



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO. 50 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

SIMON EVANS KANDIE.....ACCUSED

JUDGMENT

Introduction

[1] The accused was charged with murder contrary to section 203 as read with 204 of the penal Code with particulars that he had “on the 22nd day of April 2016 at Tuyobei Village, Muchongoi Division, Marigat Sub-County within Baringo County murdered Kandie Kipyegon.” The prosecution called nine witnesses and the accused when placed on his defence gave unsworn evidence asserting an *alibi* that he had come home to find his father killed and had, after unsuccessfully seeking from neighbours help to take him to hospital, approached the local Administration Police camp only to be arrested and detained in the cells and subsequently charged with the offence before the court.

No final submissions

[2] Despite invitation and adjournment of the hearing for purposes of taking submissions on the matter in terms of section 310 of the Criminal Procedure Code by a ruling thereon delivered on 24th November 2020, the Counsel for DPP and for the accused did not file submissions and upon inquiry by the court counsel for the accused indicated on 25th January 2021 that he would not be filing any submissions. The judgment of the court was correspondingly delayed while awaiting submissions by the parties, which were eventually never filed.

Evidence before the court

[3] The evidence led by the prosecution before the trial court was in the material parts of the Record of Proceedings as follows:

“Proceedings of hearing

14/6/17

PWI ADULT MALE CHRISTIAN SWORN AND STATES IN KISWAHILI

Jacob Kiprono Chebiego. I reside at Mochongoi. I am a farmer. The deceased in this case is my brother. The accused is a son to my brother who is deceased.

On 22/4/16, at 7.00pm in the evening, I was at home. at about 7.15pm, I received a call by a neighbor who is also a neighbor to the deceased. His name is Amos. Amos asked me whether I had got home and I told him that I had gone there at 10.00am. he said that there was something that has happened at my brother’s home. he asked me to go to my brother’s house. I went there.

My brother lived with the accused’s children who helped him to milk cows. When I arrived, I found my brother lying on the floor face up. He had injuries at the neck where he had been cut. He also had a cut on the left eye. He also had an injury on the right temple of the head and at the back of the head.

There was blood on the floor. I found people outside the house. They were about 10 people. There was no one in the house. I only found a sufuria with blood. The blood was about a mug full, it was not full.

The accused was not present. I only found the accused first born son. The accused had a house about 50 metres from the deceased. The accused lived with his wife and his children, the deceased's grandchildren. The accused's wife was not present. He had chased away his wife the previous day.

The accused and his father lived with constant quarrels. The disagreement relate to goats and cattle. the accused would demand that the father sells the animals and give him money. The father told him that the animals would for the education of the grand children, the accused's children. The accused said he did not need help in educating his children.

I waited for the chief and the police to come. I did not see any weapon. The police came and they took the body to Nakuru Hospital Mortuary. I later recorded a statement with the police.

That is all.

Cross examined by counsel for accused Mr Ngamate

At 7.00pm on that date, I was at home. at 7.15 pm, I was called by a neighbor to the deceased. He asked me whether, I had been my brother's home. I said that I had gone there at 10.00am. I left him at 10.00am when he wanted to open the animals for grazing. I did not see the accused at that time. I later met him at Mogotio.

It is about 600 metres from my home to my brother's house. I did not see incident. I suspected it was the accused because of their relationship with the deceased.

I found my neighbours at the deceased's home. There were over 10 people at the home. At the deceased's house, it was only the accused and the deceased. The accused had chased away his wife the previous day. The deceased had told me that the accused away his wife when I met him at 10.00am.

The police came at about 10.00pm in the night. It was between 9.00pm-10.00pm. I did not accompany the body on the next day I went to the hospital.

Reexamination

Nil

25/7/17

Prosecution

I present a minor for testing as PW2 who had been stood down at previous hearing.

Court

At the request of prosecution with no objection of the accused's counsel, the proceedings relating the child are to be taken in camera.

Court

The child is examined by the court to determine his understanding of the oath and intelligence. Interpretation in Tugen/English.

I am DK. I am 14 years. I do not know the year that I was born. I am in class 3. I do not know how many years I have been in school. The month of the year today is I do not know the number of days in a month. The colour of my jacket is green. My mother told me that I was 14 years. I do not go to Sunday school these days. I used to go sometime ago. There are 7 days in a week. There are many weeks. In church we are taught that I cannot recall. I came to court to say the word that my father did. I know what is truth. I would not be true to state that my jacket is black. It is not true that I am alone in court. If one tells untruth, I do not know what happens to such a person. When I was coming I was told that when I was asked I should say everything. I was told that when I am asked I should answer everything.

Court

The child does not understand the nature of oath but he is possessed of sufficient intelligence and understands duty of telling truth to justify receipt of his testimony. The witness will testify unsworn and subject as usual to cross examination.

PW2 BY MINOR TESTIFY IN TUGEN WITH INTERPRETATION INTO ENGLISH BY DAISY COURT CLERK

I am DK. I know the person who died in this case. It was my grandfather. He was the father to my father. My father is here(he points at the accused).

On that day that grandfather died, I was at the Boma our home's cowshed milking cows. We were milking with my grandfather.

After milking, we went to the house and my grandfather wanted to give me milk. At that point my father came and told me not to take the milk. I went outside through the door and my father came in with a panga and a radio. He left the radio outside door and came inside the house.

I was inside the house when my father was outside. My father came in with a panga. I saw my father hold my grandfather by his jacket and shook him and then lifted the panga as if to cut him. I was just outside the door. He lifted the panga (demonstrating lifting of the panga) and trying to cut him. I then ran away. I heard my grandfather screaming. There was nobody close in the house. The panga belonged to my father.

I see the panga before the court. It is the panga that my father had on that date.

(the panga is marked MFI 1)

When I heard my grandfather screaming, I ran to where my uncle was. He is a brother to my mother. I told him what happened. I slept at a neighbours house. The neighbor is Chepkol. Before this date, I stayed with my mother and father at home. On this date my mother had gone away. She had gone before the incident.

I know that my father cut my grandfather.

I went to police station. I recall the police station was Mochongoi. I told the police what I had seen.

That is all.

Cross examined by counsel for accused

I was with my grandfather at the cowshed milking cows. It was both of us who were milking the cows. We went to my grandfather's house after milking to measure the milk. Usually it is my grandfather and I who milks cows.

After measuring the milk using a mug I needed to take the milk to our home but my father told me not to do so.

When grandfather and I went for milking the cows, we found my father outside the house. My father had a panga and waited to go outside the house. My father had a panga and a radio. I have not seen the radio in court. My father left it outside the house. I have seen the panga that my father used.

My father came after we had measured the milk. He came violently. He was quarrelling with my grandfather. My father told my grandfather "leo hauna bahati hautandika siku leo" in tugen. I understood this to mean that my father wanted to cut my grandfather as he held him and shook him violently. He held my grandfather by his jacket right hand lapel, he did not hold him by the collar (demonstrating).

He shook my grandfather violently while lifting the panga up. He was shaking him while cutting him. He held him by one hand. I ran away. I went to my uncle. The distance between my grandfather and my uncle is far. I cannot estimate. It is further than from the witness stand to the parking area. (estimated at 30 metres) I was screaming as I ran. There are people along the way. Some heard me screaming. One of them was mama Chella.

Mama Chella stopped and asked me what had happened, I told Mama Chella what had happened. I did not meet any other person along the way.

When I arrived at my uncle's house, I found my uncle outside. The house had been locked. I was screaming all the way until I found uncle. My uncle asked me what had happened as I was screaming. I told him my uncle outside. There were other people other than my uncle. I told my uncle only.

My uncle went with others. I did not go with them. I later learnt when my grandfather was screaming my father had cut him. I saw my father holding my grandfather and lifting his panga. I did not see him cutting my grandfather. I know father had cut my grandfather as he screamed and I saw father lifting his panga.

I told my uncle that my grandfather had been cut at the house. After uncle went to see my grandfather, he came back later in the night. I was asleep. I went the neighbours.

My uncle did not wake me up. I woke up in the morning. We went to the police station in the morning. We were with Kipruto, a relative. He is a brother to my grandfather. I went with Kipruto to the Police station. He said that we should go and record the events that happened the previous day.

At the police station, we recorded at statement. I told what I knew about the matter. I do not know to write.

Reexamination by Ms Macharia

The panga before the court belonged to my father. It is the panga that my father had that day. It is the panga that I saw my father lifting when he held my grandfather.

12/4/18

PW3 ADULT MALE CHRISTIAN SWORN AND STATES IN ENGLISH/KISWAHILI

I am 248717 APC Felix Wamalwa Mutonyi. I am stationed at Tuiyobei AP Camp.

On 22/4/16, I was working at Tuiyobei AP camp at 7.30pm one person came to the camp. He was carrying a panga under his arm pit. He told me that he had fought with Mzee (his father). I saw blood on his shoes and feet. It was the open shoes. On the jacket there was blood stains. The panga also had blood on it. I arrested him and detained him on a cell. I then called the sergeant in charge of the camp and the area assistant chief. I informed him that he should go to the home of Kandie Chepyegon, the person's father, to find out what had happened as the person had reported that he had fought with his Mzee. The area assistant chief confirmed that the Mzee had been killed.

Later officers from Mochongoi police station came and took the body and I released the person I had arrested to them.

I did not go to the place where the body was. The police took the suspect and the panga. I see the panga which the suspect gave to me that day. It is the panga that I gave to the police officers. The person who surrendered to me that is the accused.

(accused identified)

That is all.

Cross examined by Mr Ngamate for accused

On 22/4/16, the suspect came to camp at about 7.30pm. I was alone at the camp at the time. The other officers were at the centre. We are usually 3 officers. It was dark. The suspect came to the camp and he called out and when I went out with a spot light and I saw that he had a panga. As he came, he asked for an officer.

(witness is referred to his statement)

I have not recorded that he had made noise outside the camp. My statement is correct. I went out with a spot light and shone it on him. When I went near him, I saw that he was holding a panga. I shone the torch and saw that his leg had blood. The blood on the feet, shoes and jacket. The shoes and jacket were not been produced today in court.

I called the Sergeant Dickson Kurui and the assistant Nixon Chepchieng, assistant chief Kimorot Sub-location. When I called him I told him to go to the homestead of Mzee Kipyegon.

From the centre to the accused's home, it is 4 kilo metre 3-4 Kilo metre. When I called the Sergeant and the assistant chief. I did not know where they were but I told them to go to Mzee Kipyegon's home. I knew mzee Kipyegon's home. I knew the accused. He lived in the same area. I knew him as living in the same area. I knew him for about 3-4 months. I had not heard of any bad behavior on his part.

It was about 7.30pm. It was about 30 minutes about 8.00pm when they called me to stay that the Mzee Kipyegon had been killed. It was the accused who told me that he had fought with his mzee. I did not call the police. It was the camp in charge who could call the police. I only hand over the accused to the police. I got to know that the body was taken by the police.

Re-examination

Nil.

PW4 ADULT MALE CHRISTIAN SWORN AND STATES AS FOLLOWS IN KISWAHILI

I am Nixon Chepchieng. I reside at Tuiyobei. I am assistant Chief for sub location Kimolot.

On 22/4/16 at 7.30 pm or 8.00pm I had arrived home from the day's work. I got telephone call from a AP police officer called Wamalwa who informed me that there had been a killing near the AP camp. I went out and accompanied by Sergeant Dickson Kurui and went to the area where the incident had taken place. We found in a house of Mzee Kandie Kipyegon that he had been killed. The body was lying on the ground floor in the house. He had been cut on the neck and head. The house was a one-roomed small house. There was blood on the floor. The body was lying on the side on the floor. When we arrived, there were a crowd of people but they had not gone inside the house. I know the Mzee Kipyegon and I knew that was his home. He lived sometime alone except when his children and grandchildren visited. The home had only the house and a small store. I knew one son of the deceased called Evans Kandie. Evans lived near the Mzee Kipyegon home. it was about 20 metres from the home. He had his family with wife and children.

When we arrived, the Mzee Kipyegon was already dead. We called the OCS Mochongoi at about 9.00pm the OCS came and took the body. Before the OCS came, I got a report that a suspect had surrendered at the AP Camp. It was the AP officers Wamalwa who

informed me. It was the AP officer who told me that Evans Kandie had surrendered himself to the AP Camp. The said Evans Kandie is the accused in the dock (accused identified)

The police took the body and later arrested the suspect Kandie at the AP camp. I later recorded my statement at Mochongoi police station.

That is all.

Cross examined by Mr Ngamate for the accused

I recorded the statement on 29/4/16. I got a telephone call by APC Wamalwa at about 7.30pm. I was at home from my daily duties. When Wamalwa called he said there had been killing at an area of Tuyobei. I got to know it was mzee Kipyegon home when the Wamalwa said it was at Tuyobei at Mzee Kipyegon.

I rely on the statement, I went with Sergeant Dickson Kirui. I went to meet the Sergeant at the camp. They were all there at the camp. We then went to the camp. I went to the camp to get security as it was a case of murder. I did not know that there was a suspect at the camp. I did not get the suspect.

It was when were at the scene of crime that we got a call from Wamalwa that there was a suspect. From the camp to the home it is 2 km. there was a crowd of people. It is very small home. There were a house, a structure for sheep, a store adjacent to the house. The home was not fenced properly. It did not have a barbered fencing. The people had not go near the house. I did not get any information from the people. We had been told the issue had happened at the home.

I knew the deceased mzee Kipyegon for sometime about 2 years. I knew him well for the 2 years. I had heard of issues in the family. We got the accused at the camp. We found him at the camp when we came back. Wamalwa had called to say that there was a person who had come to the camp with a panga.

I had called the OCS but sergeant who called the OCS.

Reexamination by Ms Macharia

The suspect was not at camp when we went for the first time. I did not get to see the suspect.

I was not shown the suspect by the officers. I do not know whether he was alive.

PW5 ADULT MALE CHRISTIAN SWORN AND STATES IN KISWAHILI

I am Amos Kibet Kiplagat. I reside at Tuyobei. I work as a farmer. Mzee Kandie Kipyegon was my neighbor. We were not related. I know Evans Kandie. He was the son of the deceased Mzee Kipyegon.

On 29/4/16, I went to Nyahururu District Hospital Mortuary. I identified the body as that of Kandie Kipyegon. The face had multiple injuries cut injuries. I did not see injuries on other parts of the body. We were with police officer, doctor and the mortuary attendants. The body had post-mortem done in my presence.

That is all.

Cross-examined by Mr Ngamate for the accused.

I had been a neighbour to mzee Kipyegon and the accused from 2011. He died in 2016. The two were having regular disagreements but there had been an incident like this before. The deceased had other children but they did not reside in the home. I do not know how the deceased died. I was asked by the deceased's brother Jacob Kipruto to go and identify the body. He is also my neighbor. We went with Jacob Kipyegon. We went on 29/4/16 to identify the body.

I was with Jacob Kipyegon. There were police officers and doctor. We were 4 of us. The body was brought when we arrived there and we identified the body. I do not know when he died. Or how he died.

Reexamination by prosecution

Nil.

17/7/18

PW6 ADULT MALE CHRISTIAN SWORN AND STATES IN ENGLISH

I am Dr. Boniface Mirunju from Nyahururu District Hospital. I have worked there since 2013. I previously worked in Nyeri PGH and Kiambu District Hospital. I graduated from University of Nairobi in 2009 with MBCHB. I have a post-mortem report of Kandie Kipyegon.

I conducted the post-mortem on 29/4/2016 at 2.45pm.

The deceased was an African male of 66 years and height of 178 cm. the body was preserved with formalin.

Examination of the body

Deep cut wounds.

- 1. On the right frontal parietal region of the head with brain tissue penetrating from the cut.*
- 2. Right side of the occipital (back) of the head and there was underlying skull fracture.*
- 3. Semi-decapitation at the level of c2- c3 on the neck with involvement of the carotid and regular vessels. The vessels had been cut.*

Systemic examination

The respiratory, cardio vascular digestive and genital urinary were normal.

On the head there were multiples deep cut wounds on the skulls with underlying skull injuries and herniating brain tissues.

In the spinal column, it had been transactional and C2-C3. As a result of the examination, I concluded that the cause of death was:

- 1. Decapitation*
- 2. Multiples deep cut wounds on the head*

I took samples DNA specimen. I signed the post-mortem report on 29/4/16 and it was stamped at our facility.

The burial permit number was 580195.

Post-mortem report exhibit no. 2.

Cross examination by Mr Ngamate for accused

I have been a doctor for 8 years. I have done many Post-mortem examinations.

I conducted the post-mortem on request by a police.

DNA specimen was blood specimen.

Reexamination

Nil

4/2/2019

PW7 ADULT MALE CHRISTIAN SWORN AND STATES IN ENGLISH

I am Dr. Joseph Waigi Njau. I am psychiatrist. I am based at Nakuru Provincial General Hospital.

I remember I saw one Simon Evans Kandie on 4/5/16. From the history, I established that, he is a married man with 5 children between 3-12 years. On further interrogation, I established that he had no history of mental illness or family history of the same.

On mental status assessment, I found him to be sound, he understood the charges he is facing. He is also capable of following the court proceedings and defending himself and instructing his lawyer. I concluded Simon Evans Kandie is an adult male who is mentally fit to stand trial.

I produce the mental assessment report P.Exh no. 3.

That is all.

Mr Ngamate

No cross examination.

PW8 ADULT MALE CHRISTIAN SWORN AND STATES IN ENGLISH

I am no. 93937 CPL Edward Esaya. I am a scene of crime officer attached to DC office Nyandarua north, Nyahururu.

I was appointed by DPP by Kenya Gazette no. 217 of 8/12/12 under section 85 (1) of the CPC as read with article 157 (9) of Constitution and pursuant to section 78 A of the Evidence Act.

I have undergone training in forensic crime scene management at DCI training school in the year 2012. My duties entail documentation of the crime scene through still photographs or videography, certification of photographic evidence prints of crime scenes and motor vehicle registration and certification.

In the case before the court, I did not visit the crime scene but the investigating officer one P.C Simon Mburu brought to our office one DVD with the forwarding letter requesting our office to process and print enlargement of photographic prints. The letter was dated 4/5/16 and I received it on 5/5/2016 at 10.00hrs.

After acting on the same, I processed the DVD and established it contained 4 photographic prints. I went to DCI headquarters where I printed the ref. no being 1202 of 2016 dated 10/11/16.

The photographs showed a body with multiples cuts from the facial view which comprises the head. There is another injury on the neck.

In the vicinity, there were some cooking materials and blood in a Sufuria. The photographs was taken at night, because the exposure it has. I filed the certificate on 28/12/16. I handed to the the investigating officer and the certificate contains my signature. The DVD is under my custody. The photographs were not tampered in any way and they may be produced if required in court. I produce the forwarding letter, the two photographic prints and the certificate.

Forwarding letter P.Exh. no. 4 2) photographs P.Exh. no. 5 (a) and (b) certificate P.Exh. no. 6.

That is all.

Cross examination by Mr Ngamate for accused

I have worked as scene of crimes for 6 years. there has been other instances where another officer take photograph and hand over to me.

A police officer may secure the scene by photographs and bring the evidence to our offices.

The photographs were taken on the day of the incident. The forwarding letter does not show the day when the photographs were taken. I received it on 6/5/16. I do not think the photographs were tampered with as the body is shown to be in the house. The author of the photographs took the photograph on the date of the incident.

Reexamination

Nil.

2/12/19

PW9 ADULT MALE CHRISTIAN SWORN AND STATES IN ENGLISH

No. 48821 CPL Simon Mburu attached to Kabati Police station Muranga.

I was attached to Mochongoi police station from 2012 to January 2018.

On 22/4/2016 at 8.30pm, I was at Police station when I received a call from the area assistant chief Tuyobei Mr Chepchieng and he informed me that there had been a murder within his area. I went to Tuyobei and on arrival at the deceased homestead; I found a group of people outside the house.

The deceased's brother opened the semi-permanent house where I found the body of the deceased, with a deep cut on the neck, about 4 cuts on the head.

I called crime scenes support unit, Nyahururu who came immediately and processed the scene and after processing the scene, I escorted the body to Nyahururu Hospital Mortuary.

I then went back to Tuyobei AP Camp where I checked the accused with panga which he had. Accused had surrounded himself to the AP Camp.

Mochongoi Police station where I charged him with this offence.

On 29/4/2016, I attached the post-mortem of the deceased at Nyahururu District Mortuary in the company of the relatives.

On 5/5/2016, I prepared an exhibit Memo and escorted blood samples of the deceased and open shoes of the accused to the Government Chemist for Analysis.

I charged the accused because he murdered the deceased. I concluded that he had murdered. I noted the evidence of PW1, the grandson.

I found next to the body a Sufuria with blood. The accused presented himself. The accused was at the time I went to the scene at the AP Camp.

I collected a panga from the AP Camp which the accused surrendered to the AP officers.

MFI 1 – a panga. I wish to produce the panga as P.Exh. 1.

I have the shoes which I presented for analysis. They belong to the accused. I picked the open shoes at the police station. I wish to produce the shoes as P. Exh no. 7.

The accused is in court. I did not know him before the incident.

The accused and the deceased were son and father.

That is all.

Cross examination by Mr Ngamate

I received a call from assistant Chief Tuyobei. The procedure allows me to take a call if the OCS is not present. At the time, my OCS was not at the station.

After the call I proceeded to the scene. I went with the driver. We were only 2.

I did not indicate that I was with the driver. It is not in the statement that I went with the driver.

I did not mention the driver because the driver was not investigating the case.

I found members of the public at the scene. They were many more than 20.

They were outside the house. The body was inside the house which was locked. When I got to the scene, the house was locked. I said in the statement that the house was opened by the brother to the deceased. It was the brother to the deceased who locked the door. He introduced himself to me in the presence of the area chief.

Members of the public were in groups outside the house. They were here because of the incident which had occurred.

Injuries on deceased. I know he had a deep cut on the neck and several cuts on the face and on the head.

(statement does not indicate cuts on the face).

The correct position is that which I have noted in the statement.

(sufuria next to the body)

It had blood. Since it was next to the body. It was human blood. Assumption that it had blood.

Photographs were taken by crime scene support unit.

(I took the photographs of the scene)

I called the crime scenes support unit.

I was informed by Area Assistant Chief that accused was at AP Camp.

He told me where the body was. The chief later told me that accused had surrendered at AP camp.

(witness referred to statement)

The area assistant chief further informed me that accused had surrendered at Camp and surrendered a panga. It is in the statement.

At the Post-mortem, the body was identified by the brother of the deceased. We were three of us at the post mortem. I cannot recall the names.

I chose to take shoes and not the panga but both had blood. I established by investigation that the accused was asked by his father to give him his panga to firewood.

There was no past disputes between the accused and deceased.

Re examination

Nil.

DPP

We close the prosecution's case.

Defence

[4] In his defence, the accused gave an unsworn evidence as follows:

“19/10/2020

DW1 ACCUSED IN UNSWORN STATEMENT

I am Simon Evans Kandie. I worked as a farmer before the case was brought to court.

I am charged with murder of Kandie Kipyegon. Kandie Kipyegon is my father.

On 22/4/2016, I closed my work at a casual work. When I get to our home, I found my father having being injured in one of the houses in our compound.

I tried to get him to hospital but I did not succeed. I tried to get help from the neighbours but did not get help. I decided to report at AP Camp Tuiyobei. I got to the AP Camp at 7.00pm in the evening. It is 700 metres from our home to the AP Camp. I thought I would get help at the AP camp as I had not succeeded to get help from the neighbours.

At the AP Camp, I explained that I had arrived home and found my father having been injured inside the home. The AP officers told me that they should go to home. They locked me up in the cell after one 1 hour the AP officers came back to the camp. They had a panga and they asked me whether I recognized the panga. I answered in the negative.

After about 30 minutes, they escorted me to Mochongoi Police station. The police station is about 45 minutes away by car from the AP camp.

At Mochongoi police station I was held for 2 days and taken to court on the Monday following 25/4/2016.

I did not get to know what happened to my father. In the course of the trial, I have spoken with my sister, Cecilia Kandie. My sisters are away at their married homes. My sister Cecilia did not also know what had happened to our father.

I am not the one who injured my father.

That is all.”

Issue before the court

[5] The issue before the court is whether having regard to the alibi defence of the accused the prosecution has proved beyond reasonable doubt that the accused was the perpetrator of the attack in which the deceased was killed.

[6] There was no issue as regards the death of the deceased in view of the evidence of PW1 and PW5 who identified the body; the photographs produced by PW8; and the post mortem report by PW6 in which the nature and cause of death was shown as decapitation and multiple deep cut wounds to the head with herniating brain tissue.

DETERMINATION

Analysis of Evidence

[7] The court has in its analysis of evidence adopted the principles established by caselaw. Firstly, in the leading case on analysis of evidence in a criminal case, *Okethi Okale & Others v. R* (1965) E.A. 555, 559 the Court of Appeal for Eastern Africa reiterated the principles set out in *Ndege Maragwa v R* (1965) E.A.C.A. Criminal Appeal NO. 156 of 1964 unreported and gave the following guidelines:

“We think with respect that the Learned judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v. Republic (10), where the trial judge had used similar expressions this court said:

*“. . . we find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach; apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution. **Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence.** (These remarks do not, of course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different.)”*

We think that the observations of this court in that case apply with equal force to the present appeal.”

[8] Secondly, the court has also taken into consideration the assessment of evidence at the respective stages of analysis leading to a conclusion at the end as in *Nguku v. R* (1985) KLR 412 where the Kenya Court of Appeal held that:

“When analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so.”

[9] Thirdly, in the course of evaluation of the prosecution evidence the court has in the foreground of its mind the accused's defence as in *Ouma v. R* (1986) KLR 619 where the Court of Appeal held that:

“At the time of evaluating the prosecution evidence must have in mind the accused's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true. If there is a doubt, the benefit of that doubt always goes to the accused person.”

[10] In accordance with section 124 of the Evidence Act and section 19 of the Oaths and Statutory Declarations Act, the court has sought corroboration of the evidence of the child eye witness in the matter who was 13 at the time of the incident on 22/4/2016 and 14 years at the time of testifying in court on 25/7/2017 and for whom upon a *voire dire* examination by the court it was ordered:

“The child does not understand the nature of oath but he is possessed of sufficient intelligence and understands duty of telling eth truth to justify receipt of his testimony. The witness will testify unsworn and subject as usual to cross-examination.”

[11] See *Kibangeny Arap Kolil v. R* 1969 E.A 92 and *Oloo v. R* (2009) KLR 416 and *Johnson Muiruri v. R* (1983) KLR 445.

Finding of the court

[12] The court is cautious in accordance with principles established in *Kibangeny Arap Kolil v. R*, *Johnson Muiruri v. R* and *Oloo v. R*, supra, to look for corroboration of unsworn evidence of a minor and especially with regard to his eyewitness evidence of identification. The principle of caution in identification evidence was established by the Court of Appeal for Eastern Africa in *Abdalla Bin Wendo v. R* [1953] 20 E.A.C.A. 166 by which a court is required to seek corroboration of the identification evidence of a single witness, as follows:

*“Subject to certain well-known exception it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen **the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility.**”*

[13] See also application of the principle with regard to identification evidence against relatives in *R v. Turnbull* (1956) 3 All ER 549 which held that –

*“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone he knows, the jury should be reminded that **mistakes in recognition of close relatives and friends are sometimes made.**”*

[14] In the present case, the court found upon a *voire dire* that the child did not understand the meaning of the oath but was possessed of sufficient intelligence and understood the duty to tell the truth. As regards identification, with the accused's alibi defence in mind, I consider that although the incident happened in the evening – PW1 saying he was alerted of the incident by telephone call at 7.15pm; PW2 the

arresting officer receiving the accused who had surrendered at 7.30pm and PW4 the Assistant Chief being informed of the incident by the arresting officer at about 7.30pm, PW2 the eyewitness son of the accused said his father came after they had just finished milking their cows and the accused had told him not to take the milk that his grandfather had given him to take to their home and started quarrelling the grandfather in a quarrel that led to the accused violently holding his father, quarrelling him and telling it was his last day alive and hoisting his panga to cut him whereupon the child eyewitness ran away to call for help from his uncle, only to later learn-

“I later learnt when my grandfather was screaming, my father had cut him. I saw my father holding his panga. I did not see him cutting my grandfather. I know father had cut my grandfather as he screamed and I saw father lifting his panga.”

[15] The accused, according to his son PW2, had had a quarrel with his father and had asked the son not to take the milk he had been given by the grandfather. There was ample opportunity for the child PW2 to recognise his father as the person who came just as they finished milking the cows with his grandfather and asked him not to take the milk and started a quarrel with the deceased before starting to cut him. However, this recognition evidence of the child witness of the incident allegedly happening at night must, according to case-law, be tested with great care, especially in view of the accused's *alibi* defence.

Whether the evidence of the child is corroborated

[16] The nature and position of the injuries leading to death were consistent with cuts using a panga which is the weapon the child said the father was using when he made to cut the deceased. The evidence of the arresting officer that accused had at about 7.30pm on the material day surrendered to the police camp saying that he had fought with his father. Finally, the evidence of the deceased brother and uncle to the accused that the deceased and his son the accused here in were in constant disagreement with with the latter asking for land and the former insisting to give his land for education of his grandchildren, supports the minor's evidence that the two had quarrelled before the accused held the deceased and violently shook him and lifted his panga to cut him on the head. The evidence of the chief that his two subjects were constantly disagreeing also supports the poisoned relationship between the accused and his father providing at the very least a strong motive.

[17] The *alibi* defence of the accused that he came home to find the deceased father injured and tried to no avail to get help to take him to hospital does not stand in the light of the son testify that he saw his father lifting his panga to cut his grandfather. There is no possibility of the child of 13 years mistaking someone else for his father. Indeed, he had spoken with his father when the latter told him not to take the milk given by his grandfather, and he had witnessed the accused quarrelling his grandfather before the quarrel turned violent with accused lifting his panga to cut the deceased. It was early evening after milking the cows when his father had come with a panga and a radio, which he had outside as he went into the house and started quarrelling with the deceased. I do not find circumstances of difficult identification. It is indeed evidence of recognition by a 13-year old son of his father who engages his grandfather in a quarrel in circumstances conducive to positive identification.

[18] The arresting officer also knew the accused and from his evidence upon his report of having fought with his father and carrying a panga and suspiciously having bloodied clothes and shoes, he had lost custody of the accused having placed him in the cell until he handed him over to and was rearrested by the police officers from Muchongoi police station. The alibi accordingly, fails and I reject the alibi defence as an afterthought. It is significant that the defence did not raise the alibi issue earlier than at the defence hearing. In addition, the weight of the unsworn statement of defence is also considerably low in comparison to the sworn testimony of the prosecution witnesses. See *May v. R* (1980) KLR 129.

[19] PW6 Dr. Boniface Mirunju who conducted the post-mortem found *“on the head there were multiple deep cut wounds on the skull with underlying skull injuries and herniating brain tissues”* and he established the cause of death as:

1. *Decapitation.*
2. *Multiple deep cut wounds on the head.”*

The injuries were wholly consistent with panga cuts as described of the attack by the accused on his father by the eyewitness PW2.

[20] That the chief did not know that a suspect had surrendered to the arresting officer is not surprising in circumstances of the case where upon request by the arresting office to go and find out what happened at the deceased's home, his interest was to get police escort go to the scene and to find out whether any suspects had been arrested.

[21] The version of recovery of the panga given by the arresting officer and supported by the PW9 the Investigation Officer who testified to recovering the panga from the AP camp where it had been surrendered to the AP officers, is preferred to the accused's unsworn statement that it was the AP officers who came with the panga when they went to the home after locking him up in the cell when he reported having found his father injured. Accused said he had gone to the AP camp to seek their help when he could not get help from neighbours to get his father to hospital. Why would the police lock him in a cell when he sought help to take his father to hospital? It was a clumsy attempt to raise an alibi explain the recovery of the panga but the accused is, however, not required to prove his innocence or the truth of his alibi and, no more can be said about it.

Malice aforethought

[22] The offence of Murder contrary to section 203 of the penal Code is defined as follows:

“203. Murder

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

[23] There was on the evidence clear malice aforethought within the meaning of section 206 of the Criminal Procedure Code as follows:

“206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) an intent to commit a felony;

d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

[24] The accused was certified to be mentally fit to stand trial as testified by PW7 Dr. Joseph Njau.

[25] On the evidence as a whole the court finds it proved beyond reasonable doubt that the accused who was certified sane had following a disagreement with his father, as was wont of him, inflicted several panga cuts on the deceased's head causing injuries from which the deceased died whereupon he surrendered to the Administration Police from where he was handed to the regular police officers from Muchongoi police station who rearrested him and subsequently processed him for trial for the charge before the court. The accused had told the deceased of his intention to kill him so that he would not see the end the day as testified by PW2, and he had executed his intention by fatal panga cuts on the deceased's head and neck, which he must, as a sane person, have known or must be taken to have known would cause the death of his father or very grievous harm on him. I find the accused guilty as charged for the murder of his father Kandie Kipyegon.

Conclusion

[26] As required for a trial court by the principles of *Okethi OKale* case to evaluate the evidence of the prosecution and the defence as a whole, this court has upon considering the eye witness accounts of the accused's own 13-year old son and the arresting officer (PW3), and the doctor's (PW6) testimony of the injuries as well as the corroborative evidence of the area assistant chief (PW4) as a whole with the *alibi* defence that accused found his father killed in his house, come to irresistible conclusion that the accused killed his father by cutting him with a panga severally on the head and neck but offered his *alibi* to avoid responsibility. There was evidence of past constant quarrels and disagreement between the accused and his father over a demand by the former that the latter sells his goats and cattle and gives him the money, which the latter refused saying that the animals would be for education of his grandchildren, the accused's children, as testified by PW1, the father's brother and uncle to the accused. PW4, the area Assistant Chief, confirmed “there had been issues in the family”.

[27] The immediate quarrel between the accused and his father on the material day of the killing was related by the accused's son PW2 who said that his father “*came violently. He was quarrelling with my grandfather. My father told my grandfather “leo hauna bahati hautanika siku leo” in Tugen.*” The accused intended to kill the deceased, and had in fact, told his father that he would not live to see end of day, that is that he would kill him; or in Kiswahili language words that '*hautandika siku leo*', literally that '*you will not complete the day today*', which the eyewitness PW2 said he understood to mean “*that my father wanted to cut my grandfather as he held him and shook him violently.*” He carried out his expressed intention to kill his father by cutting him severally on his head and neck inflicting several wounds from which the deceased succumbed, as established by medical evidence of PW6. Accordingly, the accused killed his father with malice aforethought.

[28] The court, therefore, finds that the accused killed his father the deceased herein with malice aforethought, and the offence of murder contrary to section 203 as read with section 204 of the Penal Code is proved against the accused. Consequently, the court convicts the accused for the offence upon a full trial of the case.

ORDERS

[29] Accordingly, for the reasons set out above, the Court finds the Prosecution has proved the charge of murder contrary to section 203 as read with section 204 of the Penal Code against the accused who is, consequently, convicted for the offence.

[30] Sentencing proceedings shall be taken on a date convenient to the court and counsel for the accused. In the meantime, the accused shall be remanded at the G.K. Main Prison Nakuru to await the sentencing proceedings.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF FEBRUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ngamate, Advocate for the Accused.

Ms. Macharia Ass. DPP with Mr. Abwajo, Prosecution Counsel for the Prosecution.