



**State v Sijenyi (Criminal Case E035 of 2021)  
[2022] KEHC 12096 (KLR) (17 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E035 OF 2021  
RE ABURILI, J  
AUGUST 17, 2022**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**FREDRICK ONYANGO SIJENYI ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused Fredrick Onyango Sijenyi 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, from the Information dated 18th November 2021 are that on the 6th and 7th day of November 2021 at Kabor village, Marenyo sub-location, within Gem sub-county, the accused murdered one Millicent Atieno Ogolla
2. The accused person pleaded not guilty to the charge and the matter proceeded to full trial with the prosecution calling a total of six (6) witnesses in support of its case which is summarised herein below.

**The Prosecution’s Case**

3. PW1 Joshua Ochieng Ogola the deceased’s son testified that his father Maurice Ogola died in 2002 and in 2010, his mother started cohabiting with Fredrick Onyango Sijenyi the accused herein who had another wife. PW1 testified that the accused alternated between the deceased’s house and his home. He recalled that on the night of 6<sup>th</sup> - 7<sup>th</sup> November 2021, he was awakened by the accused at night who called him telling him that PW1’s mother was in danger and that the accused had picked her on the road where he found her bleeding. That the accused told PW1 that he had left the deceased. PW1 accompanied the accused to where his mother was and found her sited and supporting herself on the wall with her eyes closed. He testified that he called her out but she never spoke and that the house was in disarray.



4. PW1 saw household items scattered and broken all over and that on the wall, he saw panga cut marks. He testified that the deceased was in the sitting room but that at that moment he did not see any visible injuries on her body. He called his brother Michael Otieno and when Otieno arrived, he told PW1 that their mother was dead so he called the police who arrived and collected items from the house and removed her body to Yala Mortuary.
5. PW1 accompanied the police who took the body to the morgue before he went to Yala Police Station after which they were told to go home and return the following day to record their statements which they did.
6. It was his testimony that the accused was very chaotic and loved war and fights with the deceased and that the two had disagreed and whenever the accused visited her, the accused would assault his mother. He testified that they chased the accused from their home and he went to build a house at his home where the deceased used to visit him from time to time and he could also visit her at their home. PW1 identified Fredrick Onyango Sijenyi as the accused in the dock.
7. In cross-examination, PW1 stated that he was aged 25 years and that he was 5 years old when his father died. He stated that they were 8 children and he was the 4<sup>th</sup> born. He reiterated that the accused went to live with them in 2010 and they considered him as their father because he inherited their mother as per the Luo customs. He further stated that the accused had no blood relation with their father. He further stated that he used to go to school when the accused lived with them and that their mother was the one who used to provide for them and that his brothers also used to support them as siblings.
8. PW1 further stated that whenever the accused used to be drunk, he used to fight his mother. He conceded that his mother also used to take some alcohol though he did not know where they used to drink. He further stated that he went to school up to form four and that he told the police that his mother and the accused used to fight but that but that his written statement did not say so. PW1 denied being aware of any report made to the police concerning the past assault of his mother by the accused.
9. He further stated that he was called by the accused at 1.00am. He stated that the accused lived with his younger son who was aged below 10 years old and that on that material night, he found the child lying on a chair. He testified that he could not tell whether the child was scared or annoyed as he focused on his mother. He further stated that the house had only a sitting room and a bedroom and that when the police officers arrived, the child was taken away by neighbors who went.
10. PW1 further stated that he found plates, a flask and metallic items broken in the house. He stated that among the neighbours who went to the scene was Albert. Further, that he called his brother Michael immediately he realized that their mother was silent and not responding. He stated that there was solar light illuminating the house when he arrived. It was his testimony that he did not know that his mother was already dead so he only called Michael to notify him of her state so that he could assist take her to the hospital. He testified that it was Michael who called the police who on arrival, they collected the broken items which included glasses, flasks, pans as well as the body of the deceased. He further testified that other neighbors went to the scene after Albert arrived and they assisted in lifting his mother from the house. He stated that after escorting the body to the morgue they went to Yala Police Station and proceeded home.
11. PW2 Michael Otieno Akello testified that the deceased was his step mother and PW1 was his step brother. He testified that on the 7/11/2021 at 1.00am, PW1 called and asked him to go and help him as there was a problem. He stated that he proceeded to the house of Fredrick “Nyathian”, the accused whom he met together with Joshua and Albert Omware the neighbor at the accused’s gate.



12. PW2 testified that Albert told him that his mother's condition was not good, and that she had had a fight with his father. He testified that he went to the house and found his mother sitting but laying her back on the wall in the sitting room. He examined her and realized that she was not breathing and concluded that she was dead so he alerted his uncles to go and help. It was his testimony that there was a lamp in the house so there was light and that there was a child lying in the sitting room. He stated that he first called 'Mji Kumi' who was not responding so he went and informed his uncle Ayuro of what he had seen.
13. He stated that they called the Assistant Chief who told them that he was to call the police at Yala who went to the scene. It was his testimony that they got into the bedroom where they found blood and a flask broken. He testified that on the wall, he saw panga cuttings. He testified that he checked his mother and saw a cut on the head. PW1 testified that his father and PW1's father were brothers. He stated that he knew Fredrick because he inherited his mother Millicent after their Father's death and that he used to live at his house and at their home. He further stated that the two never lived in peace as the accused used to beat their mother so they told him to stop living with his mother but the two continued living together. He stated that he accompanied the police to take the body of the deceased to the mortuary. He identified Fredrick as the accused before the dock.
14. In cross-examination, PW2 stated that he was a bodaboda rider at Rabuor and that he went to school up to class eight. He stated that the deceased was his step mother and that the accused had inherited the deceased and they lived as husband and wife though the accused never provided for the deceased and her children but PW2's cousins did. He stated that the deceased and accused used to consume alcohol in the village but that the accused used to fight the deceased even when he was sober.
15. It was his testimony that when he reached the scene, he never smelt alcohol from the accused and that there was no sign that he was drunk. He reiterated that the child was lying on the seat in the sitting room and that he saw the items collected by the police being, a panga, a hammer and a broken flask and blood stained clothing.
16. PW2 testified that Albert, who was a neighbour to the accused, was the first to arrive and that they met at the gate. He stated that the police arrived after his uncle went to the scene. He denied being aware of any report made to the police of the fight between the deceased and the accused although he was aware that the two used to fight over cattle which the deceased had and had given to the accused.
17. In re-examination, PW2 stated that the deceased wanted to have her cattle returned to her homestead from the accused's home but the accused refused so the two used to quarrel over the same. He further stated that he also attended the deceased's postmortem on 15/4/2021 at Yala Sub County Mortuary and identified the body to the doctor.
18. PW3 Carolyne Ouma Omware testified that on Saturday 6/11/2021 at about at 8.30 pm, she was in her house watching television when she heard screams from outside so she got out and found "Nyachina" a lady screaming. She testified that there were lights at her house and security lights outside so she saw "Nyachina" screaming asking for help followed by "Acompus", Fredrick Onyango Sijenyei from behind. She stated that she did not know the other name of "Nyachina".
19. It was her testimony that the screams were from her kitchen side where she saw Nyachina running, pass by her and enter her house. She testified that 'Acompus' followed her into PW3's house and that she saw him carrying a small panga,. PW3 pulled Nyachina" from her house and she saw blood on 'Nyachina's' head. PW3 further testified that 'Acompus' led the deceased away beating her using the small panga he had. She stated that she was still outside her house when 'Acompus' led 'Nyachina' away from PW3's homestead.



20. PW3 stated that after “Nyachina and ‘Acompus’ left, she went to sleep and that at midnight, she heard a knock on her door and her husband went and opened it. She testified that while in her bedroom, she heard the voice of ‘Acompus’ speaking to her husband. She stated that her house has one bedroom and that she heard ‘Acompus’ tell her husband to go and help him see ‘Nyachina’ whom he had found near the road and that she was cold and not talking. She stated that from her bedroom to the door was about three metres. PW3 testified that she heard ‘Acompus’ tell her husband that as they slept, he realized that ‘Nyachina’ was not talking to which her husband told ‘Acompus’ to go and inform her relatives of what had transpired. It was her testimony that her husband then returned to the bedroom and when she asked him on who was talking to him, he told her that it was ‘Acompus’. PW3 testified that she then told him how she had seen ‘Nyachina’ with blood on her head when went came crying for help.
21. It was her testimony that they slept and at 1am, ‘Acompus’ returned and knocked on their door and her husband opened the door and said that he had returned with the deceased’s child and requested PW3’s husband to accompany them to his house. She testified that her husband went with ‘Acompus’ and returned and told her that he had seen ‘Nyachina’ and suspected her to be dead so he asked her to accompany him to the home of ‘Acompus’ where they went and found Nyachina sitted on the floor at a corner lying on the wall in the sitting room as there was a solar lamp.
22. She testified that her husband went and touched Nyachina’s chest and found her not breathing. It was her testimony that she remained in ‘Acompus’ house and that he told her that ‘Nyachina’ had broken a thermos flask before she ran to PW3’s house and that Nyachina appeared possessed but that he had prevented her from going to a funeral upon which she ran out so he went and found her on the road, unable to talk and cold. PW3 further testified that Acompus told her that he carried her into his house and placed her at the corner.
23. She further testified that she went back to her house to sleep and left her husband at ‘Acompus’ house and that her husband returned and woke her up and on opening the door, she saw him with police officers from Malala who told her to state what she had witnessed. It was her testimony that she knew that ‘Nyachina’ had died when her husband touched her chest and found it cold. She later recorded her statement with the police. She further stated that the distance from her home to that of ‘Acompus’ is 70 metres away and that when ‘Nyachina’ went to PW3’s house screaming saying she needed help, PW3 never spoke to her.
24. PW3 testified that she knew ‘Nyachina’ before that incident and that they used to meet and greet one another although they had no blood relation. She stated that they used to meet at the river for about 5 years and that she similarly knew ‘Acompus’ before that date as he was their neighbor and from their clan and had been neighbours for about 2 years. PW3 further identified the panga she allegedly saw ‘Acompus’ holding when he was chasing ‘Nyachina’ as the one with a wooden handle and resembling a slasher. She further stated that Acompus was dressed in a flowery polo neck dotted with black while Nyachina was dressed in a full dress with black and white dots.
25. PW3 further stated that ‘Acompus’ was dressed in an orange T-shirt and a brown trouser which trouser she identified before court and stated that it was muddy and dirty with some blood stains on the waist and back pocket. She further stated that ‘Acompus’ did not show her the thermos which he had told her that ‘Nyachina’ had broken. PW3 identified the accused in the dock as ‘Acompus’.
26. In cross-examination PW3 stated that she was aged 34 years with 4 children and that on the particular day she was with her 3 children, one is aged 14 years, another 13 years and another 11 years old. She testified that she saw the deceased Nyachina when she came to her house. It was her testimony that ‘Acompus’ had inherited ‘Nyachina’ and they had borne one child though they lived apart. She further testified that Nyachina lived in her home and only used to visit ‘Acompus’ in his house.



27. She stated that both 'Nyachina' and the accused used to take alcohol but denied knowing if the two had any quarrel before the incident and that neither did she ever witness any fights between the two as the deceased lived away. She further stated that she did not know what caused Nyachina's death. It was her testimony that she found 'Nyachina' sitted on the floor. She reiterated that when 'Acompus' followed and led away Nyachina from PW3's house, she saw him beat Nyachina using the small panga telling her to go to his house.
28. PW4 Albert Omware testified that on 6/11/2021 on a Saturday at about 11pm he was at a funeral and upon returning, his wife Carolyne Omware (PW3) gave him food and slept after the meal. He testified that at midnight, he heard a knock on the door and on opening he found that it was 'Acompus' who told him that he had a problem at his house which he wanted PW4 to go and help him out specifically that the lady he lived with wanted to go to a funeral but he dissuaded her so she ran away, he followed her and found her assaulted on the road.
29. It was his testimony that he asked Acompus if she was breathing and he said that she was not breathing so he told him to go back and inform her children before PW4 could leave his house. He testified that he then locked the door and returned to the bedroom where he informed his wife that it was Acompus who was at the door. He testified that they slept and then 'Acompus' returned later and informed PW4 That he had brought the son of 'Nyachina' so PW4 went with Acompus to the latter's house.
30. PW4 testified that he saw the lady sited at a corner and in the house of Acompus and that when he touched her on the chest and felt no pulse, he told the son to the lady that the lady was dead and advised him to call their other relatives and inform them, which he did. It was his testimony that later, the police from Yala arrived and removed the body of the deceased. He testified that he saw a fresh cut on the deceased's head – facial and that in the house, he saw as if there was a fight as items were broken and the wall was pricked. He further testified that when he went and found the lady dead, he returned to his house, informed his wife and they went together and she also witnessed. He testified that the distance form his house to the house of Acompus was about 60 metres.
31. PW4 stated that 'Acompus' was his uncle and was the accused before court. He further stated that the lady was dressed in a flowing black and white dotted dress while 'Acompus' had a brown trouser. He testified that when the police arrived, they removed a panga and a hammer from the bedroom of 'Acompus'.
32. In cross-examination, PW4 stated that his wife told him what had happened after 'Acompus' went to his house that night. He further stated that his wife told him how earlier on, the lady had come crying for help, entered their house then Acompus followed her and removed her from the house while beating her. He stated that the deceased had been inherited by the accused and that they used to fight and partake of alcohol. He stated that he could not tell if the two had serious fights but that they used to quarrel. It was his testimony that in the house, there was evidence of a struggle. PW4 stated that it was the accused who called him to go and assist him at his house and that he was the only person the accused called.
33. PW5 No. 238072 Inspector Kizito Lisunza testified that on the 7/11/2021 at about midnight, he received a call from the Officer Commanding Station (OCS) Chief Inspector Evans Wafula who instructed him to go to Kobol village where a murder incident had occurred and that the OCS gave him a contact number. He testified that he mobilized officers, Corporal Nyaga and Police Constable (Driver) Kirui and they proceeded to the scene at Kobol village where they met members of the public gathered at a semi-permanent house.



34. He testified that upon entering the house, they found a lady sitting on a piece of cloth at a corner of the house, dressed in a black and white flowered dress. He testified that he made observations using his torch and saw a deep wound on the upper side of the right eye. He further stated that there was a lantern lamp in the house. PW5 stated that the woman had another sharp cut above the left eye. He testified that in the deep cut, the skull was broken while the other sharp cut had the skin peel. It was his testimony that inside the house, they found the village elder and the Assistant Chief. He testified that there was a man sited in the arm chair whom the village elder identified as the suspect.
35. PW5 testified that he interrogated the suspect who told him that he had picked the lady on the way after she fell by the roadside. It was his testimony that he told the suspect to take him to the scene at the roadside but the suspect declined. He further testified that he inspected the house, got into the bedroom and found it in shambles. He testified that the thermos flask was broken and on the floor, the bed was undone and that there were bloodstains on the bed, on the gunny bag on the floor, on the long trouser and on the towel.
36. PW5 testified that he got out to check for the murder weapon and that while outside, he heard the crowd saying that the man had killed the woman and that the fight started at Omware's compound. He further testified that he was led by the suspect to Omware's homestead which was not far away, which home was well lit where he met Omware's wife who narrated how on 6/11/2021 the deceased had gone to her house screaming and was followed by the accused carrying a slasher which he used to beat the deceased.
37. PW5 testified that he returned to the suspect's house and found the slasher leaning near the bed. He testified that he also found the hammer that was placed at a corner opposite the bed and that he also recovered pieces of a thermos flask which was broken but scattered all over and kept all as exhibits. It was his testimony that after receiving the exhibits, he arrested the accused person, took him to Yala Police Station and removed the body of the deceased to Yala Mortuary for postmortem. He identified the accused person in the dock as the person whom he arrested.
38. In cross-examination, PW5 stated that he found that the deceased was a girlfriend of the accused and further that he established from the neighbours that the two used to engage in fights whenever they were drunk. He testified that he found that there was a fracas in the house of the accused as he first saw broken pieces of thermos flask., blood stain on the gunny bag, towel, mattress, trouser and beddings. He testified that he was the initial investigator but the case was taken over by the DCIO. It was his testimony that he did not have evidence that the blood on those items were for the lady who died and that he relied on the evidence of PW3 and other circumstantial evidence of the fight in the house. He further testified that the house of PW3 was about 60 metres from the accused's house. PW5 further stated that he could not tell if PW3 would hear what happens to a person at the home of the accused person.
39. PW6 No. 75141 Sergeant Ng'eno Kibet Simon testified that he was the Investigating officer in this case and that on the 7/11/2021 at about 6.00 pm, they received information of the death of Millicent Atieno Ogolla. He testified that Chief Inspector Mbalani instructed him together with Inspector Juma to proceed to Kabor village, Marenyo sub location, the scene of the alleged Murder which had taken place on the night of 6<sup>th</sup> to 7<sup>th</sup> November 2021.
40. He testified that they got into the house of the accused where they found items scattered, blood on the mattress and sitting room and remains of a broken thermos flask. He testified that Inspector Kizito and other officers had already removed the body of the deceased to Yala Mortuary and that the accused had also been arrested. It was his testimony that he looked for witnesses, recorded their statements and later obtained an order on 8/11/2021 from court to investigate the matter further.



41. PW6 testified that they escorted the accused to Jaramogi Oginga Odinga Teaching and Referral Hospital for mental assessment and that on the 15/11/2022, the family were called upon to witness an autopsy and they preferred Sagam Community Hospital. It was his testimony that Inspector Kizito handed over items recovered from the house of the accused to him as follows:
- a. MFI (I) a panga – sharp and long with a wooden handle which he produced as PEx1.
  - b. MFI 2, a brown trouser which was muddy and with some blood stains which he produced as PEx2.
  - c. MFI 3, a metallic hammer which he produced as PEx 3.
  - d. MFI 4, a stripped towel with grey, pink and yellow colours which he produced as PEx4.
  - e. MFI 5, a broken pink thermos flask which he produced as PEx5.
  - f. MFI 6, a gunny bag stripped pink, green and yellow which he produced as PEx6.
42. PW6 further testified that on the 15/11/2021 he attended the postmortem on the body of the deceased that was conducted by Dr. Ochola who concluded that the cause of death was increased intracranial pressure secondary to intra-cerebral haemorrhage, secondary to assault. He produced the postmortem Report as PEx7 with no objection from the defence. PW6 further stated that he took over the investigations after the accused was arrested and did not know him prior to the incident. He identified the accused as the one in the dock.
43. In cross-examination, PW6 stated that he was not the one who recovered Exhibits 1 to 6 as they were recovered by Inspector Kizito. He further stated that he did not have the forensic evidence on whose blood stains were on the trouser and the panga. He stated that he had the photographs of the scenes of crimes though he did not produce them in court. It was his testimony that from his investigations, the accused and deceased were a couple who used to fight after getting drunk and that on that night, they fought and the accused killed the deceased. He further stated that he was not the first person at the scene of crime.

### **The Defence Case**

44. The accused gave sworn testimony and stated that on the Saturday of 6/11/2021 he was in his homestead and that at 8 pm he heard the deceased calling him from the roadside and on inquiring who she was, the deceased stated that she was Mama Akinyi. He testified that he told her to go to the house but she feared his fierce dogs so he assured her and she went over and started crying saying that Ochieng was giving her problems at home and had chased her from her home. That the accused told her to get into the house but she said that she ought to first go and get the 2 children whom they had together. That he persuaded her not to leave then he went to tether the cattle but on his return, he found that the deceased had left his house.
45. The accused testified that the deceased carried a Dasani bottle with chang'aa inside and that she was drunk and had bruises on her face. He further testified that he then received a call from the deceased's son who was in Nairobi asking about her whereabouts to which he responded by saying that she had left. It was his testimony that the deceased's son asked him to look for her so he put his small child to sleep and went looking for the deceased. He testified that he found some people who told him that she had been chased from a drinking spree because she was drunk.
46. The accused testified that he continued walking and found her fallen on the floor so he lifted her and escorted her to his house where she disturbed him the whole night forcing him to leave his bedroom



and go and sleep in the sitting room. It was his testimony that when she fell asleep, he locked the door and went to call her son Ogolla, whom Millicent said had chased her but on returning to his house, he found that Millicent was already dead.

47. The accused denied seeing PW2 until people gathered at his house and further that he never went to Albert's house. He testified that a thermos and solar light were broken by the people who had been called by Mike. He testified that the people assaulted him saying that he had killed Millicent. He further testified that he had recorded on his phone how Millicent had been talking and that the phone was taken by the Assistant Chief. He further testified that it was Mike called the police who arrived and arrested him.
48. The accused admitted that the 2 pangas, slasher, broken thermos and hammer were all his but not the knife. He testified that his blood was not taken for forensic examination. The accused stated that he had no issues with the deceased but that the deceased used to drink a lot. He testified that the doctor told them not to drink and that he had stopped drinking. The accused denied killing the deceased and stated that she got to his house while drunk. He further testified that they only disagreed after the doctor told them to stop drinking alcohol but she persisted. He denied ever fighting with her. The accused further told the court that the clothes he had on were the same that he had on the material night and that he had not changed.
49. On cross-examination, the accused stated that 'Acompus' was his nick name that he went by at home. He admitted knowing Carolyne Omware who was her daughter in-law as her husband was his nephew and further that they were his neighbours. He stated that on the material night, he never went to Carolyne's house and that he had a land dispute with Carolyne, which dispute the Assistant Chief was aware of.
50. The accused further told the court that he knew the deceased very well but that she never lived with him in his house. He stated that his wife had left his home due to an ailment leaving him with a young child. He further stated that he had no issue with Millicent other than her refusal to stop taking alcohol. He further stated that the deceased never said that he was killing her and that Carolyne and her husband only went to his house. He further stated that he told Ochieng that his mother was at his house. He stated that he had no dispute with Ochieng.
51. In re-examination, the accused stated that Carolyne Omware and her husband gave him Kshs. 1,000 to escape to Nairobi but he declined and that he still had the money in prison. When questioned by the court as to the difference between Ochieng and Ogola, the accused told the court that they were the same person namely Ochieng Ogola.

### **Analysis and Determination**

52. I have considered the evidence in support of the charge of murder and the defence proffered by the accused person on oath. The only issue for determination is whether the prosecution has established beyond reasonable doubt all the elements of murder against the accused person herein. Sections 203 and 204 of the Penal Code which provides that:
  203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
  204. Any person convicted of murder shall be sentenced to death.
53. From the above provisions under which the accused person is charged, the elements of the offence of murder which the prosecution must prove beyond reasonable doubt are:



1. The fact and cause of death;
  2. The unlawful act or omission causing death;
  3. That it is accused who executed the unlawful act or omission that caused the death
  4. The existence of malice aforethought
54. The above elements have been reiterated in various cases including *Republic v Andrew Omwenga* (2009) eKLR where the court stated:

“It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:

- (a) the death of the deceased and the cause of that death;
- (b) that the accused committed the unlawful act which caused the death of the deceased and
- (c) that the Accused had the malice aforethought.”

55. It is the duty of the prosecution to lead evidence to prove all the above elements of the offence of murder beyond reasonable doubt. This burden does not shift at all times except in statutory exceptions. This is the principle espoused in Section 107 and 109 of the *Evidence Act* Cap 80 which provides that:

“Section 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 States: -

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

56. On whether the first element of the offence of murder has been proved beyond reasonable doubt, the fact and cause of death are not in doubt. PW1, PW2, PW4 and PW5 all testified as to the state of the deceased's body that they found at the scene specifically that the deceased was found sited supported by a wall at a corner of the accused person's house and that she was motionless and that the deceased was not breathing. PW6 produced Pex7, a postmortem report done by Dr. Ochola in which the doctor concluded that the cause of death was increased intercranial pressure secondary to intracerebral hemorrhage secondary to assault. The fact and cause of death was therefore proved beyond reasonable doubt.
57. As to whether the deceased's death was caused by an unlawful act or omission, the court in the case of *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 stated inter alia that every homicide is presumed



to be unlawful except where circumstances make it excusable, for example in cases of self defence, or where it has been authorized by law.

58. From the postmortem report produced as PEx 7, the cause of death is stated to be increased intracranial pressure secondary to intracerebral hemorrhage secondary to assault. From PEx7, the deceased suffered injuries of lacerations on the scalp and the right zygomatic region and further that the deceased had multiple lacerations on the torso, abdomen and the extremities amongst other injuries.
59. It is clear from that evidence that the same could not have been self-inflicted or that the deceased simply fell and suffered those kind of injuries. I am satisfied from the evidence contained in the post mortem report that the deceased died due to an unlawful act.
60. As to whether it is the accused who committed the unlawful act that led to the deceased's death, none of the prosecution witnesses saw the accused unlawfully kill the deceased. The prosecution case against the Accused person primarily rests on circumstantial evidence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal stated as follows:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

61. The Court of Appeal further laid down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.”

62. In this case, the circumstances surrounding the death of the deceased were as follows, from the evidence adduced- PW3 told the court that on the material date at 8.30pm she heard the deceased screaming for help as their homes are near each other. She further testified that shortly, the deceased came running to her house screaming followed by the accused who was armed with a panga which he used to beat



the deceased as he pulled her from PW3's home. She also told the court that she saw blood coming from the deceased's head.

63. PW4 testified that on the material night at midnight, the accused woke him up telling him that the deceased was not breathing but PW4 told the accused to go inform the deceased's children first. He further testified that shortly, the accused returned with one of the deceased's children and they proceeded to the scene where they found the deceased sited on the floor and but supported by the wall and on touching her, he found no pulse. He testified that he saw a fresh cut on the deceased's head as well as numerous broken items in the house.
64. PW1 testified that on the material date at 1am, the accused woke him up telling him that his mother was in danger as he had found her on the road and carried her to his house. He further testified that when he went to the house, he found the deceased's sitting at the corner and noticed cut wounds on her head and further that he found broken utensils in the house. He stated that the accused fought with the deceased on numerous occasions.
65. PW2 corroborated PW1's testimony stating that he received a call from PW1 that he should proceed to the accused's home and on his way there, he met the accused together with PW1 and PW4 at the accused's gate. He testified that on entering the house, they found his mother sitting on the floor propped up against the wall and upon examination, he noticed that she was not breathing. He further testified that he noticed that the deceased had a cut and that there was blood in the room as well as broken utensils.
66. PW5, Inspector Kizito who was the initial investigating officer testified that on reaching the scene he observed that the deceased's body had a deep wound on the upper side of the right eye and that upon interrogating the accused, he said that he found the deceased on the road side and brought her to his home though he was not willing to take PW5 to the roadside where he had allegedly found her.
67. Juxtaposed against the prosecution evidence was the accused's testimony on oath that on the material day the deceased went to his house saying that she had been chased from her home by one Ochieng and that he later left her in the house to go and tether the cows only to come back and find her missing and when he went to look for her, he found the deceased by the wayside having fallen down so he took her to his house.
68. The evidence presented by the prosecution places the accused as the person last seen with the deceased. The testimony of PW3 which was corroborated by PW4, PW1 and PW2 when weighed against that of the accused makes the accused's defence to be wanting and in my view, a mere denial.
69. The evidence of the cut wounds on the deceased's head as earlier seen by PW3 when the deceased was dragged from her home by the accused and later seen by the other prosecution witnesses after her death are corroborated by the findings of the Dr. Ochola who carried out a postmortem on the deceased's body as contained in PEx 7.
70. With such clear evidence that the deceased was last seen in the company of the accused who was dragging her out of PW3's homestead, the accused was required to offer an explanation on how the deceased met her death. Sections 111(1) and 119 of the *Evidence Act* provides as follows:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the



burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

71. In the Nigerian case of *Stephen Haruna v The Attorney-General of The Federation* (2010) 1 iLAW/CA/A/86/C/2009 the court opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

72. Similarly, in the Indian case of *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

73. The same principle was reiterated by this court in the case of *State v F.O.O* [2021] eKLR

74. In the circumstances, it is my finding that the evidence adduced by the prosecution witnesses sufficiently places the accused person at the scene of the murder of the deceased and points at the accused as the one who committed the unlawful act that led to the deceased’s death. His defense, I find, is not believable.

75. I must however add that the exhibits produced which were not taken for forensic examination are of no probative value to this case. Nonetheless, even without those exhibits linking the accused herein to the unlawful killing of the deceased, I am satisfied that the accused having been seen dragging the deceased from a neighbour’s house where she had run to seeking help, he cannot escape by merely saying that he never went to the said neighbour’s house. I find PW3 and the rest of the prosecution witnesses to have been truthful and the suggestion by the accused that he had a land issue with Carolyne is unfounded.



76. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that it was the accused who unlawfully caused the deceased's death.
77. Finally, turning to the question of whether the accused had malice aforethought when he unlawfully killed the deceased, the Court in the case of *Rex v Tubere S/O Ochen* 1945 12EACA 63 laid down the guidelines for trial Judges in consideration of malice aforethought stating inter alia that the court has 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.
78. 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 sufficiently inferred malice aforethought from the nature and type of weapon used and multiple severe bodily injuries to the victim.
79. In this case, the accused's motive is discernible from the manner in which the deceased was injured. All the prosecution witnesses testified that they noticed that the deceased had a deep cut on her head and that there was blood all over the house.
80. Dr. Ochola who carried out the deceased's postmortem provided in PEx 7 that that deceased suffered injuries of lacerations on the scalp and the right zygomatic region and further that the deceased had multiple lacerations on the torso, abdomen and the extremities amongst other injuries that led him to conclude that the cause of death was increased intracranial pressure secondary to intracerebral haemorrhage secondary to assault. The nature of injuries sustained by the deceased were thus intended to cause her death or at the least grievous harm.
81. Taking all the above evidence and 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.
82. In the end, I find and hold that the prosecution has proved all the elements of murder against the accused person herein. I find the accused person herein Fredrick Onyango Sijenyi guilty of the murder of the deceased Millicent Atieno Ogolla as charged. I hereby convict him accordingly.
83. Sentence shall be pronounced after records and mitigation.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 17<sup>TH</sup> DAY OF AUGUST, 2022**

**R.E. ABURILI**

**JUDGE**

