 2nd accused respectively, went to take chang'aa at her place. She stated that there were many others drinking including Kevin, the deceased, who was already drunk so she refused to sell him chang'aa. She testified that Kevin then ordered for chang'aa worth Kshs. 200 and shared it out to other revellers who were drinking including Austine and Odhiambo. She testified that Kevin gave her Kshs.500 and she gave him change. She testified that



Kevin also greeted every reveller and that was when Austine started an argument with him complaining against him. She testified that it started raining and all the revellers entered her house.

4. PW1 testified that Austine and Kevin started quarrelling with Austin claiming that Kevin had stepped on him. It was her testimony that she told them not to quarrel from her house. She further testified that Austine continued quarrelling so she told Kevin to leave and he left. She testified that Austine continued quarrelling and asking why she had sent Kevin away. PW1 testified that she then saw Austine who was carrying a sack, remove a panga and an axe and that at that point, Odhiambo said that Austine was bad such that he could cut someone. She testified that the other people in the house decided to leave fearing Austine and they also demanded that Austine leaves. It was her testimony that Odhiambo also left with Austine and that Austine carried his panga and axe and left heading towards the direction of her gate and further that after they left, a few remaining revellers also left.
5. PW1 testified that the following morning, the Chief went to her house and informed her of a dead body at the nearby Centre and asked her to go and identify it which she did and found that the body was that of Kevin. It was her testimony that Odhiambo did not say anything but only left with Austine. She identified Austine and Odhiambo before court by pointing at them in the dock. She stated that she saw the 1st Accused carrying a panga and an axe when he went to her house. She also identified the panga with a wooden handle as produced as PEX 5.
6. In cross-examination, PW1 stated that Austine and Odhiambo went to her chang'aa den to drink and that they ordered chang'aa worth Kshs. 20 each then when Kevin arrived, he greeted them and ordered chang'aa for everyone. She testified that only Austine quarrelled with the deceased. It was her testimony that Austine was very irritated by the manner in which Kevin greeted him and stepped on him. She stated that the deceased left her house at about 7pm but not in the company of the accused as the two accused persons left together 30 minutes later. It was her testimony that the 1st Accused Austine had a panga and an axe in a sack and that when the other revellers realised that he had weapons, they demanded that he leaves so he left carrying his weapons. She reiterated that she saw the weapons. PW1 reiterated that It was the 1st accused who was in possession of the panga which she identified and it was produced as PEX5.
7. On being questioned by the court as to how she could tell that the panga she identified as PEX5 was what she saw on that particular day, PW1 stated that the panga had a wooden handle covered by Skin/ hide which the court noted that the PEX5 was a panga with a wooden handle covered with a hide/ animal skin which had partially peeled off.
8. PW2 Lawrence Ochieng Omamo testified that on the 7/9/2021, he was in PW1's house with Lameck, Austine, Odhiambo and James and other 3 ladies. He stated that PW1 was present. It was his testimony that they had gone to drink Chang'aa and as they drunk, at about 6 pm, Austine and Odhiambo arrived at the den and the deceased also came in later and started greeting everyone then bought them chang'aa. It was his testimony that the deceased who is usually rough but jokingly pushed Austine and Odhiambo jokingly after which Austine started quarrelling with him.
9. PW2 further testified that the quarrel was on and off and at about 7 pm, Beatrice told the deceased to leave and then Austine started complaining to Beatrice why she had let the deceased leave. He testified that the two ladies had also left. It was his testimony that shortly before 8 pm., Owino arrived with his girlfriend and upon seeing Austine carrying a panga, he told Austine that he should not walk around with weapons. PW2 testified that he had earlier on seen Austine come in the house with a panga and axe. He testified that people lamented why Austine was walking around with such weapons and demanded that he leaves. He further testified that Owino also wondered why Odhiambo was walking around with Austine. It was his testimony that the two-Austine and Odhiambo left and PW2 remained



with Owino, the latter's girlfriend and other revellers but later Owino and his girlfriend left and PW2 remained with James and Beatrice.

10. PW2 testified that his home was far so he slept in Beatrice's kitchen. He testified that when he woke up in the morning, a lady neighbour went and told Beatrice that someone had been killed at the Centre. He further testified that the Chief also arrived and left with Beatrice to the Centre and upon her return, Beatrice told him that the deceased had died. He testified that the deceased died 400 m away from Beatrice's place. He stated that the previous night, the deceased left while staggering as he was drunk. He testified that he knew the deceased to be Otieno. PW2 identified Austine and Odhiambo as the 2 accused persons in the dock.
11. In cross-examination, PW2 stated that he was present when Austine and the deceased started quarrelling. He stated that the origin of the quarrel was the rough manner in which the deceased greeted Austine by hitting him. He stated that he saw the deceased leave the Beatrice's house and that he also saw the 2 accused persons leave together between 30 to 40 minutes after the deceased had left the house although he did not know the direction that they followed.
12. PW3 James Odhiambo Ouma testified that on the 7/9/2021 at around 6-7pm, he was in the homestead of Beatrice Atieno with other people namely; Dennis, Beatrice, Austin, Odhiambo and others. He stated that the deceased was in the house then Beatrice asked him to leave because he was drunk. He stated that he found the deceased who was given his change of Kshs.200 then he left.
13. PW3 testified that when he arrived at the chang'aa den, it was starting to rain and that the deceased was greeting people roughly but as he did so to Austine, Austine got annoyed and picked a quarrel. He stated that the deceased was already in the house, bought chang'aa for the rest of the reveller but because of his drunken state and the quarrel that he had with Austine who was so agitated, Beatrice told him to leave earlier.
14. It was his testimony that he never saw the 2nd accused quarrel with the deceased and that after the deceased left, Austine started quarrelling Beatrice. He further testified that Owino, who was feared in the village, got in and started talking and Austine removed an axe and a panga to which Owino told Austine not to carry such weapons in public places. He testified that Austine left with Odhiambo then Owino and his girlfriend left and that he-PW3 also left.
15. It was his testimony that the 2 accused persons left after the deceased had left but that PW3 was not sure of the time lapse between their departures. PW3 stated that he left at around 8 pm. He testified that the following morning at 9 am, his area Chief called him and when he went there, he saw a dead body and on checking, he saw the deceased who had been cut deeply around his neck. He testified that the police who were present directed him to go and record his statement which he did, on what he knew about the case. PW2 identified Austine and Odhiambo as the 1st and 2nd accused persons respectively.
16. In cross-examinations PW2 stated that the 2 accused persons were not very drunk when they left although they had taken chang'aa. He reiterated that he saw the deceased leaving and that he was aware that the deceased was very drunk.
17. Charles Onyango Ongor testified as PW4 and stated that he was the father to the deceased who was his second born son. He testified that the deceased served as an Administration Police Officer for 7 years before leaving employment. He recalled that on the 7/9/2021, the deceased was at home and was building his house which he finished so he sold the remaining sand at Kshs. 17,000, dressed and left towards town. It was his testimony that they stayed until evening, ate and slept.
18. He testified that on the 8/9/2021 they woke up and went to the farm to plant crops when he received a phone call from the Assistant Chief asking him if Otieno, the deceased was in his house and asking



- PW4 to go and check on him. He testified that he went home and found the deceased's house locked so he informed the Assistant Chief that Otieno was not at his house after which the Assistant Chief told him that someone was found dead at the Centre. It was his testimony that he boarded the motorcycle and went to the centre where he found his son dead with a deep cut on the neck and chest. PW4 testified that the deceased had bled so much and that many people including those he had drunk with and the lady at whose house he had drunk were brought to the scene.
19. It was his testimony that they were all taken to Siaya Police Station and the body was removed to the morgue. PW4 testified that at the scene, he was asked by the police to check on the deceased's pockets, which he did and recovered Kshs. 200, keys to the deceased's house and his identity card. He stated that he never found the phone. He further testified that one of the boys who drunk with the deceased the previous night was arrested. He testified that on the 11/9/2021, he was at Siaya Mortuary where he paid Kshs. 15,000 for post-mortem and identified the deceased's body to the doctor who performed an autopsy on his deceased son's body.
 20. PW5 Dr. Juma Gabriel Wekesa, a medical officer at Siaya County Referral Hospital testified that he carried out an autopsy on Kevin Jones Sewe on 11/9/2021 at 12.30 pm at Siaya County Referral Mortuary. He testified that the body was of an African male adult. He stated that externally, there was global parlour on all mucosa membrane, that there was a deep cut wound running across the right side of the chest below the right clavicle through the manubrium. He further testified that the cut wound was 15 cm and 20 cm from the deep cut. He further stated that there was exposed right jugular and severed internal carotid vein.
 21. PW5 testified that the internal examination revealed that in the respiratory system, there was a right pulmonary tamponade with collapsed right lung and pleural haematoma while in the cardiovascular system, there was a right jugular and right internal carotid vascular injury. He stated that in the head, they found a cut of the major vessels just above the right side of the neck while all other systems were normal. He concluded that the cause death was found to be severe cardiopulmonary failure following shock resulting from sharp chest trauma and neck vascular trauma. He issued a death certificate No. 1439xxx and removed some samples for examination. He further stated that there were toe and hand nails for forensic examination and that he signed the post-mortem report and stamped dated it 11/9/2021. He produced the post-mortem as PEX1.
 22. PW6 Salvin Cheruto Kapkoi a Senior Government Analyst from Kisumu Government Chemist working in the DNA laboratory testified that on the 14/9/2021, they received an exhibit memo from No 86706 PC Joash Koriese of DCI Siaya and that they also received a finger nail of Kelvin Jones Dewe, the deceased, in a clear container marked 'A', a rusted panga with a wooden handle in a red carrier bag marked 'B'.
 23. She testified that the panga item 'B' tested positive for human blood and that the DNA profile generated from the panga and the finger nail were tabulated at the end of the report on 10/2/2022.
 24. PW6 testified that her findings were that the DNA profile generated from the blood stains on the panga item B matched the DNA profile generated from the reference finger nail of Kelvin Jones Dewe, the deceased. She produced the exhibit memo as PEX b 2(a) and the Report as PEX 2b. In cross-examination, PW6 testified that her final conclusion was that the blood stains on the panga 'B' Matched the DNA Profile of the deceased Kelvin Jones Dewe.
 25. No 86xxx PC Josh Koriese, a DCI Officer, attached to Siaya Sub county DCI Office testified as PW7 that he was the investigating officer in this case. He testified that on the 8/9/2021 at about 9am, they received information of a murder at Ligano village, Koyieyo sub location. He testified that they proceeded to the scene with officers who included scenes of crime personnel and on arrival, they found



- officers from Ndere Police Post already at the scene. He testified that the area Chief and Assistant Chief were also present and that a huge crowd had also gathered around the dead body.
26. PW7 testified that they inquired from those present on what had transpired and learnt that the deceased was last seen drinking at the house of PW1. He testified that they conducted normal police procedures and the scenes of crime personnel took photographs of the scene which photographs and the Statutory Declaration dated 14/1/2022 he produced as PEX3 (a) to (g) and PEX4 respectively.
27. It was his testimony that the deceased was said to have been drinking chang'aa at the house of PW1 when a quarrel ensued and PW2 and 3 were among those drinking with the deceased. He testified that the witnesses informed them that the 2 accused persons who were also drinking with the deceased were present and quarrelled with the deceased and that when the deceased left, they followed him and the following morning, he was found dead. He testified that the deceased's body was removed to Siaya County Referral Hospital Mortuary for Post mortem which was conducted by Dr. Juma, who established the cause of death.
28. PW7 testified that they looked for the 2nd accused who was traced and arrested and brought to the scene before they left the scene and that PW1 and PW3 were among the crowd at that time. He testified that they searched for the 1st accused who had vanished from home and traced him at 'Kanyajer B' village of Komenya Kalaka Sub location where he had sought refuge at his Uncle's home. He stated that they arrested him at about 2am and he led them to his parent's home at Ligano near the scene of crime and on knocking the door to his parent's house, the father opened the door upon which the 1st accused walked straight into his parent's bedroom, knelt under the bed and removed a panga from under the bed and gave it to PW7 then they proceeded to Siaya Police Station. He stated that on the same day, they applied before Siaya Law Courts vide Miscellaneous Application No. 26/2021 to detain the accused for 7 days pending conclusion of investigations after which they took the 2 accused persons for mental assessment and recorded witness's statements then forwarded the panga to the Government Chemist. He produced the pang that recovered from the 1st Accused on 9/9/2021 as PEX5.
29. PW7 testified that PW1, PW2 and PW3 mentioned an axe and a panga which the 1st accused allegedly had but that they only recovered the panga, not the axe. He further testified that the nail was taken from the body of the deceased during post mortem. He stated that the panga had some blood at the end of the handle. PW7 testified that they escorted the 2 items to the Government Chemist for Analysis. He then identified the 2 accused persons whom they arrested as the ones before the court.
30. In cross-examination, PW7 stated that they recovered the panga from the house of the parents of the 1st accused, in the bedroom, under the bed. He further testified that the 1st accused led them into that house. It was his testimony that the 2nd accused had already been arrested so he was not present when they recovered the panga from the 1st accused's parent's house.

The Defence Case

31. Placed on their defence, the 1st accused testified as DW1 on oath that he was Austine Otieno Odhiambo. He stated that he left home in the morning carrying a panga and an axe to go and cut trees for burning charcoal which was his work and he worked until 5 pm when he passed by a place where alcohol was being sold, while carrying his panga and axe. He testified that he met PW1 who was selling alcohol in her house and that he entered the house with his panga and axe. PW1 testified that PW1 who was seated at the door asked him to give her his panga and axe to keep for him so that he could get enough space to sit as the house was small then she brought him alcohol which he took for 20 minutes when the 2nd accused arrived and they continued taking alcohol together. He testified that



- they stayed on until they got drunk and that PW2 who was also present got drunk until they carried him to the kitchen.
32. It was his testimony that as they were to leave, PW1 asked for her money totalling to Kshs. 400 but he only gave her Kshs. 200 which PW1 refused insisting on the full amount. He testified that he told her that he had Kshs. 1,000 which he could only change after which PW1 took his panga and axe and kept them in her bedroom under a chair. It was his testimony that he was forced to leave his panga and axe as curfew hours were approaching and that he told PW1 that he would pass by her house to pick the panga and axe the following day.
33. The 1st accused testified that the 2nd accused followed him as he left the chang'aa den then they parted ways ahead. He testified that he reached home at 8 pm, ate in his mother's house and went to sleep. It was his testimony that on the morning of 8/9/2021, they were to go and bake bricks with a certain boy so he went and worked the whole day and as they did not finish that work which was a lot, they slept there. He further stated that at night, they heard people on a boda boda knock the door saying they were police officers. He testified that the people told him that they were looking for him after which they arrested him and took him to a vehicle parked by.
34. DW1 testified that the people asked him where he had left the panga and axe and he told them that he had left them at PW1's house so they beat him up then led him to his mother's house and searched for a panga and the axe. He stated that they searched in the bedroom where they recovered a panga which was produced in this court.
35. The 1st accused stated that he had never seen that panga in their home for three years and that he was forced to carry the said panga. He further stated that he was told that they wanted a panga having blood to which he responded by saying that he had no such panga. He further stated that he was taken to the police station with that panga where he met the 2nd accused person who had been arrested during the day. He stated that he was taken to court and charges read out to him. It was his testimony that after 7 days, the Investigating officer showed him the panga which had blood and when he asked the officer where the blood came from, the officer told him that the 1st accused was all knowing and must be jailed. He testified that that was how he found himself in court. It was his testimony that he did not see the deceased at the chang'aa den and that there was no scuffle at the chang'aa den. He stated that he did not know how the deceased met his death as he never killed him.
36. In cross-examination, DW1 stated that he knew the panga which was produced in court as an exhibit. He admitted that it was recovered at their home in his mother's house and that when the police officers went to arrest him, they did not bring with them any panga or an axe. DW1 further stated that PW1 kept the panga and the axe after he was unable to pay her Kshs. 400. He testified that the 2nd accused was present when PW1 took his axe and panga and that many other people were drinking chang'aa at PW1's house. The 1st accused denied lying and further stated that he did not know the deceased Kevin Jones and that he had never had any altercation with him as stated by PW1, PW2 and PW3. He admitted knowing PW1 and stated that he had no issue with PW2 and PW3.
37. DW1 testified that he had no disagreement with PW1 but that she refused to take Kshs. 200 from him. He stated that they never quarrelled and that he had no reason to state why the three witnesses PW1, PW2 and PW3 could come to court to tell lies about him. He admitted that PW1 had never been to his home but that she knew where he came from. He further stated that PW1 did not bring the panga to his home.
38. The 2nd accused testified on oath that he was Joseph Odhiambo Were. He recalled that on the 7/9/2021 at about 6.30 pm, he left his home to go on a drinking spree at Bar Olengo at the home of Beatrice. He



- stated that he was alone and had Kshs. 200 on him, that on arrival, he found people partaking alcohol with some seated outside on a bench while others were inside the house. He testified that he sat outside alone and when Beatrice saw him, she went to where he was and asked him, what she could serve him. DW2 testified that he ordered chang'aa for Kshs. 30 and as it started raining, they got into her house.
39. It was his testimony that he saw the 1st accused seated inside the small house of Beatrice. He testified that he sat near the door because he knew there and had not been frequenting that place. He testified that he took his alcohol and that other people were drunk so they got out and left. It was his testimony that he drunk until 7 pm when he was getting drunk. He further testified that he checked on the floor and saw an axe and a panga near a chair and the bed.
40. DW1 testified that he told Beatrice, PW1, that it was not safe to have such weapons near where people were drinking alcohol. He testified that PW1 went outside then returned and told them to leave because alcohol was finished. He stated that the 1st accused left and other people also left. He testified that they went together and parted midway as their homes are in different directions. He stated that he went to sleep.
41. It was his testimony that the following morning, he went to the farm to plant maize until 9.00 am when he saw his Assistant Chief and another Assistant Chief who arrested him and that he was then questioned by two police officers who asked him where he had been drinking the previous evening and he informed them that he went to take alcohol at Beatrice's house. It was his testimony that he was informed that a person had been found dead near the place he had been drinking the previous evening. He testified that he was arrested and escorted to Siaya Police Station where he found PW1.
42. DW2 testified that he was asked if he knew Austine and he told them that he did not know him but that he had met him at the house of PW1 where they drunk together then left together after alcohol got finished. He testified that he was then asked if he knew Austine's home and he denied. It was his testimony that they went to look for Austine. He testified that he slept in the cells until the following day when he saw Austine whom he spoke to and he told DW2 that he had no idea what had happened. DW2 testified that he only met Austine at the chang'aa den. He further stated that there was commotion at the chang'aa den as Beatrice was having a quarrel with those who had taken chang'aa but were unwilling to pay. It was his testimony that there were many people at the chang'aa den and as he did not know all people in the area, he did not know if the deceased was present.
43. In cross-examination, DW2 stated that he did not know the 1st accused before that day and that he only heard his name being called out while he was there. He stated that he went to the chang'aa den alone and that he never saw Austine quarrel with anyone at the den. He stated that he saw Austine with a panga and an axe and that he saw Beatrice take and keep them away as they were in a dangerous place, not because Austine had her debt. DW2 stated that he saw PW1, PW2 and PW3 at the chang'aa den and that their testimonies before court was not lies.
44. Joseph Odhiambo testified as DW3 and stated that he was the father to the 1st accused Austine Otieno. He recalled that on the 7/9/2021 at 6.30 pm, he was at his home and that at about 1 am, police officers arrived in the company of Austine. He stated that the officers beat both him and Austine up, entered his bedroom, searched and recovered a panga which his children used to take to school.
45. In cross-examination, DW3 testified that when the police officers went to his home, they were not carrying any panga and that they recovered the panga from under his bed. He stated that he knew the panga very well as it used to be among his tools of trade and further that he used to keep it under the bed.
46. Rosemary Anyango Odhiambo the 1st accused's mother and wife to DW3 testified that on the 7/9/2021 at about 6.30 pm she was at her home and that at about 1 a.m. in the night, she saw the



1st accused being brought by police officers under arrest. She stated that the officers were beating his son asking him where he had kept the panga. She stated that the officers also beat up the 1st accused's father. She testified that she went outside the house and the police entered her bedroom and came out carrying a panga that she always used. In cross-examination, DW4 stated that the panga was found in her house under the bed.

Analysis and Determination

47. I have considered the evidence adduced by the prosecution witnesses and the defences proffered by the two accused persons. The main issue for determination is whether the prosecution has proved beyond reasonable doubt all the elements of murder against the accused person herein or anyone of them. The essential elements that must be proved beyond reasonable doubt to establish the offence of murder 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 persons who jointly caused the unlawful death of the deceased and; finally, that the accused persons had malice aforethought when they unlawfully killed the deceased.
48. On the fact of death, the same is the evidence by PW1, PW3 and PW4 was that they saw the deceased's body at the scene. PW4, the deceased's father testified that he identified the deceased's body to the doctor who carried out the autopsy prior to the autopsy being done. Accordingly, it is clear that the fact of death was proved beyond reasonable doubt.
49. On the cause of death, PW5, Dr. Juma Gabriel Wekesa testified that he carried out the autopsy on the deceased's body and concluded that the cause of death was severe cardiopulmonary failure following shock resulting from sharp chest trauma and neck vascular trauma as was contained in the post-mortem form produced as PEX1. For that reason, the cause of death was similarly proved beyond reasonable doubt.
50. 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 PW3 and produced as PEX1 showed that the cause of death was decapitation resulting in abrupt interruption of nervous, respiratory and neuronal function with a sharp object. There is no lawful basis for the aforementioned cause of death. The deceased could not have cut off his own head. In the circumstances, it is my finding that indeed, it was established beyond reasonable doubt that the deceased's death was unlawfully caused.
51. On the question of whether it was the accused persons who caused the deceased's unlawful death, none of the prosecution witnesses actually witnessed the deceased being unlawfully killed. Accordingly, there was no direct evidence linking the accused to the death of the deceased. The prosecution relied on circumstantial evidence.
52. The Court of Appeal in the case of *Pon v Republic* (2019) eKLR stated *inter alia* that although not direct, when faced with circumstantial evidence, a court must satisfy itself that the circumstantial evidence satisfies three tests namely:
 - (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; and



- (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.
53. The circumstantial evidence in this case is found in the testimonies of PW1, PW2, and PW3 all who testified that they were all at PW1's chang'aa den where a commotion broke out after the deceased had aggressively greeted the 1st accused and even stepped on him which made PW1 to tell the deceased to leave the premises as he was clearly drunk.
54. PW1, PW2 and PW3 all testified that at some point that night during the commotion, they saw the 1st accused remove a panga and axe from his sack. PW3 even commented that the 1st accused's possession of the axe and panga at the den caused discomfort to the other revelers that they began to complain that such weapons ought not to be carried and placed to such premises.
55. PW1 insistent that she knew the panga that she saw the 1st accused with, which panga was produced as PEX5 by PW7. On questioning by the court as to why she was so certain about the panga, PW1 told the court that the panga had a wooden handle covered by Skin/hide and on inspection, the court noted that PEX5 was a panga with a wooden handle covered with a hide/animal skin which had partially peeled off.
56. The deceased's body on postmortem revealed that the deceased suffered a deep cut wound running across the right side of his chest below the right clavicle through the manubrium and further that he had a cut of the major vessels just above the right side of neck.
57. The testimony of PW7, the investigating officer, was that after they arrested the 1st accused, they led him to his home where he went to his parent's bedroom and under the bed, they recovered a panga, which was later produced as PEX5. PW7 stated that the panga had blood and therefore they submitted it together with the deceased's DNA profile to the Government Chemist. PW6, Mrs. Cheruto, the Government Analyst testified that the blood found on the panga forwarded to them by DCI, that is PEX5, matcher the deceased's DNA profile.
58. On his part, the 1st accused admitted that he was at PW1's chang'aa den but denied that there was any commotion. He further testified that he was not aware of where PEX5, the panga as recovered from his parent's bedroom, came from. However, in cross-examination he admitted that the said panga was recovered from his parent's bedroom after the police accompanied him there. The 1st accused further stated that the police did not have any panga when they went to arrest him and led him to his home. The testimony of his parents DW3 and DW4 regarding the recovery of PEX5 was that it was recovered from their bedroom and that it was theirs.
59. Despite the testimonies of PW1,2 and 3, the 1st accused stated that he did not know the deceased and that he had no altercation with him. It was his testimony that PW1 confiscated his axe and panga for his failure to clear the bill that he had accrued from drinking. However, the panga allegedly confiscated by PW1 was recovered from his parent's bedroom. Considering that PW1 had never been to the home of the 1st accused, admittedly, although he stated that she knew where he came from, and with the parents of the 1st accused testifying that the panga was theirs, I find and hold that the 1st accused was lying in his defence when he claimed that the panga was confiscated by PW1 for nonpayment of the changaa bill. This position is supported by the testimony of the 2nd accused who stated that it was not true that PW1 confiscated the panga from the 1st accused on account of non-payment of changaa.



60. The 2nd accused testified that the testimonies by PW1, PW2 and PW3 were correct and further that indeed he saw the 1st accused with a panga and axe which the PW1 took to keep as they were in a dangerous place and not because the 1st accused had failed to settle his drinking bill for that date.
61. From the above evidence, it is clear that the 1st accused's evidence amounted to a mere denial which consisted of contradictions and lies. His reason for PW1 taking the axe and panga and also how PEX5 came to be located in his parent's bedroom was in my view, made up.
62. The medical evidence adduced by PW5 on the injuries sustained by the deceased corroborate the testimony of PW6, the Government Analyst that found that the DNA profile generated from PEX5 matched that of the deceased indicating that indeed PEX5 which was identified by PW1 as that belonging to the 1st accused and which was recovered from the 1st accused parents' bedroom was indeed the murder weapon. Further, the 2nd accused corroborated the testimonies of PW1,2 and 3 that the 1st accused had a panga.
63. On his part, the 2nd accused was only mentioned as drinking next to the 1st accused. None of the evidence adduced points towards him as having taken part in the deceased's murder. Both him and the 1st accused testified that after they left PW1's chang'aa den, they parted ways as their homes were in different places.
64. PW3 testified that he never saw the 2nd accused quarrel with the deceased. The 2nd accused testified that he met the 1st accused on that particular day and had not known him before and as such there was no way he could have plotted with the 1st accused to kill the deceased.
65. From the above evidence, this court is persuaded by the evidence adduced by the prosecution witnesses which points at the 1st accused solely as the one who caused the unlawful death of the deceased. I am satisfied that the prosecution proved beyond reasonable doubt that the 1st accused was the one who caused the unlawful death of the deceased.
66. On whether the 1st accused had malice aforethought when he and others unlawfully killed the deceased, in the case of *Rex v Tubere S/O Ochen* 1945 12EACA 63 the Court laid 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”.
67. 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 inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries inflicted to the victim.
68. In the instant case, the 1st accused person's motive is discernible from the testimony of PW5 Dr. Juma Gabriel Wekesa, who carried out the post mortem on the deceased's body and found that the deceased suffered a deep cut wound running across the right side of his chest below the right clavicle through the manubrium and further that he had a cut of the major vessels just above the right side of neck specifically the right jugular vein leading him to conclude that the cause of death to be severe cardiopulmonary failure following shock resulting from sharp chest trauma and neck vascular trauma.
69. The testimony of PW6, the Government Analyst also confirmed that the weapon that was used during the deceased's murder was a panga. This is a clear manifestation of malice aforethought on the part of



the 1st accused person as the weapon used as well as the areas targeted in the attack point to a person who was intent on causing the deceased grievous harm and in this case, death.

70. In the circumstances, I find and hold that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the 1st accused person Austine Otieno Odhiambo alias Wuod Othialo who is hereby found guilty of the offence of murder as charged and convicted accordingly.
71. As for the 2nd accused, none of the prosecution witnesses implicates him as discussed herein above. Accordingly, I find Joseph Odhiambo Were alias Okaro Not Guilty of the offence of murder as charged. He is hereby acquitted of the charge of murder. Unless otherwise lawfully held, Joseph Odhiambo He is hereby set at liberty forthwith.
72. Sentencing of the 1st accused person to be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF JUNE, 2022

R. EABURILI

JUDGE

