



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 7 OF 2019 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL OJWANG ONYANGO.....ACCUSED

JUDGMENT

Introduction

1. The accused person **SAMWEL OJWANG ONYANGO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of the Information dated 24th April 2019 being that on or about the 7.4.2019 and 8.4.2019 at Otono beach, Nyamonye Sub-Location within Siaya County, the accused murdered one Joseph Onyango. The accused pleaded not guilty to the charge and the prosecution called eight witnesses in support of their case which is summarized herein below. Placed on his defence, the accused person gave unsworn testimony denying knowledge of why he was arraigned for murder as he knew nothing of what had allegedly happened to the deceased Joseph Onyango.

The Prosecution's Case

2. **PW1 Fredrick Otieno Yuya** a fisherman from Seger South Location Ojwando "B" Location testified that on the 8.4.2019 at about 8 a.m., he was at work when he heard people saying that Ojwang Omollo had killed his friend, Jagem. It was his testimony that he knew both Ojwang-the accused person herein and his friend Jagem who he stated lived together as friends in the house of Mzee Ojwang. PW1 identified Mzee Ojwang as the accused herein. It was his testimony that he saw Mzee Ojwang with blood on his shirt; trouser and leg and that he held him and inquired from him as to who had killed the deceased to which the accused replied that he had killed the deceased while he was alone. PW1 further testified that a young man ran and informed the Police who came to Nyamonye and arrested the accused and escorted him to Nyamonye Police Post. He identified the clothes worn by the accused person allegedly on the material day. He later recorded his statement with the police.

3. In cross examination, PW1 reiterated his evidence in chief and stated that he had known the accused for a long time prior to the events of 8.4.2019.

4. **PW2 No. 219517 Senior Sergeant George Omwa** an Administration Police Officer based at Siaya Station testified that on 8.4.2019 at 8 a.m. he received a telephone call from a good Samaritan that a person had been killed at Otono Beach. He notified his colleagues and was accompanied by Nyabera to Otono Beach where they found Joseph Onyango dead, 15 metres from the house where he lived at the Beach. It was his testimony that he later received another telephone call from the Police Post nearby that the suspect of Murder had been arrested with blood stained clothing.

5. PW2 then proceeded to Nyamonye Police Post where the suspect was and he assisted his colleagues who were being overwhelmed by the public that bayed for the suspect's blood. He testified that he learnt from a good Samaritan that the deceased died on 7.4.2019 at 8 p.m. He further stated that the accused was collected by D.C.I.O. Siaya. PW2 saw the deceased's body which had panga cuts on the chest and head. He identified in court MFI 3 a panga which had a black handle which he said he saw in the kitchen house where the deceased lived and that it had blood at its tips. He stated that there was also blood on the floor of the kitchen. PW2 identified the panga he saw on the material day before court.

6. In cross examination, PW2 reiterated his testimony in chief and stated that he could not recall how the accused was dressed when he found him at Nyamonye Police Post.

7. **PW3 Margaret Anyango Ochinga** the Assistant Chief Nyamonye Sub-Location testified that on 8.4.2019 at around 7 a.m. he received a call from one of the villagers to the effect that Joseph Okoth was dead. It was her testimony that she went to the scene at Nyamhalo where

she found Joseph Okoth lying dead outside his house with cuts all over his body with blood drops from the Kitchen to where the deceased lay. She testified that the area Chief also arrived and that they suspected the person who lived with the deceased in the same house.

8. It was her testimony that they received information that the person who lived with the deceased and who was suspected of committing the murder had been arrested at the Nyamonye centre. She further stated that she saw cuts on the neck, hand, knee and head of the deceased. It was her testimony that when they went to the centre, they found that the accused had been taken to the Police at Nyamonye and thus followed and found the accused with blood stains on his hands, legs and clothing he wore at that time. PW3 testified that he asked the accused his name and he responded that he was Samuel Ojwang and said that he lived with the deceased. She further testified that the accused informed her that the deceased arrived late and quarreled the accused for not untying goats from the shade and the deceased slapped him thus raising the accused's anger to the point that the accused cut the deceased.

9. PW3 testified that they went with the accused to the deceased's house and found it locked but they managed to open it as the accused had the keys. She further stated that on checking inside the house, they found a short sharp panga inside which was used to cut the deceased and which she identified before court (MFI 3). She further identified the accused before court.

10. In cross examination, PW3 testified that prior to the incident, she did not know the accused but was familiar with the deceased. She stated that at Nyamonye, she saw the accused in a grey T-shirt which was stained with blood, and that his hands and legs too were stained with blood. She stated that she was with the chief and Police Officers when speaking to the accused person at Nyamonye.

11. **PW4 No. 235987 Chief Inspector Chrispine Nyaga Ifara** the in-charge of Usenge Police Station within Bondo Sub-County Siaya County testified that on 8.4.2019 at 8 a.m., while at Usenge Police Station, he received a phone call from Vicks Abuti Opir, the Chief of North Yimbo who informed him that a person had been killed at Otono Beach in Nyamonye. He notified the area Chief to meet him at the scene whereupon arrival, found that one Joseph Okoth Otieno had been killed.

12. It was his testimony that the scene was sad as they found the deceased's body 15 metres from his house with cuts all over his body on the knees, head, thigh, and head. He further stated that inside the house, there was blood in the place where the accused used to sleep and further that they found a panga in the house where the accused lived. It was his testimony that blood was from the house until where the deceased lay and that while at the scene, they never saw the suspect but that he was arrested and handled over to the Police at Nyamonye and brought to the scene. PW4 testified that the accused appeared shaken. He testified that though the accused had clothes on, he could not recall the colours of his clothing. PW4 identified the panga found at the scene. He also identified the accused in the dock.

13. **PW5 Dr. Juma Daniel** working at Bondo sub-county Hospital testified on behalf of Dr Willis Ochieng Odhoch who carried out the postmortem on the body of the deceased. He had worked with Dr Odhoch in 2018 and 2019 but the latter had since been transferred to Migori. It was PW5's testimony that Dr Odhoch made the following general observations on the deceased's body: Body was unclothed, Male, Black African, 60 years of age, Good nutritional status, Height 172 cm, Physique – well built.

14. Regarding the Post mortem changes Dr. Juma testified that the body was well preserved and there was rigor mortis. Externally, the doctor noted that there were multiple cut wounds, one on the right **preorigular** region extending to the anterior neck, another on the right upper limb at dentoin region estimated at 8 cm x 3 cm, cubital fossae severing the bronchial artery, mediam aspect of the forearm 6cm x 3 cm. On the left upper limb was a cut wound 15cm x 3 cm, medial arm had a cut wound extending to the biceps.

15. He stated that there was another cut on the forearm measuring 5 cm by 3 cm on the hand, 1st and 2nd fingers. On the neck, there were cut wounds on clavicular area extending to the stenal cledomustoide muscles on the lower limbs cut on patella area exposing patella bone anteriorly 8 cm by 3 cm and 8 cm x 2 cm in dimensions.

16. Dr. Juma stated that on the right lower limb, there were 2 deep cut wounds on the thigh measuring 8 cm x 3 cm and that anteriorly, there were 2 other cut wounds, the largest of which measured 8 cm x 3 cm on the medial aspect of the foot, involving the medial maliola. He testified that on the back, there were 2 deep cut wounds one on the right scapular area and one on the lower back 15 cm x 4 cm. He further stated that internally, all aspects of the body were normal.

17. Dr. Juma testified further that as a result of examination, the Doctor found the cause of death to be due to hypovolemic shock due to the massive hemorrhage caused by multiple cut wounds caused by sharp objects. He stated that death certificate No. 893439 was issued and the postmortem report signed and dated the 16.4.2019 was produced as P. Exhibit No. 1. The Doctor was not cross examined.

18. **PW6 Wilson Amolo Okoth** from Nyamonye testified that on 8.4.2019 he was at Otono Beach at night and slept there. It was his testimony that in the morning, he heard that "Jagem", Joseph Okoth, his father, had been cut with a panga and was dead. He went to his father's house and found him dead with panga cuts all over his body and his house locked with a padlock. It was his testimony that he did not find the person his father lived with, one Mzee Ojwang.

19. PW6 further testified that he found many people, including the police at the scene and that when he entered the kitchen, he saw blood leading to where the body of his father was lying outside the house. He stated that Mzee Ojwang was found at the Centre and that he saw him at about 2 p.m., when he went to Bondo Police Station. He stated that Mzee Ojwang had blood stains on his clothes, shirt, and hands. It was his testimony that he knew Mzee Ojwang who lived with his father for about 3 months. He further stated that his father lived in that home as caretaker for James Winja. He witnessed the postmortem. He identified Mzee Ojwang as the accused in the dock and further stated that when the Assistant Chief arrived, the door to the house was closed and that they went to the Centre and returned with Mzee Ojwang who opened the door using the key wherein they found a panga.

20. **PW7 Polycarp Lutta Kweyu PF 2012024565** a Senior Analyst at Government Chemist Kisumu testified that he has worked for the last 8 years and has qualifications of a Masters of Science in Medicinal Chemistry from the Jomo Kenyatta University of Agriculture and Technology, 2008 class. He outlined his duties as collection of samples, analyzing, preparing reports and testifying in Court. It was his

testimony that in the instant case, on the 10.4.2019, P.C. Shadrack Mwendwa of D.C.I. Bondo submitted the following items on which they were requested to ascertain any genetic relationships between these exhibits:

- a) ***Blood sample of one Joseph Okoth Otieno indicated as for the deceased marked "A"***
- b) ***A panga with a black rubber handle with red stains marked "B"***
- c) ***A long sleeved checked shirt indicted for Samuel Ojwang' marked "G"***
- d) ***Did a buckle swab sample from the suspect Samuel Ojwang Onyango marked letter "E"***
- e) ***A brown long pair of trousers marked "D"***

21. It was his testimony that after analyzing the exhibits, he generated his report with the following findings:

- a) ***The red stains on the Panga item "B" was blood of human origin.***
- b) ***The shirt "C" and long pair of trousers "D" had blood stains of human origin and he proceeded to generate DNA profiles from those items***

22. The witness generated DNA profile from Blood of the deceased and buckle swab of Samuel Ojwang Onyango and the panga, shirt and the trousers. He testified that a look at those DNA profiles revealed that the DNA profile of the deceased matched the DNA profiles generated from the panga, the shirt and the trouser. He found no mismatch. ***He thus opined that the DNA profile from the blood stains on the panga item "B", stains on the shirt item "C" and long trousers item "D" matched the DNA profile of Joseph Okoth Otieno, the deceased while the DNA profile of the suspect Samuel Ojwang did not match any of the DNA profiles on the submitted items. He prepared the report on 20.9.2019, signed and sealed it, which report he produced as PEx. No. 2.***

23. **PW8 No. 63517 CPL Evans Karanja** who was part of the investigating team in this case testified on behalf of P.C. Shadrack Mwendwa, the investigating officer who was away attending a course at Kiganjo until June 2021. It was his testimony that they visited the scene of crime together with PC Mwendwa, recovered some exhibits together, arrested the accused person together and escorted the accused person to Kisumu together for extraction of swab.

24. He further testified that on 8.4.2019, he was in the office with Police Constable Mwendwa when their D.C.I.O. SP Josephine Wambua informed them of a Murder incident at Nyamonye Central village and requested them to accompany her to take over the case. It was his testimony that at the scene, they found the Officer Commanding Station Usenge Police Station and some Police Officers, local administration leaders and members of the public gathered.

25. He testified that they found the body of an aged man lying outside about 13 – 15 m from the house with multiple panga cut on the neck, knee, head and other parts of the body. He further stated that at the scene they gathered that the deceased lived in the house nearby with another man called Ojwang who was not present at that time. He stated that they called scenes of Crime Officers from Siaya to come and document the scene before they could take the body to the morgue.

26. PW8 further testified that while at the scene, they entered the deceased's house and obtained a blood stained panga, went to the kitchen and found blood on the floor and a blood stained trousers which items they took as exhibits and that while still at the scene, they received information that members of the public had arrested the suspect on suspicion of committing a crime as he was found at Nyamonye Market with his hands, shirt and trousers blood stained. He stated that they got a vehicle and officers from Nyamonye Administration Police Camp who rushed to where the suspect was and rescued him from the mob.

27. It was his testimony that after the scene was documented, the body was taken to Bondo Mortuary as they proceeded to Nyamonye and re-arrested the accused and recovered his blood stained and trouser. He stated that later they took the blood sample of the deceased which they took to the Government analyst together with the blood stained panga, blood stained shirt, and trouser recovered from kitchen and escorted them for forensic examination. He produced the blood stand panga as P.Ex.3, the cream trouser blood stained as P. Ex 4, checked shirt as P. Ex 5 and the exhibit memo received by Government Analyst as P. Ex No. 6.

28. He further testified that the brown trouser belonged to the deceased and that while at the scene they gathered information that the deceased and accused lived together but that the accused slept in the kitchen as the deceased owned the house and accommodated the accused. He further stated that they learnt that the two disagreed over caring of the goats and chicken belonging to the deceased hence the accused cut the deceased. He further testified that they found that the confrontation started in the kitchen to where the deceased lay outside. It was his testimony that there were no bloodstains in the room where the deceased used to sleep. He further identified the accused in the dock.

29. In cross examination PW8 testified that in his own opinion and from their investigations, the accused and deceased were friends and lived peacefully. He stated that the accused told them that when the accused failed to open the door for the chicken and goats, the deceased chased him from the compound.

30. The prosecution then closed their case and the accused was placed on his defence.

Defence Case

31. Placed on his defence, the accused person gave unsworn testimony and identified himself as Samwel Ojwang Onyango. He stated that he lived in Gem and was aware of the charges of murder brought against him to which he pleaded not guilty. It was his testimony that on the material night when the incident took place, he could not recall what happened and where he was. He reiterated that he never committed the offence and did not know why he was brought to court.

Analysis and determination

32. I have considered the evidence presented before the court both by the prosecution and the defence and in my opinion, the main issue for determination is whether the prosecution has proved the case against the accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.

33. The Offence of murder is established under Section 203 of the Penal Code which provides that:

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

34. In **Anthony Ndegwa Ngari v Republic [2014] eKLR** the Court of Appeal(Nyeri) held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

35. In the instant case therefore, the question that I must answer is whether the prosecution proved:

a) That there was the death of the deceased and the cause of the said death

b) That the death was caused by unlawful acts or omission

c) That the accused committed the unlawful act which caused the death of the deceased

d) That the accused had malice aforethought

36. The fact of the deceased’s death is not in doubt as PW2,3,4 & 8 all saw the deceased’s body at the scene of crime and further PW6, the deceased’s son who identified the deceased’s body prior to post-mortem being carried out and further witnessed the post-mortem. On the cause of death, PW5 Dr. Juma produced a post-mortem report that detailed the deceased’s cause of death as hypovolemic shock due to the massive hemorrhage caused by multiple cut wounds caused by sharp objects. Accordingly, the death and cause of death of the deceased was proved beyond reasonable doubt.

37. On whether the deceased’s death was caused by an unlawful act or omissions and whose unlawful act or omission it was, Article 26 (1) of the Constitution of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law. The aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. This court in the case of **Republic v W.O.O. [2020] eKLR** cited with approval the case of **Gusambizi Wesanga v Republic [1948] 15 EACA 65** where the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defense or in defence of property.”

38. In the instant case, there is no doubt that the death of the deceased was caused by the multiple injuries he sustained on the head, neck, hand and other parts of the body. The injuries seen on the deceased’s body and described by the aforementioned prosecution witnesses including the doctor who carried out an autopsy and those who saw his dead body could not in any way be self-inflicted.

39. Multiple cuts on the deceased’s body could not have been self-inflicted. They must have been inflicted by someone else whose act in inflicting the said wounds cannot be said to be lawful in any way. There was no justification for the said act. There is also no defence of self-defense proffered by the accused who denies knowledge of what happened to the deceased. The evidence adduced before this court irresistibly points to an unlawful act that led to the death of the deceased.

40. On whether the prosecution have proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased, it is noteworthy that there was no eye witness to the deceased’s death. Admittedly, the prosecution case against the accused person primarily rests on circumstantial evidence. It is not uncommon for legal practitioners to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence.

41. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, the Court of Appeal had this to say on this point:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been

proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” See also Musili Tulo v Republic Cr. App. No. 30 of 2013.

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

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

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else. (see also Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt. (see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

43. In this case, two key strands of evidence connect the Accused herein with the death of the deceased. These are the Accused person residing with the deceased at the time of death and the material evidence collected from the Accused person’s clothing and a panga from his dwelling house as recovered by the police as well as the conduct of the Accused on the day the deceased’s body was discovered.

44. In Neema Mwandoro Nduzya v R [2008] e KLR the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”

45. In its earlier decision in Mwangi and Another v Republic (2004) 2 KLR 32, the Court of Appeal stated:

“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.”

46. See also Regina v Exall and Others (1866) 176 ER 850 emphasizing the view that all pieces of circumstantial evidence ought to be viewed as individual strands of a cord which when combined together, constitute a rope.

47. In this case, the identified key strands of evidence together as they weave into one another are that the deceased and the accused shared a house as firmly established by the evidence of witnesses **PW1, PW3, PW6 and PW7**. This was further proved by the testimony of PW3, 6 & 7 all who testified that access to the house in question was only gotten once the accused who had been earlier arrested at the nearby Centre or market place, was brought to the scene of crime and he opened the door using a key that he possessed. The testimony of witnesses present at the scene of crime indicate that the deceased must have been killed in the house before being dragged outside of the house some 15 metres away from the kitchen. PW6, the deceased’s son testified that the accused had lived with his father for about 3 months as the deceased was a caretaker for one James Winja. PW4 testified that there was blood inside the house where the accused used to sleep where they also found the panga that was produced as an exhibit.

48. The other strand of evidence linking the accused to the deceased’s unlawful killing was the material evidence collected from the Accused person and his dwelling place by the police. The evidence of PW3 and PW8 was to the effect that when the accused was arrested, his hands and legs as well as his clothing found to be stained with blood. PW8 further testified that he forwarded the accused person’s blood-stained clothing to the government analyst for examination and the government analyst in his testimony and report produced as an exhibit found that the deceased’s DNA profile matched that of the blood stains found on clothing that the accused was found dressed in when he was arrested. In addition, the panga recovered from the room where the accused used to sleep was also found to be stained with blood which blood matched the DNA profile of the deceased.

49. Placed on his defence, the accused denied any knowledge of the events leading up to the deceased’s death. It is important to appreciate

that the accused person was not obliged to say anything or give any self-incriminating evidence or offer any explanation for the blood stains found on the clothing he was arrested while wearing. This is because the burden of proof lies on the prosecution throughout the trial, to prove its case against the accused person beyond reasonable doubt and that burden does not shift to the accused person in any way. However, I find that the prosecution proved its case beyond reasonable doubt that the blood found on the panga which was found in the accused person's residence and the clothes that he was wearing when he was arrested matched the DNA profile of the deceased. In the absence of any reason why the accused would be soiled with blood from the deceased's body as matched by the DNA profile, this court's conclusion is that the accused and not any other person, was responsible for the unlawful killing of the deceased whom they lived together.

50. Section 111 of the Evidence Act provides that:

“(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 prosecution, 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence. (2) Nothing in this section shall— (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

51. It is my humble view that in view of the overwhelming evidence linking the accused to the scene of crime and the death of the deceased, the denial by the accused person is completely displaced by the prosecution evidence.

52. I am therefore satisfied that on the evidence adduced by the prosecution witnesses, the circumstances proven in this case point unerringly to the Accused as the perpetrator of the offence herein, and give no room for the co-existence of circumstances negating or weakening the inference that the Accused is the person who committed the unlawful acts leading to the deceased's death

53. On whether the perpetrator had malice aforethought, Malice aforethought is defined under section 206 of the Penal Code in the following manner:

“It 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused;

c) An intention 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.

54. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code, beyond reasonable doubt. What can be deduced from section 206 (a-d) is that malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case at the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the classic case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63**, it was held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.

55. The post-mortem report produced by PW5 showed that the deceased had multiple cuts on his body on the neck, arm, hands and thighs that led to massive loss of blood resulting in the deceased's eventual passing. The weapon used was sharp and was recovered being a panga which this court had the opportunity to view. Cutting someone severally and on his head and other parts of the body and leaving him for dead is in itself evidence of malice aforethought and motive is immaterial. See section 9 of the Penal Code.

56. Accordingly, it is my finding and holding that the accused herein by cutting the deceased and inflicting on him multiple injuries, he intended to cause grievous harm to the deceased and as such I am satisfied that the prosecution has proved malice aforethought on the part of the accused person, beyond reasonable doubt.

57. In the end, I find and hold that the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code has been proved against the accused person **SAMUEL OJWANG ONYANGO** beyond reasonable doubt. He is accordingly found guilty of the offence of murder as charged and is convicted accordingly.

58. Sentence will be meted after mitigation and records.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF APRIL, 2021

R.E. ABURILI

JUDGE

In the presence of:

Mr. Kakoi Prosecution Counsel

Mr. Ooro Advocate h/b for Ms Akinyi

The Convict

CA: Modestar and Mboya