REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 13 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PETER WAMBUA MUSYOKA.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Ogeto for the accused

JUDGMENT

The instant case was instituted by the State which preferred a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code against the accused person. The accused who was represented at the trial by learned counsel **Mr. Ogeto** denied the charge and particulars of the offence of killing the deceased **Mwatu Mutiso** on 19th September, 2016 at Chagoto Village. Under Section 107(1) of the Evidence Act the prosecution set out to secure a conviction and judgement in their favour relying on the testimonies of the 10 witnesses. The summary of their evidence is as follows.

PW1 – Nicholas Mutiso Musyoka testified that on the material day, on 19th September, 2016 while burning charcoal he came into contact with the deceased who passed by shortly and left the scene. In a short while **(PW1)** was to hear a scream and a voice calling for his attention. He rushed to the scene took a motorcycle and assisted to carry the deceased to the hospital. On arrival **(PW1)** told the court that he saw the deceased person with the wounds on the head being held by **PW4.** At the same time **PW1** and **PW4** testified that an alarm was raised to alert the villagers on the occurrence of the incident. As the deceased had already passed on PW1 and PW4 stated that the body was left at the scene as police assistance from Adu police station was sought to take over the matter. PW1 and PW4 were later to record statements with the police. According to pw4, who was the first person to arrive at the scene and found the deceased still talking told the court that the name of the suspect Peter came from the deceased before he took the last breath.

PW2 – Rose Martha Musyoka, who testified as the mother to the deceased confirmed that on receipt of the report she travelled to the scene only to be confronted with the death of her son. At that moment PW2 told the court that she noticed the deceased had sustained physical injuries to the head.

PW3 Samson Mwalimu – Testified that on19.9.2016 he received information from PW4 that the deceased had been killed by the accused but the motive was not known. According to PW3 he walked towards the scene where he met with (PW1) and the deceased body lying on the ground. In his testimony the suspect had been identified together with other elders when a plan was hatched to have him arrested and taken to the police station.

PW5 – Kazungu Tsuma testified also as the Village Elder of Chagoto where the incident of murder took place. As one of the elders who deals with conflict and peace issues he went to the scene only to confirm the reports that the deceased had been fatally injured.

PW6 – Musyoka Muli Ndunda, the father to the deceased testified that prior to the death of his son they had worked together with the accused burning charcoal. On return the accused was not on site but his tools an axe and panga were still at the same place. When the day activity was concluded PW6 testified that he returned home at about 5.00 p.m. It was while at home a message came in from PW4 that the deceased had been fatally injured by the accused person. The accused who was the key suspect according to PW6 had to be arrested by members of the public (Bajaja operators) at about 10.00 p.m.

PW7 – Samson Thethe, the Assistant Chief of Adu Sub-Location testified to the effect that immediately as an administrator when he

received the sad news of the incident which had occurred involving the accused and the deceased. As a village elder and other members of the public took action to have the accused apprehended to face the consequences of the Law.

PW8 – Dr. Joab Kaya, testified on behalf of **Dr. Angone** the pathologist who carried out the postmortem and prepared the report in respect of the examination on the deceased body. The postmortem report admitted as exhibit confirmed that the deceased had sustained deep cut wound to the occipital region. The pathologist opined that the cause of death was the deep cut wound which impacted, on the brain matter.

PW9 George Ogunda, the Government analyst testified on the forensic analysis carried out on the blood sample of the deceased along side the exhibits panga and green jean pair of shorts. According to PW9, the DNA report generated a match from the panga and the green jean shorts to be that of the deceased. The analyst report was qualified report produced as exhibit 5.

PW10 – Inspector Getende of crime branch Malindi testified on the nature of investigations carried out arising from the murder report booked at the police station. Further PW10 told the court that he recorded witness statements from the various witnesses who were later to form the basis of the indictment against the accused person. The exhibited panga was recovered at the scene by PW1 as it was PW10's testimony one of those to respond to the distress call. The exhibits recovered were forwarded to the Government chemist laboratory for analysis.

The analyst report from PW9 revealed a DNA match between the blood stained pair of jeans of the deceased with the blood sample of the deceased. That therefore according to PW10 placed the accused at the scene of the murder.

The accused was placed on his defence under Section 306 of the CPC. He gave a detailed accord on how he spent the better part of the day on 19th September, 2016. He denied that he ever participated in assaulting the deceased. The accused told the court that he was to learn of the murder after he was arrested by members of the public for an offence he did not commit. That was the case from both sides at the trial.

I now turn to the ingredients of the charge and whether the prosecution discharged the burden of proof beyond reasonable doubt.

Analysis and Determination

The standard of proof

It is trite that in criminal cases like the instant one against the accused persons, the burden of proof lies with the prosecution at all times save for statutory exceptions, when an accused person may be required to answer certain aspects of the case on facts traceable to his or her own knowledge.

The Law

Section 107(1) of the Evidence Act provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts, he asserts, must prove those facts exist. The position runs through the entire process in consonant with Article 50(2)(a) of the Constitution that the accused person is presumed innocent unless the contrary is provided. Even in the exception created by virtue of Section 111 of the Evidence Act, the burden for the accused to answer to any issues comes into effect when the prosecution has placed before court sufficient evidence establishing each elements of the offence against the accused person.

The principle on this purposive interpretation was stated in the case of **Mkende Shiro v R {2002} KLR** where the court of Appeal held that:

> ***"The accused persons assume no legal burden of establishing his innocence except for certain limited cases where the law places a burden on the accused to explain matters which are peculiarly within his personal knowledge."***

(See also text on criminal law by (**William Musyoka 2nd Edition Law Africa pg 74 paragraph (a1).** The same issue was also considered in the persuasive authority from South Africa in the case of **DPP v Oscar Leonard Carl Pistorius appeal No. 96 of 2015** where it was stated:

> ***"The proper test is that an accused is bound to be convicted if the evidence establishes his (her) guilt beyond reasonable doubt, and the logical corollary is that he (she) must be acquitted if it is reasonably possible that he (she) might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in record, however, is that the conclusion which is reached, (whether it be to convict or to acquit) must account for all the evidence, some of the evidence might be false, some of it might be found to be possibly false, or unreliable but none of it may simply be ignored."***

Refocusing on the burden of proof, the evidence so required of the prosecution is that one which bears more weight than what the accused is likely to offer in his defence.

The standard of proof concept is as defined in the cases of **Glanville Williams** in his book Criminal Law 2nd Edition:

> ***"The concept of reasonable doubt is defined as follows" "It is a business of the prosecution to bring home the guilt of the accused to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled to must be such as rational, thinking, sensible man fairly and reasonably entertain, not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle skepticism. There must be doubt which a near may honestly and***

conscientiously entertain."

It was also laid down by the decision of the Supreme Court of India in State of **U.P v Krishna Gopal & Another (AIR 1988 SC 2154)** follows:

> ***"There is an unmistakable subjective element in the evaluation of the degree of probability and quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the sometime, uninformed legitimization of trivialities would make mockery of administration of criminal justice."***

The commentary by **Lord Denning in Miller v Minister of Pensions {1942} 1 ALL ER** explains the standard of reasonable doubt which is as ancient aspect the criminal justice system itself in the following words:

> ***"Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong….. as to leave only a remote possibility in the accused's favor, which can be dismissed with the sentence "of course it's possible, but not in the least probable." The case is proved beyond reasonable doubt, but nothing short of that will suffice."***

Therefore, the reasonable doubt standard would remain an important consideration, in this case under review for the prosecution to be tested in the Law and compatibility of the evidence.

The duty for the prosecution to prove the accused guilty beyond reasonable doubt never shifts save for the existence of a prima facie evidence which places such an obligation on the accused to allude to material evidence especially those within his knowledge and belief (see **Mwaitige v R 1961 EA 470** and **Hasibu Bin Rashid v the Queen KLR 172**).

The offence of murder has been defined under Section 203 of the Penal Code to be unlawful killing of another human being with malice aforethought. The prosecution therefore has the burden to proof:

> ***1) the death and cause of the person being killed***
>
> ***2) the unlawful act of mission***
>
> ***3) the element of malice aforethought.***

On account of this case, the death of the deceased is not disputed. What is in issue is whether the cause of death was unlawful and at the end of the pendulum the accused did it so intentionally.

As a general rule no action shall be instituted against an accused person on a commission of a crime unless its proved that he did so voluntarily in disobedience of the Law. In a case of persuasion from **South Africa, S v Cunningham {1996} 1 SACR 631** the court held:

> ***"The state in discharging this onus: is assisted by the natural inference that in absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary ……. That this was attributable to some cause other than mental pathology"***

This principle espouses in any case, be reluctant to enter a verdict of guilty on manifestation of intention alone without corresponding *actus reus.* The unlawfulness is what the case of **Guzambizi Wesonga v R {1948} 15 EACA 65** stands for that all homicides are unlawful unless excusable in Law.

As aforeshadowed upon arrest the question that must be asked is whether the accused conduct or acts of omission was a consequence that eventuated the death of the deceased. On this legal causation theory the test was propounded within the context of Section 213 of the Penal Code.

Hearing both sides at the trial is intended to affix liability in appropriate cases with the underlying tests **foreseeability, individualization and adequate cause of the death.** In consonant with these tests **PJ Visser & M.C. Mare Visser & Vorster's General Principles of Criminal Law through the cases 3rd Edition 1990 p46 R v Milini and Erleigh 7, 195, 1 SA 791** the following principle came into being:

> ***"The novus actus (or nova cauza) intenveniens test expressed in terms of an abnormal, intervening act or event which serves to break the chain of causation. The normality or abnormality of an act or event is judged according to the standards of general human experience."***

In this case it's the chain of causation and any intervening event which must be adjudged for the unlawfulness act of omission and the opined medical evidence on the cause of death. In striking evidence by the prosecution points at the accused to have inflicted the fatal wounds upon the deceased. Further, the lethal wounds were of a nature and severity that they immediately led to the death of the deceased.

A paradoxical intention may occasionally be put forward that in exercise of due diligence and the deceased being taken to the hospital, the

medical intervention could have broken the chain of causation.

My deeper analysis of the evidence shows that in such a case of the deceased the severity of the injuries and parts of the body targeted the ensuing death was a foregone conclusion. There could have been no intervening event to stop it in its tracks as soon as the accused set it in motion by infliction of the multiple serious injuries. All such acts of omission and causes taken together assumed the test of a primafacie evidence, generally demanding for a rebuttable answer from the accused. One noteworthy element on evaluation of the accused defence on the face of it is the principle in **Burcheel (Principles of Criminal Law 5th Edition {2016}**

> ***"which stipulates among other factors with regard to functions which are possessed by normal people which render their responsible for their conduct." "Two psychological factors render a person responsible for his voluntary acts, firstly, the free choice, decision and secondary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil (insight) before committing the act."***

In the instant trial, I do desire to say one word about the whole indictment. It will be observed that no evidence is given which is admissible to keep the issues which are perfectly clear in the prosecution case out of the realm and knowledge of the accused I may add in the circumstances of this case nothing renders the accused from being blamed for the death of the deceased. Certainly, the prosecution has acquitted itself under Section 107 (1) of the Evidence Act on the ingredient of unlawful death and the person who had a hand in it.

The offence of unlawful homicide never ends there until malice aforethought is proved to be in place. The diagnostic of an intention of man as a device to terminate the life of another human being and the duty owed was espoused by **Devlin J in Robert Portler {1957} CRIM L. R. 365** as follows:

> ***"Murder was an act or series of acts, done by the prisoner which were intended to kill, and did in fact kill. It did not matter whether Mrs. Moreel's death was inevitable and that her days were numbered, if her life were cut short by weeks or months, it was just as much murder as if it was cut short by years….."***

Smith and Hogan Textbook of Criminal Law 7th Edition Buterworths & Co publishers London 1992:

> ***"The mensrea of murder is traditionally called malice aforethought. This is a technical term and it has a technical meaning quite difference from the ordinary popular meaning of the two words, ordinary and inevitably so joined in various jurisprudential decisions and texts.*** *(underlined emphasis mine)*

There is however strength of opinion either way on the notion of intention in the crime of murder to produce the encompassed result. In this discussion I will be looking at the mental or fault element in the commission of the offence.

The law goes further to define malice aforethought under Section 206 of the Penal Code to be deemed to be established when the prosecution establishes any of the following elements:

> ***a) An intention to cause the death or to do grievous harm to another human being,***
>
> ***b) Knowledge that the act or murder mission causing death with probably cause death of or grievous harm to some other person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference, whether death or grievous harm is caused or not or by act that it may not be caused,***
>
> ***c) An intent to commit a felony,***
>
> ***d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.***

The accused therefore can only be convicted of murder once the prosecution establishes by way of evidence objectively that the unlawful act or commission was accompanied with malice aforethought. The accused caused the death of the deceased specifically, with an intention to cause death and or intention to do grievous harm.

The leading authorities on the question of circumstances of malice aforethought have formulated various characteristics that would justify an inference for murder. The classic case of **Rex v Tubere S/O Ochen 1945 128 EACA 63:**

> ***"held as to the question as to whether malice aforethought is manifested in law the court is to determine it from the nature of the weapon used, the manner that was used to inflict harm (injuries, that part or parts of the body targeted by the accused, the inferential conduct of the accused before, during and after the unlawful act of killing."***

In **Ernest Asami, Bwire Abanga alias Onyango v R CA No. 32 of 1990** the Court of Appeal held:

> **"Where there is evidence to conclude on the fact that the killing was brutal and culminated to cause death and grievous harm malice aforethought can be inferred in such circumstances."**

In the case of **Karani & 3 others v R 1991 KLR 622** the appellant was found to have inflicted deep injuries to the head which caused death due to shock as a result of intra cranial haemorhage, due to cut wounds. The injuries were also inflicted with two pangas which were found

at the scene smeared with blood belonging to the deceased blood group. The court held that: **"The appellant had no other intention but to kill or to do grievous harm."** See also a test on criminal law by **William Musyoka at page 315 (supra)**. Further in the case of **Nyabuto v R CA No. 194 of 2008** According to the facts of this case the appellant and others had been armed with dangerous weapons where they attacked the deceased causing maim; eventually resulting in the death of the deceased. The court held that:

> **"Mensrea under Section 206 of the Penal Code had been satisfied that the intention was to cause death or to do grievous harm to the deceased."**

In the facts of this case there is in my respectful view knowledge that can be taken from the circumstantial evidence in particular the testimony of (PW1) on the intent to commit a felony. This question on Section 206(D) of the Penal code was considered in the early case of **Petro Sentalii S/O Lemandwa v Reginum 1953 20 EACA 230** where the Eastern Court of Appeal took the view that:

> "**malice aforethought would be established if death is caused by any unlawful act or omission done in furtherance of an intention to commit any felony. In that case the deceased was heard crying out, they are killing me. She was later found dead or dying on the floor of the house**."

See also full test of this in the book on **Criminal Law 2nd Edition Repair 2016 (William Musyoka page 320 element (VI).** The Law as can be seen from the above authorities lays the basis to evaluate the evidence whether the prosecution discharged the burden of proof on malice aforethought beyond reasonable doubt.

A consideration of these principles and guidelines in light of the evidence given by the prosecution is instructive to make a finding whether the charge proved is murder or manslaughter. Malice aforethought includes all those circumstances defined under Section 206 of the Penal Code.

My understanding of the concept as a major ingredient of the offence of murder contrary to Section 203 of the Penal Code means the state of mind of an accused which he kills another human being unlawfully with no justification, excuse or any statutory defences known in Law.

In dealing with this ingredient the evidence of **Muema Mutiso (PW4)** was categorical that he passed through (PW1) farm when he came across the deceased crying due to the injuries inflicted. That the deceased who was still conscious claimed that the injuries had been inflicted by the accused. It followed that PW1 found PW4 and even as they were raising the alarm the deceased passed on before any medical assessment could be availed after the assault.

The post mortem examination by **Dr. Angone** dated 29.9.2016 shows the deceased to have sustained a deep cut wound to the occipital region of the head by **Dr. Kaya** on behalf of **Dr. Angone** the cause of death was the cut wound in the occipital region affecting the brain matter by use of a sharp object herein identified as a panga.

As a result of the injuries PW4 confirmed that the deceased became unconscious soon thereafter as they waited to have him taken to the hospital. The injury inflicted on the head of the deceased are of the vital parts of a human body was forceful and inflicted with penetrative felocity. It is evidence that the perpetrator did nothing to assist the deceased after inflicting harm but left him to suffer death as a consequence of his act.

It is also worthy to note that the use of force was accompanied with a dangerous weapon identified as a panga which was recovered at the scene. The panga admitted as an exhibit became a subject of forensic analysis by **George Ogunda,** who testified as PW9 as to nature of analysis carried out and the outcome of it relevant to this case. According to PW9, he confirmed that the DNA analysis from the panga with the blood sample of the deceased generated DNA match with considerable scientific weight that it was used to inflict the serious injury upon the deceased.

In **Hyam v DPP {1975} AC 55, 86 the dictum by Lord Diplock** makes clear that intention is vital to the judicial discretion on culpability in considering whether the facts of the case proof the offence of murder. In this regard he stated as follows:

> ***"No distinction is to be drawn in English Law between the state of mind of one who does an act because he asserts it to produce a particular evil consequences, and the state of mind of one who does the act, knowing full well that it is likely to produce that consequence, although it may not be the object he was seeking to achieve by doing the act. What is common to both these status of mind is willingness to produce the particular evil consequences: and thus, in my view, is the mensrea needed to satisfy a requirement, whether impounded by statute or existing at Common Law, that in order to constitute the offence with which the accused is charged, he must have acted with intent to produce a particular evil consequence or, in the ancient phrase which still survives, in crimes of homicide, with malice aforethought."***

Little efforts is required to agree with the prosecution evidence that the death ensued in this case to high degree of foresight that the accused violent acts would result in the death of the deceased.

Turning to our legal system the English Law on this element on this element on intention to apportion liability has been applied in several cases. The case in point being of **Cherono & Another v R [1933] 15 KLR**, the court held:

> ***"That malice aforethought is established when death is caused with an intention to commit a felony is evidenced, and when the felony involve employment of violence against the person killed."*** **(See Tubere (supra), Ernest Asami (supra), Karani (supra).**

In the sense of the evidence adduced the attack of another human being with a sharp object targeted at the vulnerable part of the head is

prima facie evidence that the wrongful act was intended to cause death or serious maim to the deceased.

From the foregoing analysis its inevitable to conclude that the offender who committed the unlawful act did so with malice aforethought as defined under Section 206, (a), (b), (D) of the Penal Code. The onus on the prosecution to prove this element has been discharged beyond reasonable doubt.

In this trial there is the issue on identification or recognition of the accused as the perpetrator of the crime. There is no dispute, that the prosecution case is based purely on circumstantial evidence. The Court of Appeal in **Mwangi & another v R [2004] eKLR** held as follows inter alia:

> ***"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."***

In the circumstances of this case, the prosecution relied first on the testimony of **PW4, Muema Mutiso** who was stated to be the witness to come into contact with the deceased before making his last breath.

As soon as PW4 held a conversation with the deceased he fell into a comma and resultant death. However, as PW4 testified in court the deceased in an answer as to what happened to his head did mention the accused as the assailant.

This therefore brought in context the admissibility of a dying declarations under Section 33 of the Evidence Act. The Section provides for admission of evidence relying on the statement made by a person or victim in imminent danger of death as to his or her cause of death.

In respectful view of the Law such dying declaration statements by a person under the expectation of death is generally admissible. Therefore, even an analysis of the admissibly of the dying declarations, the court must remain vigilant to decide as to whether the prosecution has sufficiently and beyond reasonable doubt proved that the accused was one of the people who assaulted the deceased on the material day.

As regards the principles on dying declarations, the case of **Mibuto Edward v Uganda S. C. Criminal Appeal NO. 17 of 1995** held thus:

> ***"The law is that evidence of dying declarations must be received with caution because the test of cross-examination may be wholly wantong, and particulars of violence may be occurred under circumstances of confession and surprise, the deceased may have stated his inference from the facts concerning which he may have omitted important particulars for not having his attention carted to them. Particular caution must be exercised when an attack takes place in the darkness, when identification of the assailant is usually more difficult than in daylight. The fact that the deceased told different persons that the appellant was the assailant is no guarantee of accuracy. It is not a rule of law that in order to support conviction, there must be corroboration of a dying declaration as there may be circumstances which go to show the deceased could not have been mistaken. But it is generally speaking very unsafe to base conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subjected to cross-examination unless there is satisfactory corroboration."***

Further support to this view is to be found in the Court of Appeal decision of **Philip Nzaka Watu v R 2016 eKLR** which considered the provisions of Section 33 (a)of the Evidence Act as follows:

> ***"Under Section 33 (a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under the provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. While it is not the rule of Law that dying declarations must be corroborated to found a convicting, nevertheless, the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe."***

Applying the above principles and guidelines, there are three aspects of the prosecution case to dispose of the issue on identification of the accused and his culpability in committing the murder.

It was correctly stated by **PW4** and remains uncontroverted that while walking along PW1 farm he heard screams of a human being which later was identified to be that of the deceased on arrival at the locus in quo, **PW4** saw the deceased with cut wounds to the head which on inquiry, he stated that they have been caused by the accused.

PW6 alluded to the fact that on 19.9.2016 he was with the accused in the farm where they usually burn charcoal. It was **PW6** evidence that he excused to answer a call of nature but when he returned the accused was nowhere to be seen. More pertinent was the evidence by PW6 that on going back to his home, the accused who also resides with them was nowhere within the precepts of the homestead.

As the evidence of **PW6** stands, it did not take long before information would trickle in that the accused has fatally injured the deceased.

The prosecution drew the courts attention to third aspect of the evidence of the Government analyst (PW9) **George Ogunda** the panga recovered at the scene of the murder was analyzed with the blood sample of the deceased. The analyst further had in his possession a pair of jeans shorts allegedly worn by the accused on the fateful day of the murder.

In the findings of the analyst the DNA profile from the exhibits of the panga and pair of green jeans stated to belong to the accused matched with the blood sample of the deceased.

Against this evidence was the defence statement by the accused who denied being involved in the murder of the deceased. The nature of the evidence and what transpired required of the accused to bring himself within the provisions of Section 111 of the Evidence Act. All these pieces of evidence corroborate the dying declaration of the deceased.

Comparing the prosecution case and the accused defence, it could seem to this court that the prosecution witnesses is consistent and credible throughout the trial. There was no third person involved with the death of the deceased except the accused person.

The alibi defence raised by the accused did not demolish the evidence against him which possibly identified him as perpetrator of the crime.

Accordingly, I find the prosecution has discharged the burden of proof beyond reasonable doubt that:

1) The deceased Mwatu Mutiso is dead.

2) His death was unlawfully caused with malice aforethought.

3) The accused has been positively identified and placed at the scene of the murder.

In this circumstances, I find the accused guilty of the offence of murder contrary to Section 203 of the Penal Code and as a consequence do convict him of the murder of the deceased.

Sentence

As I embark on this last journey of the trial to pass sentence against the accused in exercise of the judicial authority conferred upon me by the Kenyan people through the Supreme Law of the Law and other statutory instruments, I can't resist to reflect on the following statement from **G.R.R. Martin (A Game of Thrones)**

"The man who passes the sentence should swing the sword, if you should take a man's life, you owe it, to him to look into his eyes and hear his final words. And if you cannot bear to do that, then perhaps, the man does not deserve to die."

In assessing an appropriate sentence, the court has taken into consideration the totality of mitigatory factors and sought to weigh them *vis-a-vis* the aggravatory factors at the same time seeking to strike a balance on the nature of the offence, murder with constructive intent and the offender, his personal circumstances and societal interest, that justice must not only be done but must be seen to be done. Society requires protection from dangerous criminals and in fact the society looks up to the court to do justice not condone crime in a manner which would intrigue society into losing confidence in the whole justice delivery system.

In mitigation, I have taken into account the fact that the accused a young person aged 26 years who at the time of the commission of the offence was aged around 22 years. He is a first offender with no previous record. He expressed remorse for the offence he committed upon being interviewed by the probation officer.

It is in aggravation that, the deceased had a deep cut wound to occipital region of the head which occasioned by the use of a panga. The court will not lose sight of the pre-trial and during trial, incarceration period. The court is alive to the fact that prison life is not easy for the obvious infringement of dignity and freedom. He has been behind bars for the past 4 years. This goes to explain that the accused persons had an intention to kill or to cause grievous harm when they embarked on executing the crime. The same was not inflicted in light of self-defense or following some kind of provocation. At least no such defences were raised at any point during trial and this makes the crime a cold blood murder.

I find that the murder was callous, ruthless, brutal and cruel. The accused by unnecessarily resorting to violence as a way of resolving a dispute acted in a barbaric manner occasioning the death of the deceased. Sacred human blood was lost and the court frowns at such violent - criminal conduct. We should show displeasure at such violent conduct leading to loss of life by the corresponding sentences imposed.

I therefore reject the probation officer's recommendation that the accused be given a non-custodial sentence and consider 3 years under Probation Order. The offence as observed correctly by the counsel for the state is an offence deserving of custodial sentence and removal of accused from the community. In the premises, circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the accused. The appropriate sentence, for this case in line with precedents. For a conviction of murder with malice aforethought is thirty (30) years' imprisonment. It is the sentence I so pass against the accused. For you **Peter Wambua Musyoka**, I bear no ill will against you, never forget that justice is what love looks like in public.

It is so ordered.

14 days right of appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MARCH 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Gekanana holding brief for Ogeto for the accused person

2. Ms. Sombo for the state