



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 16 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS ODHIAMBO WAIREMBA ALIAS AYINGAACCUSED

JUDGMENT

Introduction

1. The accused person herein **Julius Odhiambo Wairemba alias Ayinga** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on or about the 2/4/2017 and 4/4/2017, the accused murdered one **JO alias N**.

2. The accused person pleaded not guilty. The prosecution called ten witnesses in support of its case which is summarised herein below.

Prosecution Case

3. PW1 **Mellitius Oguny Oundo** a peasant farmer from Osumba Village testified that on 2nd April 2017, a Sunday, he went to church and left his children including **JO alias N** and that after church he returned home and they had dinner and at 10.00pm the children including **JO alias N** went to sleep where he normally slept with LO in a Cottage which is about 20 metres away.

4. He further testified that the following day at 6 am, **JO alias N** was expected to go to school at [Particulars Withheld] so PW1 got worried when **JO alias N** did not wake up by 6.00am. PW1 therefore went to wake **JO alias N** up but the other young boy told him that **JO alias N** had gone out. PW1 testified that the door was locked and the young boy was inside. He stated that he found all **JO alias N** books intact.

5. He testified that he went to inform **JO alias N's** mother that her son was not in the house and had not gone to school and then left to look for him and when he returned, he heard his wife talking to someone on phone asking how **JO alias N** got to Nairobi imploring that he be brought back. He further testified that his wife handed him the phone and the person on the line asked him how he was related to **JO alias N** to which he responded that he was **JO alias N's** father. He testified that the person on the line further asked whether he knew where **JO alias N** was to which he responded by stating that he was to be in school sitting for his last exams but was nowhere to be found.

6. PW1 testified that the man on the line inquired whether he had any in laws married in Ugenya and he answered in the affirmative as he thought of Grace Adhiambo a younger sister to his wife. He further testified that the person further asked whether he knew that the husband of Grace was sick in Nairobi which PW1 answered in the affirmative.

7. PW1 testified that Grace was at her Aunt's place as her second husband had been disturbing them prompting them to release her to her Aunt's place. He further testified that Grace's 1st husband was one Bernard whereas her second husband was Julius Odhiambo the accused herein. He further testified that the person on the phone inquired as to whether he knew the people who treated Bernard and those who settled his Hospital bill and which church Bernard used to go to, all to which PW1 he answered in the negative.

8. He further testified that the person on the phone informed him that he was a fellow church member of Bernard and that he traded in blood and that they settled Kshs 200,000/= Bernard's Hospital Bill and that if that money was not settled (paid to them), it would be paid with blood. PW1 further testified that the person further stated that it had taken long to settle the Bill and that when they went to Ugenya they found Bernard so ill that they could not get anything so they went to PW1's home looking for Grace, never found her so they took **JO alias N**, PW1's son.

9. PW1, while breaking into tears, testified that he was pained and asked the person to return his son. He further testified that the person on the phone informed him that they would help him but that he should not inform the police or anyone else. He further testified that the person

on phone inquired whether he knew Nyaruoth who had 2 sons which he answered in the affirmative stating that one of her sons stayed with them at home. He further testified that the person told him not to inform Nyaruoth and that even if he did, he knew how to deal with the Police. He also asked him whether he knew the current husband of Grace and where he lived to which he answered in the affirmative after which the person on the phone informed him to return Grace with her 3 children back to Julius Odhiambo –the accused herein so that she could carry her cross after which he informed PW1 that he would call him later.

10. PW1 testified that he waited for the phone call in vain so he went to report to Siaya Police Station on 3/4/2017 and recorded his statement on 4/4/2017 after which the Police asked him the whereabouts of Grace and asked him to tell her to go and write her statement with the police which she did.

11. He further testified that on the 6/4/2017, the Officer in charge of Crime, Mr. Ayub Ngatia called him to go to the police station where he was told that a body had been recovered at Nyakango in a Sugar Cane plantation but when they went to identify the body at Siaya mortuary, it was late so he returned the following day but did not see the body until 20/4/2017 when they went to the mortuary to witness postmortem.

12. He testified that they saw a mutilated body whose identity they denied but after a DNA test was carried out, it was established that he was the parent of the deceased. He testified that he did not witness the postmortem but saw the DNA report. He further testified that when he was told a body had been recovered in a Sugar Cane plantation, the Police told them that there were items recovered at the said scene namely, some piece of curtain (old) used on the window or door & a cap which he could not identify because his son never used to wear/use them.

13. PW1 identified the accused as Julius Odhiambo the accused herein who had separated with Grace after which she returned to her parents. He further testified that he would mediate when disagreements arose between the accused and Grace and that Grace had informed him that the accused told her that it was PW1's wife and PW1 who pampered her and that he had threatened that one day he would burn PW1's home or do something bad to them.

14. In cross-examination, PW1 stated that he recorded his statement with the police and signed it. He further stated that in the last paragraph of his statement he mentioned the accused as the owner of the cap recovered at the scene and further that the curtain material found at the scene was identified by Grace as belonging to her husband, the accused, and that is why the police suspected the accused and went for him.

15. He further stated that the issue of threats to burn his hut were not in the typed statement he made with the police. He reiterated that he stayed with his sister-in-law Grace and 3 of her children with her first husband who never claimed them. He further stated that he had not told the court the telephone number he was being called on because he had not been asked. He stated that he did not see Julius abducting or killing his son and only knew his son was dead when a DNA test was conducted. He further stated that he had not seen the cap which was found at the scene because it was with the police.

16. In re-examination, PW1 stated that the person he was speaking to, called his wife's phone. He stated that when he went to the police station he told them everything about the frosty relationship Grace and him had with Julius. He reiterated that Julius was the accused before court.

17. PW2 Florence Akoth Ogony, the deceased's mother testified that on the 2/4/2017 the deceased, who was aged 15 years left at 10pm going to sleep in his cottage with one L her nephew. She further testified that she also went into her house and slept after praying and did not hear any unusual thing at night.

18. She further testified that on the 3/4/2017 she went for her morning prayers and realized that **JO alias N** had not woken up so she sent his father to wake him up who returned saying **JO alias N** was not in the house. It was her testimony that she had severe headache so she went to sleep and the father went towards the farm when at 8.00am she saw a strange number calling her. She further testified that the caller inquired whether she was mama **JO alias N** after which the person asked if she was a Luo which she answered in the affirmative.

19. She further testified that the caller then asked whether she knew of **JO alias N**'s whereabouts to which she responded that they were looking for him to go to school but he could not be found. She further testified that the caller identified himself as Alex Okoth and informed her that he had taken **JO alias N** away.

20. It was her testimony that Okoth further inquired whether she had a sister married in Ugenya which she replied in the affirmative to which Okoth responded by saying that because her sister's husband was very ill and they had settled his hospital Bill they had gone for him at Ugenya and found him very ill so they could not take him, that they wanted to take her sister but they did not find her at Ugenya and that when they went to PW2's home and could not find her there, they decided to take **JO alias N**.

21. She further testified that 'Okoth' told her that he was part of the people trading in Blood (Blood suckers). It was her testimony, amid tears, that she pleaded with him that Nabii was not related to Bernard so they should not take him since Grace had already left Ugenya and that they should have taken a brother or father to Bernard. PW2 testified that the caller told her that she should take Grace and her children to her current husband at which point her husband walked in and she handed over the phone to him.

22. She testified that later, they went to report to the police and that to date her son had not been traced. PW2 further testified that later a body was recovered at Nyakongo sugar plantation and they were told to go and identify the body but her husband never identified the body. She stated that the police later took them to the mortuary to identify some mutilated body which they could not recognize so DNA was done by taking tissue from her and after sometime the police returned results saying **JO alias N** body was the one recovered.

23. She further testified that Julius Odhiambo was the husband of her sister Grace whom she was told by the caller to take Grace to. She testified that Julius married her sister for 3 months & 2 weeks but they had quarrels and Grace kept going to PW2's home with Julius following her all the time.

24. In cross-examination, PW2 stated that Grace was her sister who was first married to Bernard Oduor who was a sickling and was the same brother-in law who was being mentioned by the caller. She further stated that she recorded her statement with the police who wrote it for her and she signed it.

25. It was her testimony that her statement said that Grace had signed for repayment of Kshs. 200,000/= and in default human blood will be used as compensation. She stated that she could not tell if Grace signed any agreement and further that Bernard had informed her that the Bill was Kshs. 240,000/ not Kshs. 200,000/=

26. She testified that Grace left Bernard and started staying with Julius on 8/11/2016 but separated around 28th/29th March 2017. She further stated that Grace and Julius had no children together. She further stated that she told the police how Julius used to frequently go to her home and the threats that he made. She stated that the abductors called on Monday and subsequently called her on Tuesday at 4pm and she informed her husband that the caller used the same number.

27. She further stated that she knew Julius had no phone or identity number and that he never used to call them and only used to go to her home. She stated that police investigations revealed that it was Martin Onyango calling her from Luanda and that she strongly believed that it was Julius who killed her son.

28. In re-examination, PW2 stated that she recorded her statement with the police to the effect that Julius used to go to her home frequently demanding for his wife Grace and that is when she relocated Grace to Nairobi. She further stated that the number used to call her was 074xxxxxxx and that Julius had at one time gone to her home and found her son **JO alias N** taking care of cattle.

29. PW3 Grace Adhiambo Oyugi from Obambo village testified that she did not work but was supported by her sister and brother. It was her testimony that the accused was her boyfriend and she had lived with him for 3 months from 8/11/2016 to March 2017 when they separated and she went to live with her sister Florence Akoth Ogoni, PW2 herein.

30. She testified that she knew the children of Florence as PO, SO, EO and JO the latter who was in Form 2 at [Particulars Withheld] Secondary School. PW3 testified that when she lived with PW2, the accused would go to their residence in the morning and evening for one week telling her to go to his house but she declined seeking more time. She testified that she regularly involved PW1 and PW2 in solving the issues she had with the accused and that whenever the accused visited them, he would threaten her saying she would never go for free and that whatever they spoke was not in vain.

31. She further testified that the accused once told her that he would do something to her sister that he would never be forgotten. It was her testimony that after PW2 informed her that the deceased was missing, she returned home and went to the police station where she was shown some items, a cap, some drawings of a knife and of a Pastor, akala shoes and a curtain and she was able to recognize the cap and curtain which belonged to Julius Odhiambo the accused herein. She stated that she and the accused used to tie the recovered curtain at their door when she lived with Julius Odhiambo. She further stated that she had taken some photos with Julius in December 2016 and on 1st January 2017 which photos were among the items she took to the police station.

32. PW3 testified that she was familiar with the white curtain material which was torn and dirty shown to her in court as she used it in her house with the accused. She further identified the military type cap as the one that was owned by the accused.

33. In cross-examination she reiterated that PW2 Florence Akoth Ogoni was her sister, that she had three children and was first married to Bernard Oduor for 3 years who was sick in Nairobi at St Francis Maternity in Mwiki where the Hospital Bill was Kshs. 240,000/=. She further stated that New life Community Church paid his bill of Kshs. 200,000/= and the balance of Kshs. 40,000/= was settled by relatives back in 2015.

34. She stated that both on the 2nd & 4th April 2017 she was in Nairobi but that she returned sometime in April after **JO alias N** went missing though she could not remember the exact date of her return. She stated that PW2 told her about the strange phone call and how the caller told her the whereabouts of her son **JO alias N** and the demand for Kshs. 200,000/=. She further stated that she informed PW2 about the bill of Bernard and the settlement by the church.

35. It was her testimony that she met Julius after leaving Bernard on 8th November 2016 as Bernard had already gone home. She stated that Julius did not have a phone and that he used to see her physically when she was at PW2's home. She stated that she had 2 children when she lived with Julius and that Julius knew about the third child. PW3 stated that she truly knew that Julius knew the whereabouts of PW2's child. She stated that she did not have any bitterness with Julius because of their separation.

36. The witness stated that she last saw the cap which was in court in March 2017. She further stated that she used to live with the accused but left him without taking any of his property, only carrying her clothes and those of her children. She further stated that the curtain presented in court was in the charcoal store in when she and the accused left Pandi for Banana. She further stated that at all times, the accused used to wear the cap presented in court which she was informed was recovered where the deceased's body was found in a sugar cane plantation.

37. In re-examination she stated that when she moved from Pandi, she left the curtain hanging on the stores door (store for charcoal) which was located in Pandi.

38. PW4 Bernard Oduor Waloga testified that he hailed from Zumba Village and that on 2/4/2017 his neighbour's child went missing. He testified that PW1 was his neighbor is Mellitus Ogoni and that the child who went missing was called **JO alias N** whom he had known since 2012. He further stated that on the 2/4/2017 during the day, he saw the accused with the deceased at around 11.00am, left them with John and went about his duties. He further stated that he used to see the accused go to his neighbour's, PW1, home. He stated that he learnt that the deceased was missing on Monday morning and that he vanished the day he was with Odhiambo, the accused herein.

39. In cross-examination he stated that on 2/4/2017 at 12.30 hours he was at his compound and that he saw the accused at around 11.00 am. He stated that he was at home with his wife and that he was later informed that the boy (J) was abducted at night. He stated that L was playing in the homestead.
40. PW5, LO, a minor gave unsworn evidence as he did not understand the importance of taking oath. He testified that he went to sleep with J (N) his brother in the night and when he woke up in the morning, he did not find him and has never seen him again. He further stated that he saw the accused, whom he pointed at in the dock, go to their home to talk to **JO alias N**.
41. PW6 Dr. Gabriel Juma a Medical Officer at Siaya county Referral Hospital testified that he had worked for 2 years at the hospital. He stated that he graduated with a Bachelor of Medicine and Surgery from Moi University in 2013 and had been practicing since then. It was his testimony that he had a certified copy of a Postmortem report of an unidentified male done by Dr. Hassan who had since left the country.
42. He testified that the postmortem was of an unidentified male body found at Hono sub-location on 5th April 2017 at 11.30am and was escorted by IP Ghatti and Wesonga. He further testified that the Postmortem was done on 19th April 2017 at Siaya County Referral Mortuary.
43. He further testified that the findings revealed that externally the body was decomposed and an estimated time of 2 to 3 months had lapsed before prior to the time of the autopsy. He further stated that the head was decapitated (detached from the body), the left leg was missing and the right foot was also missing. He further testified that because of the nature of the decomposition, no systematic dissection was done. It was his testimony that the cause of death was unascertainable and further that it was not indicated the weapon used to sever the body parts of the deceased.
44. In cross-examination, he stated that the body was believed to be an African male adult. He further stated that nail samples were taken for analysis. He further reiterated that the head was detached from the body and that body parts were found in a sugarcane plantation. He stated that the doctor did as far as he could in view of the decomposition of the body as very little could be done retroactively.
45. PW7 Richard Langat a Government Analyst for 27 years in Kisumu with a BSc. in Analytical Chemistry from Egerton University and Certificate in Forensic Science from University of Nairobi and in Finland testified that an Exhibit Memo was forwarded to him by PC (W) Yvonne Olendi on 20/4/2017 under inquiry No. 3 of 2017 with the accused indicated as Julius Odhiambo Wairemba and the deceased indicated as **JO alias N**.
46. He testified that the Memo form submitted exhibits of a container with finger nails cartilage from the deceased and buccal swab from Florence Akoth (PW2), the alleged mother to the deceased. He testified that the two items were sent for examination and analysis to determine the DNA genetic relationship.
47. He testified that he extracted DNA from the deceased cartilage and buccal swab from Florence Akoth and subjected extracts to the DNA genes analyzer and both generated DNA profiles which he tabulated in a table. It was his testimony that every person inherits half of their DNA from their biological mother and the other half from their biological father and it was thus possible to determine the DNA of a person from the biological mother and father.
48. He stated that from the DNA generated, he tabulated in the report and found that the deceased gained half of his DNA from Florence Akoth indicating that he was her son. He further stated that there was a 99.9% chances that Florence Akoth (PW2) was the biological mother to the deceased **JO alias N**. He testified that he signed the report on the 28th July 2017 and produced as PEx 2.
49. In cross-examination he stated that the deceased was the son to Florence Akoth and further that the DNA of the father of the deceased was submitted for analysis.
50. PW8 Fredrick Onyango Muga testified that he hailed from Nyakongo village. It was his testimony that he did not know JOO alias N-the deceased and that he knew the accused in court. He testified that on the 5/4/2017 at around 9 am he was in his farm working-weeding, when his deceased mother went and told him that there must be something disturbing the dogs. He testified that she went ahead of him and picked a bone which dogs were struggling over and put it on the branch of a tree where dogs could not reach and told her to observe the dogs to see where they were going.
51. He testified that the dogs started going to the sugarcane plantation and he followed them immediately and found many dogs gathered struggling over some meat, then he saw a human head and a skeleton with no flesh. He stated that on discovery that it was a human head, he also saw a dirty white curtain and a cap-jungle which he identified in court and a paper which was folded.
52. PW8 testified that he went to where his mother was and told her that the dogs were fighting over a human body and that the bone she had picked could be belonging to the same person after which they called the village elders and Assistant Chief who called the police who went to the scene and took possession of the bones. It was his testimony that when the Police arrived, they took them to where the bone his mother had picked was and the police took it away with other bones
53. In cross-examination, he stated that he recorded his statement and signed it on 25/8/2017. He further stated that in the statement, the cap was not near the police when they were taking photographs in the sugarcane plantation. He identified the cap in court however he could not see the small curtain, which was not in court at that time. He stated that the body parts had no clothes and that he saw the body of a person without the head or legs but one hand was there. He stated that the legs were eaten by dogs. He stated that he never smelt anything but there were flies.
54. PW8 further stated that the body was inside the sugarcane plantation where cane had been cut. He stated that there are two roads nearby

but there was no route where the body was found. He testified that after about 5 days he heard that the deceased's head was found near another homestead that was 1 kilometer away being eaten by some dogs. He stated that he never saw how the body of the deceased ended up at the scene and only followed the dogs and found the body parts.

55. PW9 No. 86640 Cpl Douglas Wamalwa currently of Scene of Crime Department Busia County and previously of Scene of Crime Personnel Siaya County testified that on 5/4/2017 at about 11 am in company of PC Eliud Wesonga of Siaya Police Station they visited an alleged scene of murder where the body of John Odhiambo Obonyo had been dumped in sugarcane plantation within Hono sub-location, Siaya County where he was requested to take photographs of the scene as follows:-

- a) Photograph 1 (MFI 4(a) is general view of blood at the scene.
- b) Photograph MFI 4(b) is general close up view of blood at the scene.
- c) Photograph MFI 4© general view of part of mutilated body found at the scene.

56. He testified that he had the photographs printed on 20/4/2017 at Siaya HQ. It was his testimony that the original prints in his custody were not tampered and could be produced if required. He produced the photographs as exhibits 3(a), (b) and (c).

57. In cross-examination he stated that in his report he indicated the view and ground. He further stated that one of the photographs MFI4(c) showed body parts of the deceased and that his report did not state a cap or a curtain nor were the same captured in the photographs. He testified that the body was partially decomposed with no head and that he did not know if the head was recovered but that the scene was in the sugarcane.

58. PW10 No. 237371 Inspector Hillary Kibor from Siaya Police Station stated that he was standing in for PC Wesonga the investigating officer in the suit herein and who had been transferred to Kwale and due to distance could not travel.

59. He testified that that on 3/4/2017 the deceased **JO alias N** was abducted by unknown persons and that later some parts of a body were recovered at a sugarcane plantation where the investigation and scenes of crime went to the scene and recovered parts of a decomposing body which were in a dirty curtain. He stated that the scene was processed and exhibits recovered and body parts were sent to the Government Analysts with the mother's DNA which revealed that the deceased was **JO alias (N)**.

60. It was his testimony that the Investigating Officer in his investigations found that the accused herein was the last person to be seen with the deceased and that the accused had married the deceased's mother but that they were not in good terms so they were separated at that time. He further testified that the Investigating officer also established that the cap found at the scene belonged to Wairemba after the deceased's mother and another neighbour identified it. He stated that after investigations, the accused person was charged with murder of the deceased. That the Investigating officer prepared an exhibit Memo Ref. No. A41/2017 dated 20/7/2017 and send exhibits to Government Chemist which he produced as exhibit. He further produced the jungle cap found at the scene as exhibit 5(a) and the dirty curtain as exhibit 5(b),

61. In cross-examination, PW10 reiterated that he was not the Investigating Officer but that he perused the statements. He stated that the case first reported was of abduction with the Investigating Officer recording statements. He further testified that the Investigating Officer followed up with the mother of the deceased who said she knew the suspect. He further stated that the Investigating Officer followed the conversation in the phone but the owner was not traced and that subsequently, the case of abduction ended after the body was found.

62. PW10 further stated that the deceased's father also recorded a statement with the information of ransom but the Investigating Officer did not go further after getting the body which was suspected to be of the deceased. He stated that the accused was arrested because he was the last seen with the deceased and the accused person's cap and curtain were found at the scene where the deceased's body was found. He stated that he could not confirm if Grace's first husband was investigated.

63. PW10 reiterated that the phone that called Florence (PW2) was not specifically linked to the murder but that the accused was the last person seen with the deceased and his cap found at the body of the deceased. He further stated that the Investigating Officer was the one who collected the cap and curtain from the place where the deceased's body parts were recovered and that according to the investigating officer, the phone calls purporting to disclose the whereabouts of the deceased were a hoax.

Defence Case

64. Placed on his defence, the accused testified that he hailed from Seme near Kombewa and was a businessman prior to being arrested as he sold charcoal for 8 years. He stated that he lived in Siaya in Banana and that he knew Grace Adhiambo who was his wife as they lived as husband and wife for 3 months from 2016 December. He testified that they never had any children as she had told him that she had one child when they got together but after one month of living together, she told him that she had another child and that she had left the child at her home. He testified that he told her to bring the child, which she did.

65. It was his testimony that after two weeks Grace told him that he had another child which the accused confirmed with WO, Grace's elder brother. He testified that he expressed his discomfort with Grace after the revelation that she had more than one child. He further testified that in December 2016 after Grace's mother died, he refused to go for the funeral and subsequently on the 25/3/2017 he told Grace that he could not live with her so she packed her belongings and left his home but left with some of his properties.

66. It was his testimony that on the 2/4/2017 he went to Grace's sisters place and met her there at 10.00am in the morning and stayed there until 11.00 am where he found a small boy there, who was a son to Grace named WO. He testified that the following day on 3/4/2017 at 11.00 am he returned to PW1's home and found PW1 the husband to Grace's sister and explained to him how Grace went away with his

properties.

67. It was his testimony that Grace told him that she took the bag to her original home at Obambo not at her sister's place. He testified that they did not tell her anything to do with the child of Grace. It was his testimony that he learned that Grace's son had disappeared after being arrested on 10/4/2017 while he was in his house at Banana Estate in Siaya. He testified that on the 2/4/2017 he never took away Grace's child from his home and further that he neither knew nor killed **JO alias N**.

68. He further testified that in March and April 2017, he never had a phone or any line of a phone. It was his testimony that the police on arresting him never asked him about the mobile telephone number. He stated that he used to physically go to meet Grace when he wanted to meet her. He reiterated that he did not know about the curtain and cap as they were not his and further that no DNA test was done on him, the cap and curtain, which he was shown at the police station.

69. In cross-examination he stated that on the night of 2nd to 3rd April 2017 he was in his house in Siaya with his child. He stated that there were neighbours one of them who was Rosemary Anyango and the other Joseph Owino. He stated that he did not get the time to call his neighbours as witnesses as he was in prison.

70. It was his testimony that on the 2/4/2017 he went to the home of John Ogony and saw WO the son of Grace. He stated that when he went to Grace's sister (Florence) home he did not find the deceased. He reiterated that he only heard that Florence had a son by the name **JO alias N** but he never saw him.

71. He stated that he had disagreed with Grace and she went to her sister's home. He further stated that he never said he could not stay with Grace because of her baggage of 3 children which she had lied to him about. He reiterated that he never met the deceased during the day and only spoke to Willis. He reiterated that he never had a phone on 2/4/2017.

72. In re-examination he stated that on the material day he only met Willis with a certain lady at the gate.

SUBMISSIONS

Analysis of the Law and Determination

73. The offence of murder is defined as follows by section 203 of the Penal Code:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

74. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must be proved beyond a reasonable doubt in order to prove the charge. These are:

- a) ***The fact of the death of the deceased***
- b) ***The cause of such death.***
- c) ***Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***
- d) ***Proof that said unlawful act or omission was committed with malice aforethought.***

75. On the fact of the death of the deceased there cannot be any doubt, though PW1 and PW2 doubted that the mutilated body presented before them by the investigations officer PC Wesonga was their son's, DNA analysis carried out by PW7 Richard Langat, a Government Analyst, confirmed that there was a 99.9% chances that Florence Akoth (PW2) was the biological mother to the deceased **JO alias N**.

76. As to the cause of death, Dr. Hassan who carried out the post-mortem on the deceased's body stated that the same was unsustainable. Dr. Hassan's findings revealed that due to the level of decomposition on the deceased's body, decomposition that he estimated of between 2 to 3 months, no systematic dissection could be done. However, the doctor noted that head was decapitated (detached from the body), the left leg was missing and the right foot was also missing. The doctor further noted that the weapon used to sever the body parts of the deceased was not indicated.

77. Having found that the prosecution have sufficiently proved the fact as well as the cause of the death of the deceased, the prosecution is under a duty to prove that the accused person before the court is criminally culpable for the unlawful act or omission leading to the death of the deceased. Thus the prosecution must adduce evidence to prove that the accused person was responsible for the unlawful act or omission, the direct consequence of which was the death of the deceased.

78. There was no eye witness to the incident. The prosecution is relying on circumstantial evidence to prove the charge against the accused in this case. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of **Abanga alias Onyango v Republic CR A NO.32 of 1990(UR)** in the following terms:

- a) ***The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.***
- b) ***The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.***

c) 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.”

79. Seven years later the Court of Appeal while considering a case in which the prosecution was relying on chain of circumstantial evidence in the case of **Charles Mathenge Mwangi & Another v Rep CA NO. 72 OF 1997** (unreported), (OMOLO, TUNOI JJA and RINGERA Ag. JA) held:

“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.

With profound respect to the learned Judge, it was his duty to himself and to the assessors to specify which circumstances he was relying on and what inference(s) he was drawing from those circumstances. We have ourselves set out what we think were the circumstances the prosecution was relying on and we have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the appellant. We do not know if the Judge would have come to the same conclusions had he set out each individual circumstance and analysed it as we have done. Nor was it fair to the assessors to be given directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstance and asking them what inference they thought could be drawn from the circumstance.”

80. PW1 and PW2 both testified of the call received by PW2, the deceased mother informing her that the deceased was in the hands of an alleged abductor and would be released on the condition that PW1 and PW2 returned Grace, who was the accused’s wife with whom they had separated, and her children to the accused’s residence in Banana Siaya. On her part, Grace who testified as PW3 stated that she and the accused had various disagreements as a couple and on numerous occasions, PW1 and PW2 had assisted them to settle. She further stated that the accused had told her that one day, he would do something to her sister, PW2, a thing that PW2 would never forget. PW4 Bernard Oduor testified that on the 2/4/2017, he saw the accused with the deceased. This was corroborated by PW5 LO, the minor who usually shared a room at night with the deceased who stated that he saw the accused talk with the deceased on the day of 2/4/2017. PW10 Inspector Kibor testified that the investigating officer PC Wesonga found a cap and dirty curtain at the scene where the deceased’s remains were discovered. These two items were identified by PW3, Grace, as belonging to the accused. During her testimony, PW3 identified the cap as the accused’s and further testified that the curtain found at the scene matched one that was in a house she shared with the accused in Pandi that covered the door to the charcoal store, prior to their moving to Banana.

81. The accused on his part denied the allegations against him. He admitted that on the 2/4/2017 he visited PW1 and PW2’s home and whilst there spoke to one WO who was PW3’s son. He stated that he never knew the deceased nor killed him and that on the night of 2/4/2017 he was at home with his child. The accused testified that his neighbours Rosemary and Joseph could testify to him being at home on the said night however he did not call them as his witnesses as he was in prison and did not get time to call them.

82. The question is, in whose hands did the deceased disappear? Who could be telling the truth between the accused and PW4 & 5 who both saw the accused talking to the deceased on the 2/4/2017. PW5 testified that that evening he went to sleep in the company of the deceased but when he awoke, the deceased was missing. This was corroborated by both PW1 and PW2 who testified that on the night of 2/4/2017, they had supper together with PW5 and the deceased after which the deceased and PW5 left for their hut to sleep as they normally did. There is also the evidence of PW3 who was married to the accused and testified that the accused had told her that he would do something to her sister PW2 that she would never forget. Further to this, PC Wesonga the investigations officer recovered a cap and curtain at the scene of the crime where the deceased’s body parts were recovered which were identified by PW3 to belong to the accused.

83. In the view of this court, the prosecution’s evidence detailed above places upon the accused a statutory burden to discharge a rebuttable presumption that having been with the deceased on the day that the deceased disappeared, and having threatened to do something bad to PW1 and PW2 for allegedly spoiling Grace-PW3, and his jungle cap and curtain as identified by PW3 having been recovered at the place where the deceased’s body parts were found, the accused should explain how his personal items found their way at the scene and how the deceased met his death. The statutory rebuttable presumption is spelt out under **Sections 111(1) and 119** of the **Evidence Act**. These sections stipulate 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.”

84. I reiterate that the finding of the cap and curtain belonging to the accused person places the accused at the scene of the crime. In my humble view, the accused has a duty to give an explanation of how the deceased met his death, or alternatively how his cap and curtain came to be at the scene where the deceased’s remains were recovered.

85. I am therefore satisfied that the circumstantial evidence adduced by the prosecution places the accused person at the scene of crime and establishes beyond reasonable doubt that the accused is the person who unlawfully killed the deceased. I have considered the defence by the accused that on the night the deceased vanished, he was at his rented house with his child. That may be true as far as part of that night is concerned since he did not say that he was asleep with his son the whole night, since the exact time of the night when the abduction of the deceased and his eventual brutal killing on 2/4/2017 was not established. However, the fact of the deceased vanishing that same night is not in dispute. In addition, the accused person's personal items positively being identified by PW3 to have been found at the scene where the deceased's body parts were discovered, with the accused merely denying that his items were found at the scene clearly places the accused at the scene and dislodges the accused person's defence of not being involved in the disappearance and eventual death of the deceased.

86. **On whether the accused person herein unlawfully killed the deceased with malice aforethought, Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought as follows:

“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) ...”

87. In **Republic v Gedion Wambua Koko & 2 others [2019] eKLR** citing the East African Court of Appeal in the case of **Republic v Tumbere S/O Ochen [1945] 12 EACA63** in determining whether malice aforethought had been established, considered the following elements:

a) The nature of the weapon used.

b) The manner in which it was used.

c) The part of the body targeted.

d) The nature of the injuries inflicted either a single stab/wound or multiple injuries.

e) The conduct of the accused before, during and after the incident.

88. **On whether motive for the offence was essential and whether it has been established in this case, it** is trite law that motive need not be proved. This is evident under **section 9(3)** of the **Penal Code** which stipulates thus:

“(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”

89. That provision was the subject of interpretation in the case of **Choge Vs Republic (1985) KLR1** where the Court of Appeal held:

“Under section 9(3) of the Penal Code (cap 63), the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

90. I am well guided by the above decision of the Court of Appeal. It is clear that where motive is proved it may, when taken with other circumstances constitute such circumstantial evidence as to furnish some corroboration to establish the accused person's culpability to the offence. Failure to prove motive is however not fatal to the prosecution's case.

91. In the instant case, motive against the accused can be inferred from the evidence of PW3 that the accused threatened to do something bad to PW1 and PW2, that they would never forget, claiming that they were the ones spoiling PW3 not to live with the accused. The end result was, in my humble view, the unlawful killing of the deceased who was the son to PW1 and PW2.

92. Malice aforethought can also be inferred from various circumstances as set out under **Section 206** of the **Penal Code**. The Court of Appeal in **Rex versus Tuper S/O Ocher [1945] 12 EACA 63** ruled thus:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick...”

93. The murder weapons in this case were not recovered. However, the weapons used could be inferred from the injuries inflicted on the deceased. Dr. Hassan noted that the deceased's head was decapitated (detached from the body), the left leg was missing and the right foot was also missing. He further testified that because of the nature of the decomposition, no systematic dissection was done. It was his testimony that the cause of death was unascertainable and further that it was not indicated the weapon used to sever the body parts of the deceased.

94. *Albeit no murder weapon was produced by the prosecution, failure by the prosecution to produce the murder weapon(s) is not fatal as stated in the case of Karani Vs Republic [2010] 1 KLR 73 that:*

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”

95. It is the view of this court that even though the murder weapons were not produced as evidence in this case, the weapons used to commit the offence could be inferred by this court from the post-mortem report as the body of the deceased was cut into pieces. Such failure to produce the murder weapon does not prejudice the accused's defence, neither was it fatal to the prosecution's case.

96. The conclusion I make from the doctor's findings is that the weapons used were sharp objects, sharp enough to cut through all the blood vessels and muscle around the neck as well as severe limbs from the body.

97. Any person arming themselves with either of these weapons and applying the kind of force that was applied on the deceased cannot have had any other intention but to cause either death or grievous harm to the deceased. Malice aforethought can thus be inferred not only from the weapons used to inflict the injuries but the nature of the injuries that were actually inflicted on the deceased resulting in the deceased's death.

98. Therefore, upon careful analysis of all the evidence for the prosecution and defence by the accused person, and considering all the exhibits produced in evidence, I find and hold that there is no doubt that the prosecution has proved beyond reasonable doubt that the accused was the one who, with malice aforethought, unlawfully killed the deceased **JO alias N**. The prosecution has also shown that the accused's cap and curtain were found at the scene of crime thus placing the accused at the scene.

99. I am very much aware that the accused has no burden of proof. He has no burden to prove his innocence. He could as well have exercised his right to remain silent. However, there is sufficient circumstantial evidence connecting him to the murder of the deceased. Having been placed at the scene by his personal belongings which were positively identified by PW3 who lived with him as husband and wife, I find that the accused had a statutory burden to dislodge a rebuttable presumption as stated earlier in this judgment. The statutory burden is on a balance of probabilities. The principle applicable was well explained in the Court of Appeal in **Ernest Abanga Alias Onyango v Republic CA NO.32 OF 1990** that:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”. This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it's a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available.”

100. I am convinced beyond reasonable doubt that all the circumstantial evidence points to the accused as the person who eliminated the deceased and that it satisfies the principles of circumstantial evidence as set out in numerous authorities including the case of **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135**, in which the court of appeal East Africa had this to say;

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

101. Evidence of the surrounding circumstances to a crime is said to be the best evidence. Locally, courts have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** thus:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”

102. I have however cautioned myself when relying on circumstantial evidence. While recognizing the dangers of relying on circumstantial evidence the Court in **Teper v. R [1952] AC 489** as quoted in the case of **Republic v E. K. K. [2018] eKLR** had this to say:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

103. I have watchfully examined the evidence adduced before this court. I find that the accused's explanations surrounding the deceased death are both unbelievable and incredible and a mere afterthought. I am satisfied that the circumstances of this case points irresistibly towards the accused person to the exclusion of any other person as the principal offender in deceased's death. Strangely, the question is, where did the accused take the flesh and bones of the deceased? Did he eat it or he sold it to unsuspecting meat consumers? I am satisfied beyond reasonable doubt that the accused person was fully involved in the deceased's death as a principal offender and with malice aforethought.

104. Having come to this conclusion, I reject accused person's defence and proceed to find the accused person **JULIUS ODHIAMBO WAIREMBA** alias **AYINGA**, **GUILTY** of the offence of murder of the deceased **JO alias N** as charged and I convict him accordingly.

105. Sentence will be after mitigation, a presentence report and victim impact statement.

106. Orders accordingly.

Dated, Signed and Delivered at Siaya this 26th Day of January, 2021

R.E. ABURILI

JUDGE