



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 16 OF 2016 [MURDER]

STATE.....PROSECUTION

VS

MORRIS ODUOR OTIENO.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein **Morris Oduor Otieno** stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of Information dated 27th September 2016 are that on the 12th Day of September 2016 at about 9.00pm at Kamagoye village of Ulwa Sublocation within Siaya County, the accused Morris Oduor Otieno murdered **Peter Omondi Jwayi**.
2. The accused pleaded not Guilty to the charge on 25th October 2017 before Hon. J.A. Makau J who was transferred from the station in May 2018 before concluding the part heard case.
3. Upon my taking over the matter, on 22/5/2018 the court complied with the provisions of section 200 of the Criminal Procedure Code and the accused opted to have the matter continue from where Hon. J.A. Makau left.
4. The Prosecution called nine witnesses to establish a prima facie case against the accused person who was placed on his defence. The accused opted to exercise his right to remain silent upon being placed on his defence. The court then complied with section 331 of the Criminal Procedure Code and had the prosecution sum up the case for the prosecution and the defence counsel Mr. Ooro Advocate submitted in reply. The case was then reserved for judgment.

The Prosecution case

5. **PW1, Aloise Okoth Jwayi** a farmer and a deacon from Ulwa sub-location Siaya County testified on oath and recalled that on 12/9/2016, at around 6.00 pm, he was at his house praying while his brother **Peter Omondi Jwayi**, the deceased herein was outside PW1's house. PW1 then heard his said late brother asking PW1's wife **Anjeline Atieno Okoth** for a basin and he was given to go and bath. After taking a bath, the deceased returned the basin and gave it to PW1's son, Isaac Auma. This was about 7.00 pm. They then ate dinner and went to sleep at around 9.00 pm. At around 9.00 pm, PW1's wife woke him up and asked him why he was sleeping and yet Omondi had been murdered. PW1 got up and took a torch, inquired from his wife on who had given her the information and she told him that she got information from one Betty their neighbor. PW1 then got out of his house and heard shouts of many people. He saw many people walking near the house of Betty, a distance of about 20 metres. He proceeded to the scene and found his brother the deceased Omondi lying beside a small path on his right side. He shone the torch and saw blood from the back of the head; from the ear to the mouth and left hand. He observed that his brother was unconscious. He went to get means of transport to take him to the hospital. He managed to get a vehicle but before picking the deceased, he got a call from Ochieng Ogali that his said brother had passed on. PW1 therefore returned to the scene with Boda boda and confirmed that his brother was indeed dead. He then called the Assistant Chief, Joshua Obango who arrived and called Police from Siaya Police Station who went to the scene at 2.00 am and collected the deceased's body. The police also arrested the deceased's friend, one, Kuka.
6. PW1 further testified that he went home and that the following day which was on 13/9/2016, he proceeded to Siaya Police Station with his father and Moses and they recorded statements after which they went to Siaya County Referral Hospital Mortuary and viewed the body of the deceased. On 22/9/2016, PW1 and his father Petro Otieno and Andrew identified the deceased to the Doctor who conducted the postmortem.
7. This witness was not cross examined by the defence counsel Mr. Ooro.

8. **Andrew Oduor Jwayi** a business man and resident of Bungoma testified as PW2 and recalled that on 12/9/2016 at around 9.00 pm, he was at Bungoma, when he received a call from his mother telling him that his brother Peter Omondi Jwayi had been cut by someone. He then called his other brother Aloise Okoth Jwayi (PW1) who told him that they were looking for means of transport to take the deceased to the hospital. Later, his mother Margaret Ajuang Jwayi called him and told him that the deceased had passed on.

9. PW2 travelled home on 13/9/2017 and found when Aloise and Moses had returned from the mortuary. On 14/9/2017, he heard people screaming saying that they had gotten the murderer. When he got out of the house, he met members of public with the suspect. The suspect who was a cousin of and well known to PW2 was taken near the latter's home and was made to sit down. PW2 saw a panga which was being carried by Ochieng. He stated that the people were saying that the panga was of Oduor the suspect and that the said panga was stained with dry blood. He stated that the suspect had on him only a jacket without a shirt and that when he was asked as to where his other clothes were, he told PW2 that the clothes were at the suspect's home under the mattress. PW2 and Owino proceeded to the house of the suspect, Oduor but they did not find there anyone. They found a cottage open and on entering therein, and checking under the mattress, they found a shirt which appeared to have had blood stains. They escorted the suspect to where members of the public were and when they realized that the crowd was angry, PW2 called Boda boda riders who took Oduor to Ng'iya Police Post and left him there and handed over the recovered shirt to the police. They also went with Ochieng and handed over the panga to the Police Post.

10. PW2 identified a panga in court which he stated is the one he saw, and it was marked as MFI P1. He stated that the panga had dry blood. He also identified a shirt which is light – green-yellowish in colour which had blood stains at the back, collar, at the front and back and right hand side. The Shirt was marked as MFI-P2. He later recorded his statement at Siaya Police Station. He also identified the accused in the dock as the Oduor and stated that the deceased was his step-brother.

11. On being cross examined by Mr. Ooro counsel for the accused person, PW2 stated that he knew the accused but he could not tell whether the accused and the deceased had a grudge. He reiterated that he was at home on 14/9/2016 when he heard people coming to their home making noises. He stated that he saw a panga with Ochieng. He further reiterated that the accused had a long trouser and a jacket but without a shirt. He stated that it was hard to find someone one wearing a jacket during day time without a shirt. He stated that when they asked the accused about the shirt, he had worn before, he told them that it was at home below the mattress. He stated that when he recorded his statement with the police he did not say that the shirt was below the mattress.

12. On being questioned further, PW2 stated that the accused had not been assaulted but that people wanted to beat him and PW2 stopped them. He insisted that they went and recovered the light green shirt from where the accused had kept it. He stated that the accused sometimes behaved as if he was mad. PW2 denied that they had framed the case against the accused. He stated that the accused had disappeared between 12th - 13th September 2016. He added that the shirt was carried by Owino and that it was him and Owino who recovered the shirt. He stated that at the police station, the accused said that the shirt was his.

13. In re-examination by Ms. Odumba Prosecution Counsel, PW2 stated that the accused had mental sickness in 2013.

14. **PW3 Joshua Ombago Odhoji** the Assistant Chief of Orwa sub-location testified on oath and recalled that on 12/9/2016 at around 10.00 pm, he was at his house when he received a call from Aloyce Jwayi to the effect that Peter Omondi Jwayi, his brother, had been murdered by an unknown person at their home in Kamagoye village, some metres away from their home.

15. PW3 rushed to the scene at around 10.30 pm and found the body of the deceased lying in a pool of blood. He telephoned the Officer Commanding Police Station, Kogelo Police Station and informed him of what had happened. He waited until 1.30 am when the OCS arrived at the scene with some police officers from Siaya Police Station. They took the body to Siaya Hospital mortuary.

16. On being cross examined by Mr. Ooro advocate on behalf of the accused person, PW3 stated that he had not stated anything else concerning the accused person and or what transpired on 14/9/2016.

17. In reexamination by Mr. Okachi for the Prosecution, PW3 stated that on 14/9/2016, he received a phone call from the deceased's family that they had found a suspect of murder. He rushed to the scene and arrested the suspect and took him to Ngiya Patrol Base in the company of the crowd who had given him information. He identified the accused person in the dock.

18. **PW4 George Ochieng Sumba** a resident of Agoyo Yombe sub-location and a business man testified and stated that on 12/9/2016 at about 9.00 pm he was at his home when a certain youth called Otieno telephoned him and informed him that Omondi had been cut in pieces. PW4 proceeded to the scene and found many people gathered and that Omondi was lying in a pool of blood. They tried to get help to escort him to hospital but that at about 10.00 pm, Omondi succumbed while at the scene. They therefore called the Chief who called police who went and took the body from the scene. PW4 used a torch to see cuts on the deceased's head. He stated that the police photographed the scene before taking the body to the mortuary. He identified 4 photographs of the deceased which show blood stains and the areas where the deceased was allegedly cut. Photographs were marked as MFI 3(a)(b)(c)(d).

19. The witness was not cross examined.

20. **Peter Otieno Owino** testified as **PW5** and stated that he was a resident of Agoro Yombe Sub location. He recalled that on 12/9/2016 at about 8.30 pm, he was at his home with his 2 sons **Maurice Oduor Otieno** the accused herein and **Omondi Jwayi**, the deceased. He stated that the two 'brothers' were having some petty arguments over a radio. PW5 then chased them from the house and advised them to go and sleep.

21. PW5 stated that after a few minutes, he heard screams from outside and on rushing outside near the home of Joseph Onyango, he found Peter Omondi lying on the ground with panga cuts on his head and hand but he never saw any panga or the person who had cut the deceased. He inquired from the people around but got no response so he went back to his home and returned later and found Omondi still alive. They assisted the brother of Omondi to take the deceased to hospital but he died before being taken to hospital. Later the police arrived and took

the body to the mortuary accompanied by the Assistant Chief.

22. PW5 stated that after about two days, he could not trace the accused herein who never used to leave home and that the accused used to smoke bhang so he started looking for him with his wife-the accused person's mother. That they traced him on phone and that his mother called him and told him to return home.

23. According to PW5, Peter Omondi, the deceased was his brother's son, while the accused whom he identified in court as Morris Oduor Otieno was his biological son. PW5 also identified and recognized a light green blood stained shirt MFI 2 and stated that it belonged to the accused person who is his son.

24. On being cross examined by Mr. Ooro Advocate, the witness stated that he was the biological father to the accused Morris Oduor Otieno while the late Peter Omondi was his nephew, his brother's son. He stated that when the incident took place, he did not know the person who had killed the deceased Peter Omondi. He stated that the accused was arrested on 14/9/2016.

25. **PW6 Doctor Okun Benjamin Ochieng**, BMed & Bachelor of Surgery (UON), University of Nairobi working at Siaya County Referral Hospital as a general practitioner gave evidence on behalf of Dr. Belinda Omondi who carried out a post-mortem on 22/9/2019 at 15.40 hours on the deceased's body. Dr Okun testified that Dr. Belinda was away in Cuba undertaking further studies hence she could not be available to testify. PW6 stated that he could interpret her findings as he had worked with her in 2015 and 2016, then he proceeded to Madiany sub-county Hospital and later returned to Siaya County Referral Hospital. He stated that he knew Dr. Belinda's handwriting.

26. PW6 testified that the deceased's body was identified by Aloyce Okoth Jwayi. On general observation, there were no clothing, it was the body of black male African 34 years, good nutrition, well-built physique and 164 cm. On post-mortem changes, there was rigor mortis - mild tremors of the body. Externally, there were multiple cut wounds in the head, 10 cm deep cut wound around the Right parietal region extending into the cranial (brain) cavity. There was a deep cut wound on occipital region extending from ear to ear into the brain tissue. There was a cut wound on the skull, frontal and left parietal region, 10cm. Internally, the respiratory system, cardiovascular and other systems were normal. In the head, there were deep cut wounds as described above. In the nervous system there was a cut in the brain. The spinal column and spinal cord were normal. **As a result of examination, the cause of the death was found to be severe head injury due to deep cut wounds on the head with a sharp object as a result of assault.**

27. The Doctor issued a death certificate No. 822116. The following specimens were removed for further examinations: a piece of the rib, nail and hair. She then signed the post-mortem report and it was stamped by the hospital at Siaya District Hospital. The Doctor produced the post-mortem report dated 22/9/2016 as Prosecution Exhibit No. 1. He was not cross examined by the defence counsel.

28. **PW7 No. 62444 CPL Eliud Shitanda** stationed at Tingwang Police Station and formerly of Ngiya Police Patrol Base as at 12/9/2019 testified on oath and stated that on 12/9/2016, at 10.20 pm, he was at the Ng'iya Police Patrol Base when he received a call from the Assistant Chief of Olwa sub-location Mr. Joshua Ombago who informed him that he had received a report that the deceased Peter Omondi Jwayi had been killed while he was walking to his home. PW7 informed the OCPD Siaya who informed PW7 that he had received the same information from the same Assistant Chief and that he had send police officers to join PW7. After a few minutes, Chief Inspector of Police Christopher Muraguri, late Sgt Njeri (W) and PC Wesonga arrived in a police vehicle. Together, they proceeded to Kamagoya village within Olwa sub-location where they found Assistant Chief Joshua Ombago who showed them the scene. At the scene was a footpath of 2m wide with **sisal** plants on the sides. They saw the deceased Peter Omondi Jwayi lying on his left side. The head had several injuries. The scene was photographed by scenes of crime personnel, Siaya, the body was removed to Siaya County mortuary for post mortem and investigations were commenced.

29. **PW7 stated that** after leaving the scene on 14/9/2016, the Assistant Chief of Olwa sub-location recovered a panga and a light-green short- sleeved shirt with blood stains from the house of the accused person. He took possession of exhibits and arrested the accused and escorted him to Ng'iya Police Patrol Base where the police rearrested the accused and escorted him to Siaya Police station to the CID officers. PW7 identified the panga (MFI 1) and a light-green short- sleeved shirt (MFI 2), he also identified the accused person in the dock.

30. On being cross examined by Mr. Ooro advocate, PW7 stated that he was not present when the shirt and panga were recovered by Joshua Ombago, Assistant Chief, Olwa sub-location.

31. **PW8 Polycarp Lutta Kweyu** a Government Analyst from the Government Chemist, Kisumu, possessing a Master's degree in Analytical Chemistry and having worked as such analyst for the last 8 years took oath and gave evidence and produced a report done by Mr. Richard Langat Kimutai his immediate Supervisor as the latter had other matters in Migori Court for 2 days so he could not make it to this court and requested the witness to appear and testify on his behalf. PW8 stated that he was familiar with the signature of Mr. Langat which he identified and also identified the Report which had a departmental stamp. He stated that he had worked with Mr. Langat for 8 years and could therefore interpret his report.

32. PW8 further testified that on 23/9/2016, PC Florence of DCI Siaya submitted the following samples to the Government Chemist at Kisumu:

1. *a light green short sleeved shirt.*
2. *a panga with an animal skin handle.*
3. *Rib cartilage from one Peter Omondi indicated as deceased.*
4. *Finger nails from Peter Omondi (deceased).*

5. Mouth swabs collected from Maurice Oduor Otieno indicated as accused.

33. He stated that these exhibits were submitted vide an Exhibit Memo Form dated 23/9/2016 (MFI P4) with a request to establish any genetic relationships between the submitted samples. After the samples were analyzed, the following report was generated:

1. The panga did not contain any human blood hence no DNA profile was generated from it.

2. The light green short sleeved shirt was moderately stained with human blood.

3. DNA profiles generated from the light green short sleeved shirt, rib cartilage, finger nails and mouth swabs revealed as follows: -

(i) DNA profile of blood from the light green shirt sleeved shirt was a mixed DNA profiles of the deceased Peter Omondi and the accused Maurice Otieno.

34. PW8 produced the Government Analyst Report dated 12/9/2017 as Prosecution Exhibit 2. He also identified that the animal skin handle panga MFI I, the light green short sleeved shirt with blood stains MFI 2. He added that the other samples were preserved in safe custody as they are human parts.

35. On cross examination by Mr. Ooro Advocate, PW8 stated that there was no human blood stain on the panga. He stated that the quality of their results are determined by how the samples were handled. He confirmed that their results on the shirt show combined DNA mixed profiles of the deceased and the accused.

36. In reexamination by Mr. Ngetich prosecution Counsel, PW8 stated that for the shirt, they got mixed profiles but the panga sample did not generate any DNA profile and stated that it could have been interfered due to poor handling or rusting.

37. **PW9** No. 86640 CPL. Douglas Wamalwa currently Scenes of Crime DCI Busia and previously Scenes of Crime, Siaya County gazette vide Gazette Notice No. 217/28/12/2012 testified that on 12/9/2016 at around 11.30 pm together with PC (W) Florence Kamori of DCI Siaya County, they visited an alleged scene of murder at Kamagoye village, Olwa sub-location of Siaya County. The deceased was known as Peter Omondi Jwayi. They were requested by the Investigating officer to take photographs of the body at the scene and he did take the said photographs as follows:

1. General view of the pool of blood at the scene.

2. General long range view of the body at the scene.

3. General view of body lying in a pool of blood with visible injuries on the head.

4. General close up view of the body with a deep injury on the head.

38. He then did Certificate of Production of the photographs on 20/9/2016 under his supervision. He stated that the original prints are under his custody, not interfered with and can be reproduced again on request. He produced the photographs as exhibits No. 3(a), 3(b), 3(c), 3(d) and Certificate of photographic print as PEx 4. The witness was not cross examined by the defence counsel.

39. **PW10 No. 58242 Sgt. John Nzive** attached to DCI Siaya testified on oath with leave of court and on no objection from the defence, on behalf of the investigating officer **Sgt. Florence Meli** who was transferred to DCI Eldoret in May 2019 and handed over her files after briefing him and handing over the exhibits in the case herein. He stated that according to the Police file, on 13/9/2016 the investigating officer was called by the then DCIO Siaya who informed her of a murder incident that had taken place on 12/9/2016 during the night at Ngiya, Kamagoye village. The scene had earlier been visited by OCS CIP Muraguri and the Scenes of Crime personnel had visited the scene and found the deceased one Omondi Jwayi lying in a pool of blood with a cut on his head. The scene was a few meters from the homestead where they were taking chang'aa and the deceased was attacked while he was in the company of his friend Silas Otieno Osero as they were walking along a foot path in between a sisal plantation heading to their respective homes at around 9 pm on the night of 12/9/2016.

40. He further stated that the investigating officer gathered evidence which showed Silas screamed for help following the attack and alerted other people who went to the scene and found the lifeless body of the deceased cut on the head. The scene was photographed and the body of the deceased taken to Siaya County Referral Mortuary. He stated that the investigating officer recorded statements of various witnesses and on 15/9/2016 she revisited the scene of crime and drew a sketch plan and she also received some exhibits from OCS Kogelo which are a panga, light green short sleeved shirt of blood (MF1 II) which exhibits were taken to Kogelo Police Station by the area Assistant Chief. He produced a panga as PEx 5, the light green short sleeved shirt as PEx 6 and the sketch plan as PEx 7.

41. On being cross examined by Mr. Ooro advocate for the accused person, PW10 reiterated that he was testifying on behalf of Sgt Meli who investigated the case. He stated that the statement of Sgt. Meli says the deceased was with Silas. He further stated that the exhibits, according to the statement of Sgt Florence Meli, were taken to Kogelo Police Station by the area Assistant Chief who received from members of the public who accosted the accused person. He could not tell who in particular gave the exhibits to the area Assistant Chief. He also denied knowing if the accused and deceased were closely related. He stated that he was not given the reasons why the accused would kill the deceased. He stated that it was indicated that the accused had disappeared after the incident and was tracked down a day later on 14/9/2016 and that when he was arrested he was armed with a panga and had no shirt on so the neighbours suspected him to have murdered the deceased. Further, that on being questioned as to where the shirt was, he led the public to his house and he showed the public his shirt under the bed. The public recovered it and gave it to the Area Assistant Chief.

No defence tendered by the accused person

42. At the close of the prosecution's case on 23/6/2020 the defence counsel Mr. Ooro submitted on no case to answer and by a ruling dated the same day, this court found the accused with a case to answer and placed the accused on his defence. After explaining to the accused his rights under section 306(2) of the Criminal procedure Code and Article 50(2) (i),(k)(l) of the Constitution, the accused person elected to remain silent and leave it to court to decide.

Compliance with section 311 of the Criminal procedure Code

43. In his summing up of the prosecution's case under section 311 of the Criminal Procedure Code, Mr. Okachi Senior Principal Prosecution Counsel submitted that there was an avalanche of evidence on record pointing the accused person as the person who killed the deceased. He submitted that PW5 the father to the deceased witnessed at about 8.45 pm on 13/9/2016 the accused quarrelling the deceased and alleging that the deceased had stolen his radio. That the witness asked the two to calm down and when he checked on them a few minutes later, he found the deceased lying in a pool of blood while the accused had vanished and was later arrested by a mob. Counsel submitted that later, a panga and blood stained light green shirt were recovered from the accused. He submitted that the expert Report show that the blood on the panga and light green shirt belong to the deceased. He added that the accused had not given any explanation as to how the deceased's blood found its way to the clothes of the accused and the panga found in possession of the accused. Further, counsel asserted that the postmortem report shows the cause of death was due to deep cut wounds on the deceased's head inflicted by a sharp object. Counsel concluded that the accused killed his brother on allegations that he brother had stolen his radio.

44. On the part of the defence, Mr. Ooro advocate for the accused person submitted that this is a case where there is no direct witness to the case. That the evidence is purely circumstantial, there is no evidence that it was the accused and no other person who committed the offence. Counsel submitted that there are various authorities that state that suspicion alone however strong cannot sustain a conviction. He maintained that there is no evidence that the accused disappeared after committing the offence and added that the accused and deceased had no bad blood. He further submitted that there was no evidence that the deceased and the accused quarreled on the material date and further, that there is no reason why the accused would commit such a heinous crime.

45. Counsel submitted in contention that there is no evidence that the items recovered belonged to the accused, that the court cannot tell where those items were recovered from and whose they were. He also submitted that the accused was not present when the shirt was recovered adding that the chain of custody of the items was broken. He submitted that the Assistant Chief who allegedly received the items was not called as a witness.

Analysis and determination

46. I have considered the evidence as adduced by the ten prosecution witnesses, the answers in cross examination and the submissions tendered by the prosecution and the defence counsel under section 311 of the Criminal Procedure Code.

47. The main issue for determination in this case is whether the prosecution has proved beyond reasonable doubt, all the elements of the offence of murder as required under section 203 as read with section 206 of the Penal Code.

48. The burden of proof lies on the prosecution throughout the trial to prove beyond reasonable doubt all the elements of murder against the accused person and the said burden does not shift to the accused person even if he chooses as was in this case, to exercise his constitutional right to remain silent.

49. To prove a charge of murder, the prosecution has a duty to establish the following ingredients:

i) The death and cause of death of the deceased.

ii) That the accused caused the death through an unlawful act or omission

iii) The accused possessed the intention to cause harm or kill or malice aforethought.

50. The Accused faces a charge of Murder contrary to section 203 of the Penal Code which provides:

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

51. Malice aforethought is a very important ingredient for the offence of murder. The prosecution has to establish malice aforethought. Section 206 of The Penal Code sets down the facts which constitute malice aforethought as follows:

“206... 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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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”*

1) on whether the prosecution proved death and cause of death of the deceased herein?

52. The fact of the death of the deceased was proven beyond reasonable doubt by the production of the postmortem form as Prosecution Exhibit 1 which also disclosed the cause of death for the deceased Peter Omondi Jwayi to be due to severe head injury due to deep cut wound to the head with a sharp object as a result of assault. PW5 the father to the deceased too testified that he found the deceased lying in a pool of blood.

53. On whether the deceased's death was as a result of an unlawful act or omission and whether that unlawful act or omission was by the accused herein, there was evidence from PW5 that the deceased and accused were together on the material night and they appeared to be quarrelling so he asked them to leave and after they had left, he later went out and found the deceased lying in a pool of blood and the accused was nowhere to be seen. There is no evidence that the deceased committed suicide or that he was killed as an act of self defence or defence of property. The nature of injuries sustained clearly show that he was killed. No person has any right to take away the life of another person, except by law provided. Accordingly, I find and hold that the deceased died as a result of an unlawful act.

54. On whether the prosecution proved beyond reasonable doubt that it was the accused who unlawfully killed the deceased, there was no eye witness to the incident. The prosecution entirely relied on circumstantial evidence to link the accused to the offence.

55. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of **Sawe vs Republic [2003] e KLR** had this to say:-

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

56. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see **Navaneetha Krishnan v The State By Inspector Of Police – Supreme Court Of India, Criminal Appeal No. 434 OF 2013.**

57. From the line of authorities on circumstantial evidence the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.

58. PW5 testified that he witnessed the altercation between the accused and the deceased on the material night. He then asked them to go outside. Moments later the deceased was discovered lying in a pool of blood with cuts all over the body and the accused disappeared and was arrested wearing only a coat without a shirt inside. The accused led the public to his house where a shirt was found under the mattress The blood stained shirt was recovered and forensic examination revealed that it had the DNA profiles of the deceased and the accused person herein.

59. The father to the accused, PW5 confirmed that the light green shirt which was produced as exhibit 6 belonged to the accused who was his son. The panga was recovered but there was no DNA profile on it matching the blood of the deceased. The evidence of the Government analyst, PW8 Mr. Polycarp Kweyu that the blood stained light green shirt which the accused person's own father identified to belong to the accused had DNA profile of the deceased and the accused, which shirt was recovered from the house where the accused was found to have been sleeping no doubt links the accused person to the deceased and therefore it was upon the accused person to explain how he came to have DNA profile from the blood of the deceased. There was no such explanation from the accused who had been in the company of the deceased the evening of the incident and moments later the deceased was found lifeless. Accordingly, I find and hold that the prosecution have proved beyond reasonable doubt that it was the accused person and no other person who caused the unlawful killing of the deceased **Peter Omondi Jwayi.**

60. On whether the accused person unlawfully killed the deceased with malice aforethought, Malice aforethought is defined under section 206 of the Penal Code. Under section 206 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.

61. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a-e) is that malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case at the trial.

62. In interpreting the provisions of section 206, courts have stated as such in various authorities. In the classic case of ***Republic v Tubere S/O Ochen [1945] 12 EACA 63*** the court 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. In the ***Ogelo v Republic [2004] 2KLR 14*** the appellant in this case chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held *inter alia* that by dint of section 206 (1) an intention to cause death or grievous harm malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of ***Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990.***

63. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

64. Giving directions on the matter of malice aforethought, the Court of Appeal in ***Nebart Ekaita v Republic [1994] eKLR*** stated:

“It remained a matter of questioning whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excused. In the circumstances we are unable to uphold the appellant’s conviction for murder.”

65. In ***Nzuki v Republic [1993] KLR 191*** it was stated that:

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also *Hyman v DPP [1975] EA 55.*)”

66. Applying the above principles to the present case, albeit the panga which the accused was found with a day after the incident had no blood stains to match the blood of the deceased, this court, from the evidence of the doctor who performed a postmortem on the deceased’s body is persuaded that the weapon that was used by the accused to kill the deceased was a sharp object. The evidence of the injuries sustained by the deceased was that they were deep cuts occasioned by a sharp object which is consistent with the use of an object such as a panga. Even if the panga as murder weapon was not recovered with any DNA connection to the deceased, such non-recovery of a murder weapon is not fatal to the prosecution’s case as the assailant had ample opportunity to dispose it off, and that the accused had the opportunity to either wash off all the blood on the panga which he was found in possession of a day after the incident or he disposed of the sharp weapon which he used to kill the deceased. As was held in ***Criminal Appeal No. 75 of 2014 Kazungu Katana Ngoa vs Republic***, the absence of a murder weapon was not fatal to a conviction. In that case, the Court of Appeal sitting in Malindi stated:

“This Court has in the past had occasion to deal with the question and in *Ekai vs Republic (1981) KLR 569*; held that failure to produce the murder weapon of itself was not fatal to a conviction and that as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. Similarly, in *Karani v. Republic (2010) 1 KLR 73*; the court stated that:

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

67. From the serious injuries all involving deep cut wounds extending into the brain tissue of the deceased, it can be inferred that the accused intended to kill or cause grievous harm on the deceased as the head is a very delicate part of the body and such serious deep cuts were no doubt meant to eliminate the deceased completely.

68. This court has also seen the photographs of the deceased lying dead and observed the deep cut injuries on his body and is persuaded that the assailant was determined to kill the deceased. All brain tissue out of the head of the deceased is reminiscent of what a beast intending to devour its victim can do.

69. In **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused’s conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55.”)

70. It is trite that the intention to kill may be inferred from the facts of the case. This was stated by the court in the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** where it was held that it was the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured. In **Yoweri Damuliza v Republic [1956] 23 EACA 501** it was observed that an inference of malice aforethought would flow more easily from the use of a spear or of a knife than from the use of a stick.

71. In **Ernest Asami Bwire Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990** the court held that malice can be inferred from the manner of the killing. In this case the court considered the fact that brutal killing was well calculated and planned by the appellant to conclude that he had an intention to kill the deceased. In **Karaki & 3 Others v Republic [1991] KLR 622**, the Court of Appeal held inter alia that malice aforethought can be deemed from the nature of injuries caused on the deceased and the weapons used.

72. Even if the accused had issues with the deceased, killing the deceased in such a ferocious manner was not the solution to the alleged issues. I am satisfied on the evidence adduced that the accused had malice aforethought when he unlawfully killed the deceased **Peter Omondi Jwayi**. I find the accused person Morris Oduor Otieno Guilty of the offence of murder as charged under section 203 and as read with section 206 of the Penal Code. I convict him accordingly. Sentence shall be imposed after mitigation.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 29th day of July, 2020 via Microsoft teams.

R.E.ABURILI

JUDGE