



**State v Ogombe (Criminal Case E015 of 2021)
[2022] KEHC 11593 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E015 OF 2021
RE ABURILI, J
JULY 29, 2022**

BETWEEN

STATE PROSECUTION

AND

STANLEY MUSUNGU OGOMBE ACCUSED

JUDGMENT

1. The accused person Stanley Musungu Ogombe 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 June 25, 2021 at Sumba sub-location within Nyadorera sub-county within Siaya County, the accused murdered one BOO
2. The accused person pleaded not guilty to the charge of murder and the matter proceeded to full trial with the prosecution calling eight (8) witnesses in support of its case.
3. It is important to observe that when the accused was placed on his defence and the defence case fixed hearing in earnest on March 29, 2022, the accused sought an adjournment on account that he had been operated on. On the May 4, 2022 when the matter came up again for the defence case, the accused stated that he would give his testimony only after seeing a doctor despite his advocate being ready to proceed.
4. The court after considering the arguments by the accused as well as the prosecution noted that the accused was intentionally refusing to proceed with his case and directed that the accused proceeds with his case by giving him an opportunity to elect what defence if any, to offer. The accused then elected to give evidence on oath without calling any witnesses but when put on his defence, the accused refused to testify. The court then proceeded to close the defence case as the accused had refused to testify.



The Prosecution's Case

5. PW1 SMO testified and recalled that on June 25, 2021, he escorted his wife to her grandmother's funeral when OA, a neighbour called him saying his sister's child, BO, was missing. He testified that his sister was LAM and that the child used to stay with PW1's mother. PW1 testified that he returned home and was informed that the child had been sent to buy sugar but never returned home. He followed the path that the child is said to have followed but never found the child.
6. It was his testimony that on his way to search for the child, PW1 met the accused person herein holding a panga and removing maize from his farm on the road and that the accused warned PW1 not to step near the accused's farm. PW1 testified that he was in the company of his brother KOK who was leading him on the path. He stated that on inquiring from the accused whether he had seen the child in question, the accused showed them a distant place saying the child usually played far off. It was his testimony that he started suspecting the accused because the accused had earlier on killed a cow and the fact that he was holding a panga and was harsh. PW1 then called the Assistant Chief and Chief, but they never responded and that at night, he got the village elder Roselyne Okumu, who was aware of the missing child and together with PW1's mother, brother and other villagers, they proceeded to the accused's home where they met the accused's father and informed him of their fears of the missing child.
7. PW1 testified that during day time as they searched for the missing child, they had met the accused's father and on inquiring from him of the missing child, he gave them hope saying the child would be found. He further testified that at night, they went back to the accused person's father's home and asked him if he had any information concerning the missing child and the father to the accused went and called out the accused and asked him of the whereabouts of the jembe that the accused had taken during the day but the accused said that the jembe fell in a well so PW1 and his team prayed and returned to their homes.
8. PW1 further testified that on June 26, 2021 they went to report the missing child to Rwambwa Police Station at about 8.30 am and as soon as they arrived, they saw the accused arrive at the police station and started explaining to the police officers that PW1 and others had gone to investigate at his (accused's home); and searching for a missing child and suspecting him yet he did not know the child; and that if he saw the child, he would recognize him-the child. PW1 testified that his mother asked the police to accompany them to help trace the movements of the child.
9. He testified that they left with the police to the path and area where he had found the accused harvesting maize and found the area ploughed (weeded) with fresh soil. PW1 testified that the place had not been weeded the previous day when he found the accused. It was his testimony that he used a jembe to dig around the area and saw weeds underneath and as he continued digging, he saw the missing child. He further testified that the police arrived and dug further and they removed a body of the child with no head so they placed the body on the surface and went to the house of the accused and searched but never found the child's head. He testified that they saw a sword.
10. PW1 testified that he went home and at 3 pm they heard screams from the scene where the body was and on rushing there, they found a head buried nearby, with no neck. He testified that the head was one metre away from where the body had been found buried. It was his testimony that the police were present and they took the head to the police station. PW1 identified Stanley Musungu as the accused in the docket. He further stated that he knew the accused for long as they grew up together in the village then he left for Mombasa.



11. In cross-examination, PW1 stated that the accused lived in his home with other people. He further stated that the body of the child was found on the accused's farm but that their home was big. He further testified that the previous night when they visited the home of the accused, they had not known what had happened to the child and that it was the accused's father who asked the accused to say where he had taken the jembe that he had picked from his father's house. PW1 testified that he was not at home when the child went missing.
12. PW2 RA testified that the deceased was her grandson. She testified that on June 25, 2021, a Friday, at about 1 pm, B was at her home having returned from school. She testified that she sent him to go and get her some sugar from her sister's place so B left together with her sister, C. It was her testimony that her sister's house was near so she placed water for tea on a jiko then went to buy bread in a nearby shop but on her return, she never saw Bravin.
13. PW2 testified that she asked her last born daughter B on the whereabouts of B and B told her that B had not returned so PW2 sent B to follow B and bring her the sugar he had gone to collect from PW2's sister's house. It was her testimony that B went and returned and told her that she had not found B but she had met other children who told her that they had seen B pass. PW2 testified that she followed the route followed by B and passed by Stanley's "(Noma)" home and saw a pail near the path and in a farm. She testified that she met children who told her that B had passed them.
14. PW2 testified that she returned home after failing to trace Bravin and after going to her sister's house and was told that her sister had given B Sugar and released him. PW2 testified that from her sister's house to her house was near as one passes two houses including that of Stanley. It was her testimony that the people who saw B told her that they saw him going with PW2's sister to the latter's house and on his return up to the home of Stanley '(Noma)' but from there nobody saw him.
15. It was her testimony that she started screaming when she failed to trace her grandson yet he had been well and vanished near Stanley's home so she went to Stanley's home where she found his father and explained to him how her grandson had vanished near his home upon which Stanley's father went with her to Stanley's house and asked him if he had seen the child but Stanley said that he had been harvesting maize and never saw any child pass by.
16. PW2 testified that she called the Area Chief and informed him and he advised her to continue searching for the child so they searched until night. She testified that she also called her son who joined the search. It was her testimony that during the day, as they searched, at around 3 pm, the accused told them not to pass by his farm looking for anything. She testified that in the evening, they were accompanied by the area Chief and village elder to Stanley's home and insisted that that home is where B had disappeared from so they needed answers and the accused's father who was at his home told them to check in the houses in his homestead and see if the child was in that home.
17. PW2 testified that they went back home and slept without finding B and she remembered that the accused had told them not to get into certain places on his farm as they searched for the child. She testified that the place was behind the accused's house. It was her testimony that the following day, June 26, 2021, they went to the police in the morning and reported the loss of the child and while at the police station, at Rwambwa, the accused arrived and said that PW2 and others trespassed on his land suspecting him of killing their child.
18. She further testified that the police decided to accompany them on the path used by the child to and from her sister's house and as they were going to the scene, Stanley remained at the Police station. It was her testimony that as they went with the police and followed the entire route followed by the child, very many people were at the scene. She testified that they saw part of the land which Stanley was weeding



- and the police officer told them to get a jembe from a nearby farm to find out what was in the place. PW2 testified that they got a jembe from Stanley's grandmother and PW2's son and others dug the place and found only the body without the head and neck. She testified that the police took away the body and later the head was found buried nearby without a neck in a sugar bag but without the sugar.
19. PW2 testified that the child's body was retrieved from near the place where the accused had prevented them from accessing the previous day. She testified that the police took away the body of the child and after the head was found, the police were called back and they took it away to Siaya Mortuary. PW2 identified the accused person as Stanley and stated that she had known him since he was born although, he lived in Mombasa.
 20. In cross-examination, PW2 stated that she recorded her statement with the police and thumb printed it. She further stated that after sending B to go with her sister, she went to the shop and picked bread. It was her testimony that she expected B to be back by the time she returned since he had left earlier so she sent her daughter to follow up on B whereabouts but her daughter returned saying she had not found B and that some children had told her that they had seen him returning home.
 21. PW2 testified that when she went looking for B she was calling out his name but he never responded. She testified that they searched for B until nightfall. She stated that they went to the home of Stanley and found his father. It was her testimony that she was with many people including the village elder.
 22. PW3 Dr. Juma Gabriel Wekesa testified that he conducted a postmortem on the body of the deceased Bravin Ochieng on July 1, 2021 at Siaya County Referral Mortuary at 3.30pm. It was his testimony that the body of the deceased had a dirty, linen soiled with blood and was of an African male.
 23. Externally PW3 testified that the deceased had a complete decapitation with separation of the head from the main trunk and that internally, the head was completely separated from the body. PW3 testified that in the nervous system, there was brain liquefaction while the examination of the spinal column revealed that there was complete spinal transection at C1 and C2 segments. He testified that the rest of the systems were normal.
 24. PW3 testified that they concluded that the deceased died from decapitation resulting from abrupt interruption of nervous, respiratory and neuronal function with a sharp object and he stated that he issued Death Certificate No. xxxxx signed and stamped. He further produced the postmortem form as PEX1.
 25. In cross-examination PW3 stated that the body was of an African male but the police could confirm the age.
 26. PW4 BA, a minor, gave unsworn testimony that on June 25, 2021 during daytime she had gone to play and to get fruits when she saw the accused, whom she pointed out in court, strangling a child. She testified that the accused was in a shamba as she was on the road but she saw him holding a child by the neck. It was her testimony that she did not know who the child was at that time but they were close to the road, about 10 meters into the shamba.
 27. PW4 testified that she saw the accused holding a child on the neck and mouth and when the accused saw her looking at him, he started chasing her up to the home of Aziza then turned back after she entered the home of Aziza. It was her testimony that she stood in Aziza's home then a certain lady came out of the home and held her hand and led her home. She testified that she knew the lady by appearance but not by name. She further testified that they did not go to where the accused was strangling the child.
 28. PW4 testified that when she reached home, she informed her mother of what she saw on the way but she doubted her. It was her testimony that later on people started saying that a child had been killed



- and the child's grandmother came and took her to the police. She testified that she went where the child was found and that his neck was cut off. She testified that they found the same scene where she saw the child being strangled.
29. PW4 testified that the accused wore a red shirt and that she had not known him but knew the home of that child. She further testified that there was a nearby homestead where the child was being strangled. It was her testimony that from her home to the accused's home was slightly far. She further testified that the police wrote her statement and that she knew the child's grandmother before this incident. PW4 identified the man she saw strangling a child as the accused in dock. She further testified that it was at about 2pm during the day when she saw the accused strangle a child at what time she was going to look for fruits.
 30. In cross-examination PW4 stated that she was in Class 5 and schooled with E. It was her testimony that the deceased's grandmother escorted her to record her statement on a date she could not recall but a few days after the incident about 6 months ago. She stated that she spoke as the police officer recorded her statements. She further testified that she told the police that she saw a man whom she did not know, holding and strangling a child. It was her testimony that she was not asked to go to the police identification parade. PW4 reiterated that the man was holding the mouth and neck of the child and when he saw her, threw the child down and started chasing her so she ran to Aziza's home. She testified that she did not tell the lady at Aziza's home of what she had seen. It was her testimony that there were no other people at the scene and that no children were playing nearby.
 31. When questioned by court, PW4 stated that the child was a boy and that his grandmother introduced herself as 'Nyanya O' who used to come to her home to visit her grandmother called M. She stated that when she went home, she told her mother that she had seen a man killing a child.
 32. PW5, CAO, testified that the deceased was her grandson as he was a grandson to his sister. She testified that on June 25, 2021 she left her house early in the morning, worked and returned at lunchtime to give milk to her young grandson whom she had left at her sister's place. It was her testimony that her sister asked for Sugar so she went with B and gave him 1 kg of Sugar to take to her sister. It was her testimony that B left but after a while, her sister, B grandmother, came calling and asking where B was because he had taken time to deliver the sugar which was about 30 minutes. She testified that they got out and started calling out on B and that they met children along the path and asked them whether they had seen B and they told them that B had passed carrying a bag.
 33. PW5 testified that she followed her sister who was ahead and passed by the home of 'Noma' where they normally fetch water from and continued calling out on the people nearby asking where the child could be but never saw him. It was her testimony that they decided to report to the authorities so she called the chief and notified him and he said he would investigate. She testified that they slept and at 5am her sister again came and told her she was going to report to the police the missing child. It was her testimony that at 10am, she heard screams out and ongoing to where the screams were coming from, she found many people gathered.
 34. PW5 testified that the police had arrived at the scene. She testified that she saw the body of B without a head. She testified that she had given B sugar in a blue plastic bag which she identified before court. It was her testimony that she saw people digging the ground and she saw the blue bag and the head being unburied from the ground. She testified that she was told to get a bedsheet but before she could go for it, her sister came with a bedsheet and it was used to carry the head of B into the vehicle. PW5 identified Noma as the accused in court. She stated that the deceased's body was found in his shamba next to his house.



35. In cross-examination, PW5 stated that the children she saw were playing at their home which was after the home of 'Noma'. She testified that they also found a man making bricks and that she also passed the home of M. It was her testimony that she was following the directions to her sister's place.
36. PW6, BA, testified that the deceased was her sister's child and that RJ was her mother. It was her testimony that on June 25, 2021 at around 1.30pm, she was at home and that B had gone to school and returned for lunch. She testified that PW5 came and her mother asked her for sugar so she went with B to bring them sugar as her mother went to buy bread but returned before B. She testified that her mother asked for B and they got concerned so they started looking for him.
37. It was her testimony that they went and started asking in the homesteads on the path whether they had seen him. She further testified that they passed by the home of 'Noma', whom she identified as the accused, and saw a yellow pail with maize inside. She testified that she went ahead and asked M if she had seen B and M told her that B had passed with PW5, gone and returned and gone to our home. PW6 testified that she also found a home where children were playing and they said they saw him pass by so she went back home.
38. It was her testimony that PW5 came and they left together and again passed on 'Noma' harvesting maize using a panga and asked him if he had seen the child but he denied so they continued looking for the child to no avail. She testified that at 5 pm her mother's sister called the Assistant Chief who told them to look for him as he investigated. She testified that they slept till the following morning when her mother went to report to the police and came with a police officer and they continued moving in the neighbourhood, asking people on the whereabouts of the child.
39. PW6 testified that they went to 'Noma's home and walked at his shamba and saw a place dug. She testified that the police officer asked for a jembe and her mother went to 'Noma's' home and asked his aunt for a jembe so that they could dig the place which was freshly dug to find out what was inside there. It was her testimony that her mother returned with a jembe and PW1 S, her brother started digging, removing maize cobs as he dug till they saw a body. She testified that the police officer went away to wear the uniform then the body was dug out but it had no head.
40. She further testified that they removed it and started searching for the head nearby and found it buried together with the blue basket, lying on the basket but the sugar was not found. It was her testimony that people came to the scene and that the police officer called for more police officers who came and carried away Bravin's body and head. She testified that 'Noma' had gone to the police at Rwambwa. She identified 'Noma' as the accused in the dock and stated that they had no disagreements with him and that he was their neighbour.
41. PW7 LAM testified that the deceased who was 8 years old having been born in 2012 was her son and that he lived with her mother. It was her testimony that on June 25, 2021 at 4 pm she called her mother but her sister, PW6, picked the phone and told her that B had gone missing at about 1 pm when he was sent to collect sugar from her aunt's house. She testified that she got worried and never slept and the following morning she went home and arrived at around 11 a.m. and followed her mother on the path B had passed by going to her aunt's place.
42. It as her testimony that they reached a place where it was suspected one 'Noma' was harvesting maize and on investigating found a freshly dug area. She stated that a jembe was brought from a nearby home and her brother S, PW1, dug and found the body of her child without a head. She testified that later they searched for the head and found it buried lying on a blue basket in another hole. She testified that the head was removed and as the police were already at the scene, they were taken to Siaya with the body of Bravin.



43. PW8 No 99669 PC Benard Kiptoo currently attached to DCI Nakuru testified that in 2021 he was based at DCI Siaya and that he was the Investigating Officer in this matter. He testified that on February 26, 2021 at around 12.00 hours he was tasked by his boss DCIO Siaya Sub County to join Scene of Crime Officers to proceed to a suspected Murder scene at Nyadorera. He testified that they proceeded and found the body of Bravin Ochieng buried in a shallow grave in the maize plantation of Stanley Musungu Ogombe.
44. It was his testimony that the scene was processed by Scenes of Crime personnel and the body retrieved with no head. He further testified that the accused Stanley Musungu Ogombe had presented himself at Nyadorera Police Post where he was placed in custody and the dead body was removed to Siaya Referral mortuary. PW8 testified that later at 1700 hours they received information that the head of the deceased was recovered from close to where the body had been recovered so they proceeded to Nyadorera and recovered the head and a blue basket which the deceased's grandmother had given the child to go and bring sugar in it. PW8 produced the blue basket as PEX2.
45. He further testified that the body and head of the deceased were recovered about 50-70 metres from the accused's house. He stated that witness statements were recorded and that the accused was escorted to Jaramogi Oginga Odinga Teaching and Referral Hospital for mental assessment and was arraigned for the murder of the deceased. He testified that the accused who presented himself to the police was the accused person in the dock.
46. In cross-examination, PW8 stated that he was the investigating officer in this case and that he was to verify what witnesses recorded covering what transpired. He testified that the accused was the owner of the maize plantation where the body of the deceased was found and that he did not carry out a search to establish ownership of the land where maize plantation was found. PW8 further testified that it was not true that the accused was in court because of his previous bad record or that the accused surrendered to the police station to merely complain that people suspected him of the committing the murder of the deceased.

Analysis and Determination

47. I have considered the evidence adduced by the prosecution herein. The main issue for determination is whether the prosecution proved beyond reasonable doubt all the elements of murder against the accused person herein. These elements are: the fact of the death of the deceased, the cause of that death, that the death was occasioned by an unlawful act or omission, that it was the accused person Michael Onyango Awich and no other person who caused the unlawful death of the deceased and finally, that the accused had malice aforethought when he unlawfully killed the deceased.
48. There is no doubt that there was death of a person in the name of BOO. The testimonies of PW1, PW2, PW5 and PW6, the deceased's uncle, 2 grandmothers and aunt was that they saw the deceased's body as it was dug up from the maize plantation without a head and later that the deceased's head was recovered a few metres away from where the body was. Further, PW3, Dr. Dr. Juma Gabriel Wekesa, who carried out the post mortem on the deceased's body testified that as a result of his examination, he formed the opinion that the cause of death was decapitation resulting in abrupt interruption of nervous, respiratory and neuronal function with a sharp object. Accordingly, the prosecution proved beyond reasonable doubt that indeed the deceased passed on and the cause thereof proved beyond reasonable doubt.
49. 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 the deceased's death was unlawfully caused.

50. On the question of whether it was the accused who caused the deceased's unlawful death, in this case, there is no direct evidence from the prosecution linking the accused to the death of the deceased. The prosecution relied on circumstantial evidence.
51. The Court of Appeal in the case of *Pon v Republic* (2019) eKLR stated that when faced with circumstantial evidence, a court should consider the following;

“Though not direct, circumstantial evidence, as this Court stated in *Musili Tulo V Republic* Criminal Appeal No 30 of 2013:

“... is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.”

To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are *Rex V Kipkerring Arap Koske & 2 Others* [1949] Eaca 135 And *Simoni Musoke V R* [1958] Ea71.

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

- (i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

52. The circumstantial evidence in this case is found in the corroborative testimonies of PW1, PW2, PW5 and PW6 all who testified that the deceased was sent by her grandmother, PW2 to get sugar from his other grandmother, PW5 but never returned leading to a search for the deceased by his grandmother, PW2, and his other relatives.
53. PW1, the deceased's uncle testified that during the search they inquired from the accused whether he had seen the deceased but the deceased was harsh, a fact that was corroborated by PW2, who testified that during the search, the accused was harsh to them and told them not to pass by his farm looking for anything.
54. PW1 further testified that they inquired from the accused's dad if he had any information on the deceased's whereabouts and the accused's father called the accused to inquire the whereabouts of the jembe he had taken earlier in the day but the accused stated that the jembe fell in a well.
55. PW2 also testified that when she finally went to report the missing child at the police station, the accused also came there and reported that PW2 along with other relatives of the deceased were



trespassing on his land and investigating him claiming that he was responsible for the missing child. PW2 further testified that the deceased's mutilated body was retrieved from where the accused had prevented them from accessing as they searched for the deceased's body.

56. PW5 testified that the deceased's head was found with the blue bag that she had kept sugar in for him to take to PW2 and further that when they began their search for the deceased they met children who told them that the deceased had passed them carrying a bag. This was further corroborated by PW6 who testified that when they inquired from children of a nearby home they told her and the other searchers that they saw the deceased on his way back.
57. I also have to consider the unsworn statement of PW4, the minor who testified that she saw the accused strangling the deceased.
58. In *Samuel Muriithi Mwangi v Republic* [2006] eKLR the court of appeal had this to say about unsworn evidence.

“...there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the *Criminal Procedure Code* and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the *Criminal Procedure Code*. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence.”

59. In *Jamaal Omar Hussein v Republic* [2019] eKLR the Court of Appeal went on to state:

“There is a presumption that a person who swears to tell the truth will do so and since evidence tendered on oath is subjected to cross- examination to test its credibility and veracity, then the same carries more probative weight. This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter. This Court addressed the evidentiary value of unsworn statements, in *May v Republic* (1981) KLR (Law Miller & Potter, JJA.) as follows; “An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.” In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this *Court in Mwangi v Republic* (2006) 2 KLR 94 held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence.”

60. PW4, due to her age gave unsworn statement that she saw the accused strangling a child and holding the child by the neck and that when the accused saw her, he chased her but she managed to get to Aziza's home where she waited till the accused left before proceeding home where she told her mother what had happened but her mother did not believe her.



61. PW4 described the accused as having worn a red shirt on that day and further identified him in court. It was her testimony that the deceased's body was retrieved where she had seen the accused strangling the child.
62. Following the holding in *May v Republic* (supra) the question is whether there is other evidence on record to support the evidence of PW4? Clearly from the evidence adduced above it is clear that PW4's unsworn testimony as to the location where the deceased's body was recovered is supported by that of PW1, PW2, PW5 and PW6.
63. PW1's testimony that the accused took a jembe from his father which he claimed fell down a well was corroborative of the prosecution evidence that the deceased's body was dug up where the land seemed to have been recently prepared. It further explains the accused's harshness, misdirection and apprehension as to people searching on his land as testified on by PW1, PW2, PW5 and PW6.
64. Further to this it says a lot that the deceased's body was retrieved was discovered from the accused *shamba* where he did not want people to search.
65. From the above evidence, it is clear that the accused was the last person seen with the deceased and that he knew what happened to the deceased. Further, the accused's demeanour and behaviour before court pointed to a person who did not want this case to come to an end.
66. I am thus persuaded beyond reasonable doubt that the evidence adduced by the prosecution form a tight link and point towards the accused as the one who caused the unlawful death of the deceased.
67. On whether the 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”.
68. In the cases of *Ernest Asami Bwire Abang Alias Onyango v republic* Ndumbe CACKA No 32 of 1990, *Karani and three others v Republic* 1991 KLR 622, *Republic v Godfrey Ngotho Mutiso* 2008 eKLR and *James Masomo Mbacha v republic* 2015 eKLR the courts have sufficiently inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries to the victim.
69. In this case the accused's motive is discernible from the testimony of PW3 Dr. Gabriel Wekesa, who carried out the post mortem on the deceased's body and concluded that the cause of death was decapitation resulting in abrupt interruption of nervous, respiratory and neuronal function with a sharp object.
70. Taking all the circumstances into account, there is a clear manifestation of malice aforethought on the part of the accused person. I thus find and hold that the prosecution has proved malice aforethought beyond reasonable doubt on the part of the accused person.
71. In the end, I find that the accused person herein Stanley Musungu Ogombe is guilty of the offence of murder of the deceased and I hereby convict him.

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

R E ABURILI

JUDGE

