



**State v Okinja (Criminal Case E002 of 2021)
[2022] KEHC 10223 (KLR) (22 June 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E002 OF 2021
RE ABURILI, J
JUNE 22, 2022**

BETWEEN

STATE PROSECUTION

AND

STEPHEN ONYANGO OKINJA ACCUSED

JUDGMENT

Introduction

1. The accused person Stephen Onyango Okinja is 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 July 27, 2021 at around 2300hrs in Ndere village of Pap Oriang sub-location South Alego location in Siaya sub county within Siaya County, the accused murdered one Calvin Ochieng Madote. The accused person pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called a total of eight (8) witnesses. The prosecution's case is summarised herein below.

The Prosecution's Case

2. PW1 David Ouma Madote, the deceased's brother testified that on the 27/7/2021 at about 9 pm he heard noises of the deceased from near their home so he got out of the house, went to where the noises were coming from and on arrival, the accused slapped him with a panga leading him to fall down. He got up and went home. It was his testimony that shortly, his brother, the deceased followed him and told PW1 that the accused had cut him with a panga. He further testified that when he went to the scene, he found 'Otis' Onyango, the accused, and his brother. He stated that Stephen was carrying a panga, but he did not see his brother Calvin, the deceased. He testified that from his home to the scene was about 20 metres apart.



3. PW1 testified that the deceased was taken home by Joseph and that he (his brother Calvin) told him that Onyango had cut him with a panga. He testified that they (his mother, Clinton his other brother and Ojala) took Calvin to hospital at Siaya County Referral Hospital and that at 4 a.m, Calvin died.
4. In cross-examination, PW1 stated that when he heard the screams from outside and heard his brother's voice near the home of Odhiambo Onyango, he went there to find out what was happening. He stated that he found there two people, Onyango and Onyango Otis. He testified that he did not see his brother Calvin at the said scene. PW1 reiterated that the accused slapped him with a panga on his head so he fell and on rising up, he ran away to his home. He stated that the accused first slapped him with a panga on his shoulder and when he fell down, he followed with a slap on his head. He reiterated that from his home to the scene was 20 metres. PW1 testified that after he went home, it took about 10 minutes for Calvin to arrive in the company of Joseph saying he had been cut. He stated that there was bright moonlight on that night. He also stated that he did not have any torch and that he only saw Onyango, the accused, carrying a panga. He stated that he had not seen any panga in court.
5. In re-examination, PW1 stated that he could see Onyango Stephen in court whom he identified as the accused.
6. PW2 Rael Adhiambo, the deceased's mother testified that on the 27/7/2021 at 9 p.m, she was at her home when she heard screams of shouting for about 30 minutes. She then heard someone asking her to open the door and that the voice was of Joseph Odhiambo. PW2 testified that Joseph told her to open the door as something bad had happened. That she took a while then her son Calvin told her to open the door as something bad had happened. Upon opening the door, she saw Calvin covered in blood and that he told her that Onyango, the accused, had cut him. She further testified that Calvin went and checked himself in the mirror. She testified that she saw Calvin had been cut in the neck but that Calvin stated that the cut was not bad but as soon as he got out, he fainted and lost consciousness.
7. PW2 further testified that she told her sister to go and call their neighbours to come and see what had happened. It was her testimony that Pascal went and assisted them get means of transport and they escorted Calvin to Siaya County Referral Hospital where he was admitted but at around 4.30 a.m, Calvin died. PW2 then returned home and later, a post-mortem was conducted on the deceased's body.
8. PW2 testified that when Calvin told her that he was cut by Mr. Onyango, she knew the Onyango he was referring to as the accused in the dock whom she had known for long. She testified that Onyango and the deceased had some small differences which developed when they were in a school football field. It was her testimony that Calvin had taken Onyango's sandals so Onyango followed Calvin and reported it to her. She stated that Calvin kept the sandals in his house and that she told Onyango that she would tell Calvin to return the sandals. PW2 testified that Onyango returned 3 days later and a week before the deceased's killing, asking for his sandals. She stated that they gave Onyango his sandals. She stated that Calvin was 25 years old.
9. In cross-examination, PW2 stated that when she heard the screams, she was already asleep. She stated that she did go out of the house and did not see anybody. She testified that when Joseph Odhiambo went to her house accompanied by Calvin after 30 minutes, she asked Joseph what had happened and he told her that he had received a call and on arriving, he found Onyango coming in the way of Calvin and that both Onyango and Calvin were armed with pangas then he saw Onyango cut the deceased. It was her testimony that Joseph told her that he could not separate the fight because both the deceased and the accused were armed.
10. PW2 testified that she recognised Onyango's voice because she knew him and that they were from the same village. It was her testimony that Calvin had left school and worked in Bondo. She stated that



- Calvin used to drink alcohol and that on that day when he returned home in the evening, he was drunk. In re-examination, PW2 stated that when Calvin returned home that evening he was drunk but not very drunk as he was not falling down.
11. PW3 George Onyango Amanyang testified that on the 27/7/2021 he was in his homestead when he heard screams of people fighting. He stated that he heard the voice of Stephen Onyango ‘Wuod Mieri’ who was screaming from a certain homestead of a lady who resides in Nairobi, where he was living. He further stated that Stephen was screaming and hitting the roof.
 12. It was his testimony that the screams subsided then he went to find out what the matter was. and that when he reached the home of Pascal Otieno, he heard screams from the sister to the deceased, Apiyo ‘Kapisi’. He testified that he asked her what the screams were all about and she told him that her brother Calvin had been taken to their home by Joseph and that Calvin was cut with a panga.
 13. PW3 testified that he went to the homestead of the deceased and found him lying at their door step. He stated that they tried to do first aid but the cut on the neck was serious so they looked for a vehicle and at midnight, he and the deceased’s mother, Clinton his brother and PW1 took the deceased to Siaya Hospital where he was treated but at around 4 am, he died. He testified that on the 31/8/2021, he went to Siaya Referral Mortuary in the company of the police where he identified the deceased’s body to the doctor. He later recorded his statement. It was his testimony that he was the one who carried the deceased’s mother and brother to the mortuary to view the deceased’s body.
 14. In cross-examination, PW3 stated that the distance from his house to Pascal’s house was about 100 metres. He stated that the screams were coming from almost 200 metres away and that he recognised the accused person’s voice because he knew him very well. It was his testimony that when he met the deceased’s sister at Pascal’s home she told him that her mother had send her to call Pascal to go help them as the deceased had been taken to their home by Joseph with a cut on the neck.
 15. PW3 testified that Calvin was his cousin. He further stated that when he found Calvin, Calvin looked drunk. He stated that Calvin normally used to drink and would talk loudly when drunk as he used to pass by PW3’s home. He further testified that the deceased was not violent when drunk and that he used to call PW3 as ‘Governor’, when drunk as he passed by. He further testified that the deceased used to live in Bondo most of the time, and not at his home.
 16. PW4 Pascal Otieno Nyabeda testified that on the 27/7/2021 at 10 p.m, he was sleeping at his home when a young girl went knocking at his door crying saying her mother had sent her to call him to go and help Calvin who was cut. He testified that he followed the girl to her home in the company of his wife and George (PW3). It was his testimony that they found Calvin lying on the ground with his body and clothes soaked in blood. He testified that he started looking for help by calling for a vehicle to take Calvin to hospital. PW4 testified that the deceased was unconscious but was raising his head and falling down.
 17. He further stated that it was during curfew hours so it was hard getting transport but he found a vehicle and together with his mother, Clinton his brother, George and David, they assisted and took the deceased to Siaya Hospital. He further testified that when Calvin was raising his head saying, ‘Onyango you are the one who cut me’, at that moment, PW4 could not ascertain which Onyango had cut the deceased. He stated that he did not go to hospital.
 18. PW4 further testified that at around 6 am, he heard the sound of a vehicle at his home and he saw police officers and the vehicle which had taken Calvin to hospital. He stated that they heard that Calvin had died and so, Onyango the one who was alleged to have killed Calvin was being sought for to be arrested hence they were told not to scream.



19. In cross-examination, PW4 stated that on that night, he was asleep when Rael's daughter went knocking and crying saying her brother had been assaulted. He further stated that the deceased only called out the name of 'Onyango' and said that it was Onyango who had cut him.
20. PW5 Dr. Juma Gabriel Wekesa a Medical Officer at Siaya County Referral Hospital testified that he carried out a post-mortem on the body of Calvin Ochieng Madote on 3/8/2021 at Siaya County Referral Hospital mortuary at 4.10 pm. He testified that the body was of an African male. Externally, they found a cut wound on the left side of the neck and severe parlour on all conjunctival membranes whilst internally, in the cardiovascular system, they found a left jugular injury with a sharp object and on the head, they found a 10cm left linear cut on the neck.
21. It was his testimony that there was severing of the left jugular vein with haematoma formation and that all other systems were normal. He testified that they concluded that the cause of death was acute cardiorespiratory failure following acute haemorrhage with shock and issued a death certificate No 1438587 and that he signed the post-mortem on 3/8/2021 and stamped it. He produced the post-mortem as PEx1.
22. PW6 Salbin Cheruto Katukoi a Senior Chemist at the Government Chemist in Kisumu in the DNA Section testified that on the 19/8/2021 she received an exhibit memo and some items from the DCI Siaya namely:
 - a) A panga with a rubber handle in a purple comer bag marked 'A'
 - b) A black torch with pink marked 'B'
 - c) A brown jacket in a blue comer bag marked 'C'
 - d) Blood sample of Calvin Ochieng Madote in a tube Marked 'D'
23. She testified that the panga item A, torch item 'B' were both lightly stained and that the Jacket 'C' was moderately stained, all with blood of human origin. She further testified that the DNA profiles generated from exhibits were listed and tabulated at the end of the report.
24. It was her testimony that based on the findings: The DNA profiles generated from the panga items 'A' and the torch item 'B' and the jacket item 'C' all matched the DNA profile of Calvin Ochieng Madote the deceased. She stated that she did the report, signed and dated it on 15/2/2022. She produced the exhibit memo as PEX 2a and her analysis report as PEX 2b.
25. In cross-examination, PW6 stated that after analysis, the items were preserved at their dispatch store for collection by the DCI. She stated that moderately stained is when the stain is not obvious.
26. PW7 No 230787 Sergeant Alexander Muga based in Nakuru testified that in July 2021 he was based at Kogelo Police Station and that on 28/7/2021 at around 6am, he was in his house when Rajula driver called him saying he was taking a patient to Siaya hospital when the said patient died on the way. He testified that he called the OCS and other officers and proceeded to Ojwando village to look for the suspect but never found him. He stated that they combed bushes nearby but never traced the suspect until 11am.
27. It was his testimony that someone then called him from the area saying the suspect had been spotted in the area and he, CPL Korir and PC Samuel Ochienga then went to where the suspect had been spotted. It was his testimony that when they reached the home, they saw the suspect in the home of Ojuka and arrested him. He further testified that the suspect was holding a panga in the right hand and a torch in the left hand. He stated that the suspect surrendered during arrest and PW7 handcuffed him using



- a rope. PW7 reiterated that the suspect never resisted and so they took him to Kogelo Police Station then to Siaya Police Station.
28. PW7 identified the panga and torch in court as the ones that they found the accused with. It was his testimony that he knew the accused before the incident and that prior to that date, he had never received any report from him concerning his dispute with the deceased. PW7 testified that the accused claimed that the deceased had disturbed him and chased him with a panga. He identified the person that he arrested as the accused in the dock.
 29. In cross-examination, PW7 stated that he was not the Investigating officer in this matter. He further stated that no reports were made to their Station concerning the deceased. It was his testimony that he just recovered the panga and the torch not the jacket that the deceased wore when he placed him in custody. He stated that other officers could have recovered the jacket. He reiterated that he was not aware of the complaint lodged by the accused against the deceased.
 30. PW8 No 86706 PC Joash Oriese attached to DCI Siaya Sub County testified that he was the investigating officer in this case. He testified that on the 28/7/2021 he was asked by the DCIO to investigate an alleged Murder whose suspect was already in custody. He stated that he recorded witness's statements of PW1, PW2, PW3 and PW4 who went to their office. It was his testimony that the arresting officer had also recorded his statement so he compiled a file and subsequently filed a miscellaneous application to hold the accused for 7 days.
 31. PW8 testified that on the 29/7/2021 he escorted the accused to Kakamega County Referral Hospital where the accused was examined by Dr. Mbiti and declared fit to plead. He stated that on the 3/8/2021, they witnessed a post-mortem on the body of Calvin Ochieng Madote, done by Dr. Juma, PW5.
 32. PW8 further testified that he prepared an exhibit memo and sent to the Government Chemist at Kisumu and the report was received back on 15/2/2022 as testified by PW6 the Government Analyst. He stated that he was handed he exhibits by PW7 which were a panga and a torch, which he sent to the Government chemist. He further testified that he recovered a jacket from the mortuary from the deceased which he also sent to the Government Chemist.
 33. PW8 identified the panga marked as MFI 1 and produced it as PEX 3, the torch - black with yellow cover marked as MFI 2 and produced it as PEX 4. He also produced the jacket he recovered from the deceased's body when he was taken to the morgue and produced it as PEX 5 and noted that the jacket was full of blood.
 34. It was his testimony that when the accused was in the cells, they discovered in the cause of investigations that the accused was a caretaker of a certain home where there was a road passing by towards the house of the deceased. He stated that the accused is said to have cut the deceased on suspicion of stealing from the house where the accused was a caretaker, from time to time. He further stated that the accused had allegedly chased the deceased from the house and caught up with him, and cut him severally. PW8 identified the accused in the dock and stated that he did not know him before.
 35. In cross-examination, PW8 stated that he found the accused suspect in custody. He testified that they interrogated the accused generally. It was his testimony that they spoke to Shadrack Otieno and Joseph Oganga but that the two refused to avail themselves to the police station to record their statements. He further stated that they had never received any report of theft against the deceased and that the deceased had never filed any complaint that he was being pursued by the accused. He testified that the brown jacket was recovered from the deceased in the mortuary.



The Defence Case

36. The accused testified on oath and stated that he was someone's workman. He denied killing the deceased. It was his testimony that on the 27/7/2021 at around 7 a.m. he was arrested by police officers when going to report an incident which had happened on the 26/7/2021. He testified that he was going to report Vincent Otieno Madote who on the 26/7/2021 while he was going to his place of work and on nearing there, he went to have a short call then heard someone knocking the house of his boss where he lived there alone and upon moving closer he saw a white object near a flower.
37. It was his testimony that he did not know what it was. He testified that he surrounded the main house of his boss where he saw someone standing whom he did not know so he switched on the torch he had in his hand and saw Vincent Otieno Madote standing with David Madote in white. He testified that he screamed asking Vincent if his mission was to break into the house the 2nd time. It was his testimony that Vincent and David ran away as he screamed for help. He further testified that Otis the son of Ong'ang'a Anyiego, a neighbour, heard screams and went to the scene and asked the accused what was happening and the accused told him that Vincent and David were breaking into his boss's house.
38. The accused testified that he had left his phone at home so he sent for it so that he could call his boss. He stated that he started walking towards Anyiego's home and Joseph asked him what was happening and as he explained to him, that he had been invaded at the home of his boss, he saw Vincent Otieno Madote lifting a panga and saying, "today I must kill you". He stated that it was around 8 pm and that Vincent is the same as Calvin Ochieng Madote.
39. The accused testified that when the deceased got near him wielding a panga, the accused asked the deceased why the deceased wanted to cut the accused. He stated that he was ducking the deceased who was chasing the accused around saying the life of the accused had come to an end. He testified that he ducked 4 times and on the 5th time, he leaned on a wall as he could not run.
40. The accused testified that fortunately, there was a pit nearby so his attacker fell in that pit and when the accused switched the lights towards his attacker, he saw him leaning on the panga. He testified that he went and snatched the panga and ran away with it leaving his attacker in a ditch. He stated that he went to his employer's home and called his employer who advised him that he should have reported the matter to the police but that it was late. The accused testified that he spent the night in the home nearby and in the morning, he went home and told his parents of what had happened and they advised him to go report to the Assistant Chief so on 27/7/2021 in the morning, as he was going to report while carrying the panga that he had disarmed the deceased with and the torch too, he saw police officers who chased after him and arrested him and took him to Kogelo Police Station.
41. He testified that he was later told that Calvin was dead. He stated that he was shocked and that he was taken to the police station. It was his testimony that he had no grudge against Calvin but that he had reported some incidents to the Assistant Chief who had not resolved the issues. The accused denied cutting the deceased and stated that the deceased wanted to kill him. He further stated that he only took away the panga from the deceased when the deceased fell in the ditch. He stated that Calvin was drunk so he slipped and fell in the ditch. He stated that he had no intention of killing the deceased and that he never cut him. He denied strangling Calvin.
42. In cross-examination, the accused stated that he had known Calvin and his brother David very well and that they all lived in the same village. It was his testimony that he found David and Calvin breaking the door to his employer's house but that they ran away. He further stated that he went to his neighbour's homestead. He testified that Joseph went there when he heard screams. The accused stated that he was



alone when he was attacked, that his neighbour, Otis, went there but found when his attackers had run away. He stated that he never sustained any injuries because he ducked the deceased's advances.

Analysis and Determination

43. I have considered the evidence for the prosecution and the defence. The issue for determination is whether the prosecution has proved beyond reasonable doubt all the elements of the offence of murder against the accused person. 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.
44. I will consider each ingredient separately.
45. On the fact and proof of the cause of death, the evidence of PW1, PW2, PW3 and PW4 was that the deceased died at the hospital where he had been taken for treatment. PW5, Dr. Juma Gabriel Wekesa who carried out an autopsy on the deceased's body testified that he concluded that the cause of death was acute cardiorespiratory failure following acute haemorrhage with shock as was evidenced in PEXB 1 the post-mortem report. Accordingly, I find and hold that the prosecution proved beyond reasonable doubt the fact and cause of death of the deceased Calvin Ochieng Madote.
46. On the second ingredient as to whether the deceased's death was the direct consequence of an unlawful act or omission on the part of the accused, the accused person denied killing the deceased. The evidence by PW1, PW2, PW3 and PW4 was that of a dying declaration by the deceased.
47. Section 33(a) of the *Evidence Act*, Chapter 80 of the Laws of Kenya provides that:
- “ 33. Statements, written or oral or of electronically recorded of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:
- (a) Relating to cause of death:
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 and 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.”



48. The Courts have interpreted the above provisions. In *Pius Jasunga s/o Akumu v R* (1954) 21 EACA 333 the predecessor of the present Court of Appeal stated:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.....It is a rule of law that in order to support a conviction there must be corroboration of a dying declaration (*R v Eligu s/o Odel & another* (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ,,,,,,,. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”

49. The Court of Appeal in the case of *Stephen Muturia Kinganga v Republic* (2013) eKLR reiterated the above holding which is to the effect that a dying declaration must be corroborated.

50. I will therefore examine the evidence of PW1, PW2 and PW4 and whether the deceased made the alleged statements and if so, whether the statements amounted to dying declarations and further if there was corroboration.

51. From the evidence on record, the deceased made the statements to PW1, PW2 and PW4 respectively. PW1 testified that when Joseph brought the deceased to their home, the deceased told him that Onyango had cut him with a panga. This was reiterated by PW2 who testified that she opened the door upon the deceased insisting on her to open it as something bad had happened and that she saw him covered in blood and the deceased told her that Onyango, the accused, had cut him. PW4 testified that the deceased’s mother, PW2, sent the deceased’s sister to call him so that he could help as the deceased had been cut. He testified that he found the deceased lying on the ground with his body and clothes soaked in blood. PW4 further testified that the deceased was unconscious but he kept raising his head and lowering it saying, “Onyango you are the one who cut me.”

52. As to whether the statements were dying declarations, I find no difficulty in finding that the statements by the deceased amounted to dying declarations as the statements related to the events that eventually led to the death of the deceased.

53. On corroboration, the evidence of PW1 perfectly corroborated that of PW2 and PW4. There was also the corroboration by way of medical evidence presented by PW5, Dr. Wekesa, which confirmed that the injury to the deceased’s neck was the cause of the death of the deceased.

54. The accused person was under no duty to adduce or challenge any evidence adduced by the prosecution witnesses. He however exercised his right to adduce and challenge that evidence. Juxtaposed against the evidence above was the accused’s evidence on oath in which he denied killing the deceased and stated that the deceased was attacking him with a panga when the deceased fell down into a pit and fell on the panga after which he, the accused snatched the panga away from the deceased. The accused further stated that he disarmed the deceased. The the accused stated that he had reported the deceased to the Assistant Chief on numerous occasions.

55. The accused also testified that he had no grudge with the deceased but had reported some incidents to the Assistant Chief who had not resolved the issues. PW2, the deceased’s mother on her part testified that the accused had reported to her that the deceased had some small differences arising out of the fact that the deceased had taken the accused’s sandals while they were at a school football field but that a week prior to the deceased’s death, they had returned the sandals to the accused.



56. I note that the deceased knew the accused very well and repeated to three different persons, PW1, PW2 and PW4 that it was the accused who cut him. Though PW4 stated that he did not know which Onyango the deceased was referring to, I find that the testimonies of PW1 and PW2 pointed at the accused person as the deceased's assailant. I Further believe the testimony of PW1 that it was the accused who slapped him with a panga when PW1 went to find out why the deceased was screaming from the place where he found the accused holding a panga although he did not see the deceased at that particular place and time and that upon PW1 running away on being slapped with a panga by the accused, shortly thereafter, the deceased emerged while cut on his neck saying Onyango had cut him.
57. The accused's defense that the deceased fell on the panga which he wanted to cut the accused but that the accused ducked so the deceased fell into a ditch and on the panga is not believable because the report from the government analyst reveals that the panga and torch which were recovered from the accused were all soiled with blood belonging to the deceased as per the DNA analysis and report. I say not believable because there is no evidence that the deceased also possessed the torch which was found to have blood that matched his DNA. Further, the defence by the accused person that it was late so he could not report the alleged incident to the police and that he had to seek direction from his employer in Nairobi as well as his parents so as to decide to proceed to the police is in my view a made up story.
58. Accordingly, I find that the deceased made dying declarations to PW1 PW2 and PW4 which were duly corroborated. I did not find anything to doubt the credibility of these witnesses for the prosecution. I also note that the evidence of the other prosecution witnesses remains uncontroverted. The panga and torch that the accused was found with all tested positive for the deceased's blood as was evidenced in the testimony of PW6, the government analyst and as contained in PEX 2a and PEX 2b.
59. Based on the above analysis, it is my opinion that the prosecution proved the second ingredient of the information of murder against the accused person, beyond reasonable doubt. It is therefore my finding that the death of the deceased Calvin Ochieng Madote was unlawfully caused and that it was the accused person who unlawfully caused the said death.
60. Finally, as to whether the accused person's unlawful killing of the deceased was with malice aforethought, Section 206 of the *Penal Code* defines malice aforethought as follows:
- “ 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -
- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.
 - (c) An intent to commit a felony.
 - (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”



61. The Court of Appeal in the case of *Joseph Kimani Njau v R* (2014) eKLR concurred with an earlier finding in the case of *Nzuki v R* (1993) KLR 171 where it was held 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;

- i) The intention to cause death;
- ii) The intention to cause grievous bodily harm;
- iii) 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 in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed...”

62. In the case of *Mary Wanjiku Gitonga v R* (Nyeri) Criminal Appeal No 83 of 2007 (UR) the Court of Appeal stated that:

“We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.

In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record. “(emphasis added).

63. In this case, malice can be inferred from the weapon used and the place of injury. The weapon was a sharp panga which caused a penetrating injury on the deceased’s neck, severing the deceased’s jugular vein. The accused person knew that the panga was able to kill the deceased and further his aiming at the deceased’s neck was intended to cause grievous harm, if no death.

64. Taking into account all the circumstances of this case, I find a clear manifestation of malice. It is therefore my finding that the prosecution proved malice aforethought against the accused person in this matter beyond reasonable doubt.

65. In the end, I find and hold that the prosecution proved all the ingredients of the information of murder against the accused person, beyond reasonable doubt. I find the accused person Stephen Onyango



Okinja Guilty of the offence of murder as charged. I convict him accordingly. Sentence shall be after records and mitigation.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF JUNE, 2022

R.E. ABURILI

JUDGE

