



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 5 OF 2017[MURDER]

CORAM:HON. R.E.ABURILI J

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN OMONDI OWINO.....1ST ACCUSED

WOO.....2ND ACCUSED

JUDGMENT

Introduction

1. The two accused persons herein **MARTIN OMONDI OWINO** and **WOO** are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the Information dated 20th March 2017 are that on the 11th day of March 2017 at Kanyaboli village, Ojwando ‘A’ Sub Location, Central Alego Location in Siaya Subcounty within Siaya County they jointly murdered on **PWO** the particulars of which are that in the early mornings of 11/3/2017, they murdered one **PWO**. Both the accused persons pleaded not guilty to the charge. The prosecution called ten witnesses in support of their case which is summarised herein below. Placed on their defence, the 1st accused person gave unsworn testimony whereas the 2nd accused person gave sworn testimony both denying the offence and called not witnesses.

Prosecution’s Case

2. **PW1 MAO** testified that the deceased was her husband and they had two children. Mrs. O further testified that on the 11/3/2017 she was at her work place at the home of former MP Sammy Arthur Aunya which was near her home as she could pay Kshs. 30 as fare to work. She further testified that her husband worked there too, specifically outside the compound while she used to do household chores and that on that particular day the deceased worked during the day and went home. She stated that on 11/3/2017, she never saw her husband but she had seen him on 10/3/2017 in the evening at around 5 pm and that on the 11/3/2017 at about 7am, she heard screams and on asking her neighbour on phone on what was happening, she was informed that her husband had been killed. She therefore left her workplace and returned to her home whereupon she found her husband dead, a few meters from their home. She identified her husband’s body with cuts in the photographs shown to her in court. She stated that when she reached her home, her son told her that the deceased had made dinner the previous night and after they had eaten, one ‘Baba Juju’ also known as Magari who was their neighbour came and the deceased left in the company of the said Baba Juju. She stated that their children were aged 10 years old and 13 years old, a boy and a girl respectively and that her daughter had earlier on gone to visit her grandmother therefore only her son EO was at the home.

3. In cross-examination by counsel for the accused persons, PW1 stated that her husband left her on 10/3/2017 at about 7.00 pm going home from their workplace. She further testified that she did not witness the killing of her husband and found him already dead.

4. The witness further stated that she knew the two accused persons in the dock as the 1st accused was a neighbour’s herd’s boy and the second accused was her nephew. She further stated that the accused persons were never close to her husband and that people were pointing a finger at the first accused as the person who killed her husband because he disappeared after the incident. She further testified that she found villagers surrounding the 2nd accused person and asking him to reveal the person who had killed my husband at the site where the deceased’s body was found.

5. In re-examination PW1 reiterated that the two accused person were not friends with her husband and that the 1st accused was a herdsman for their neighbour and the 2nd accused was her nephew. She further stated that she used to see the 2 accused persons in the village.

6. **PW2, Stephen Odhiambo Ouma** testified that on the 10/3/2017 he was attending a funeral of a family member in the home of Kakothe in the company of six other people namely; Nicholas Oluoch Ochieng, Martin Okeno, Washington Agunda, Gideon Sewe, Kevin Barack and Owino Adija.
7. PW2 further testified that the body of Pitallis had come from Nairobi so they were digging the grave. He further testified that they entered the funeral place at night and dug the grave until 5:30a.m on 11/3/2017 from 10.00 a.m. the previous day. Mr. Ouma further testified that a certain lady gave them Shs. 150/= for alcohol at a chang'aa den known as "kituo" which was about 100 meters away.
8. He further testified that he never took alcohol and before reaching the chang'aa den he remained behind with Kevin as he smoked a cigarette. Mr. Ouma further testified that they met the deceased and there was a scuffle between Martin and the deceased and upon inquiry as to the reason of the scuffle Martin said it was a joke. He further testified that he heard Martin tell the deceased in *Dholuo* that the deceased was the one who had beaten Martin when the latter stole a goat and that Martin's day to deal with the deceased.
9. PW2 further stated that he intervened and quelled the quarrel and the two greeted each other and as they started moving towards the chang'aa den, the deceased followed them holding a bottle of chang'aa and a long walking stick.
10. He added that they knocked the door of the owner of the den and Owino knocked the door 3 times and the owner Ms. Nyamaji opened the door and Owino entered her house. He further testified that the second to enter was Nicholas Oluoch, then WO then he entered after which the deceased entered and Martin behind him. Mr. Ouma testified that then Agunda entered the house and Kevin Barack entered last.
11. Ouma stated that he sat on the left, Martin stood, and they sat facing the bedroom whereas Kevin followed and O also sat and Otieno sat on the seat belonging to the owner of house. He also stated that Owino Adija was the first to speak Ordering 'Mama Pima' to give them chang'aa for Kshs. 150 which she did after verifying that there was enough chang'aa. He further testified that as 'Mama Pima' was measuring the chang'aa he told her he does not drink alcohol but that he smoked cigarette.
12. PW2 further stated that Nicholas Oluoch offered to measure the chang'aa for 7 people excluding him because he did not drink so he offered to give his share to the deceased **W**. He further testified that as Oluoch was handing over the chang'aa to W, Martin grabbed it and in that scuffle, Owino pulled out Shs. 150/= saying they could not add chang'aa to someone who already had chang'aa for Sh. 150/=. Mr. Ouma further testified that Owino Adija ordered cigarette for him but Mama Pima informed them that she had sold them to the deceased, W who shared the same Supermatch cigarettes with the rest of the patrons but the cigarettes got finished before he, Mr. Ouma got any.
13. Mr. Ouma further testified that they remained at the chang'aa den for ½ an hour and Martin removed a new Shs. 200/= note and ordered for more chang'aa. Mr. Ouma testified that after getting the chang'aa they left the den with **W** being the first to leave.
14. Mr. Ouma further testified that Martin then told O after **W** had left in *Dholuo* "come we go and smoke cigarettes". Mr. Ouma testified that Martin told O that they go and steal cigarettes from **W**. Mr. Ouma also testified that he told Martin that W was well known to them so that anything should not be done to him. He further testified that Martin and O followed **W** as he went away and that later at 7.30 am. He was told that he had been among those who killed **W**.
15. Mr. Ouma stated that he knew that Martin had scuffles with **W** and that he was the one who killed W. Mr. Ouma then identified Martin as the 1st Accused in the dock and O as the 2nd accused in the dock. He further testified that Martin was dressed in Yellow long sleeved and that Martin also wore a short-sleeved Arsenal T-shirt whereas O was dressed in a striped shirt.
16. In cross-examination Mr. Ouma stated that they left the chang'aa den at about 6 a.m. with all his colleagues got drunk except him. He further stated that he went home straight whereas his colleagues went to look for cigarettes.
17. Mr. Ouma further stated that when **W** left, Martin left after 2 minutes or so and O then followed shortly thereafter. Mr. Ouma further testified that when Martin left he said he was to smoke from outside but he said to O, "Let's go and snatch cigarettes and chang'aa from **W**" but that O said he could not do that to W who was his uncle.
18. Mr. Ouma stated that he did not see Martin and O follow **W** but after the deceased left, they also left. He further testified that he did not see the 2 accused persons kill the deceased **W**. Mr. Ouma further testified that Martin had a panga but O had no weapon while at the chang'aa den.
19. Mr. Ouma further testified that he later went to the scene of incident and found the deceased body in the police vehicle and that O was also present explaining to the police - giving them his statements. Mr. Ouma stated that there was no other person who could have killed W a part from Martin and O.
20. In re-examination Mr. Ouma testified that Martin had a white panga that was sharp on both sides with a handle was made of car tyre.
21. **PW3, JOO** testified that on 11/3/2017 he was in Siaya town when a few minutes before 7 am he received a call from his uncle, LJ that his eldest brother had been murdered. Mr. O testified that his uncle told him that he was not sure of the person who had killed his brother but that they were on their way to the police. He proceeded to Siaya County Referral Mortuary where he received the body of his brother brought by police officers and after receiving the body, he heard that two people, Martin and O were arrested in connection with the death. He further testified that he had known Martin for a long time as he was a herd's boy for his uncle HO whereas O was like his son at home as he was his nephew. On 11/3/2017, he went to see the accused persons and had a chat with them and that the 1st accused refused to talk to him but the 2nd accused spoke to him and told him that they were drinking together with the deceased and that there was a quarrel between Martin and his late brother over a cigarette and he heard the deceased ask Martin, "Why do you want to kill me?" PW3 stated that O told him to ask Martin a few questions:

i. *Why he washed his clothes, especially the overall he was wearing that night because it was found wet?*

ii. *Where was the panga he had the night before the deceased died.*

22. Mr. O further testified that he learnt that the first accused person Martin was last seen with his brother the night before his death and further queried as to why Martin ran away until he had to be arrested. Mr. O further testified that the first accused told him he was friends with his brother and that they only had a quarrel over beatings on allegation that the 1st accused had stolen a goat and that he did not know who killed his brother.

23. Mr. O further testified that on the 16/3/2017 he witnessed an autopsy on his brother's body and identified the body to the Mortician and that on 17/3/2017 he was given the body for burial. Mr. O further identified the accused persons in the dock.

24. In cross-examination by counsel for the accused persons, PW3 stated that he did not witness the killing of the deceased but that many people went to the morgue and told him what had happened and further that he spoke to the accused persons the following day.

25. **PW4 Godfrey Obuto Omondi** the Senior Assistant Chief of Ojwando 'A' sub-location testified that on the 11/3/2017 at about 6.40 am. he was at home when he was informed by his mother Rosemary Omondi that POW had been killed about 7 metres from his home. The witness went to the scene and on arrival he found a crowd where POW was lying in a pool of blood having injuries on the neck proceeding up to the jaw. Mr. Omondi further testified that the deceased's right shoulder also had an injury reflecting that it was an assault with a panga.

26. PW4 then called the OCS Siaya and the OCPD but their phones did not go through as it was a Saturday so he took a motorcycle to Siaya Police Station where he found the OC Crime with whom they proceeded to the scene in a land cruiser. On arrival they found Omondi Were the village elder who told him that Martin and O had evidence of the killing of the deceased and that Martin Otieno had claimed at a tea kiosk that he had dealt with 'Mnyama'- an animal. Mr. Omondi further testified that they found O at the scene who was taken to the land cruiser and further that 3 metres away, they met Martin with a dog and arrested him and took him to the land cruiser and subsequently took him to where he used to herd animals. Mr. Omondi further testified that the crowd followed them on hearing what had happened. They searched Martin's house, where he used to sleep and found a yellow T-shirt soaked in blood, although it was washed and hanged in the line. He stated that the crowd stoned them and the vehicle forcing them to drive off with the police to Siaya Police Station so as to protect Martin.

27. In cross examination by counsel for the accused persons, PW4 stated that he only learned of the murder after his mother informed him. He stated that he knew the homesteads of the 2 accused persons that Martin lived at Ogonjo's home 8 meters from the scene of crime. He further stated that from the injuries that he saw, they were caused by a very sharp object.

28. Mr. Omondi further testified that O was with the deceased but when villagers heard he was with the deceased they told him to sit down and he sat down whereas Martin was neither at the scene nor at his homestead where he lived and that they saw Martin emerge from the bush with a dog.

29. Mr. Omondi further stated that they did not visit O's homestead but visited where Martin lived and they found some cigarettes and a T-shirt. He reiterated that the other T-shirt was washed and hanged on the line and that it had blood stains. Mr. Omondi further stated that the deceased was a member of his Nyumba Kumi and that Martin had threatened to kill both the deceased and him after they found him to have stolen a goat.

30. In re-examination, PW4 stated that they also recovered *Supermatch* cigarettes from Martin's house.

31. **PW5 Celine Atieno Ohula** testified that on the 11/3/2017 she was in her homestead asleep when at about 4.30 am, the now deceased **PWO** went to her house and knocked asking her to open for him as he was vigilante of the village and wanted chang'aa. She opened the door and lit a solar lamp and ensured that he was indeed the one and that when he entered the house, she gave him chang'aa worth Shs. 100/= and *Supermatch* cigarettes. As the deceased continued taking his chang'aa, Martin ("Mato"), -1st accused, O-2nd accused, Owino, Oluoch, Kevin and Odhiambo also went into her house and they asked for cigarettes but she told them that she had sold all the cigarettes to **PW** to which **PW** removed his cigarettes and started sharing it out to the rest. She also stated that Martin while speaking loudly, said that he wanted more cigarettes from **W** prompting **W** to leave the house.

32. PW5 further testified that Martin and O followed **PW** as he left her house but that she did not check out to see which direction they followed and subsequently the other people also left and she switched off the lights and went back to sleep. At about 6.30am she took her jembe enroute to the samba when she heard screams on the roadside. She rushed there and found **PW** lying on the ground with a deep cut on the head.

33. In cross examination, PW5 stated that **W** stayed at her house until around 5.00 a.m. when he left with Martin and O following him almost immediately. She further stated that there was a scuffle as Martin was demanding to be given more cigarettes by **W** but that they did not fight. She further stated that O did not say anything and that she did not see **W** being killed. She stated that she knew Martin as a herd's boy in the area and O as her in-law and further that none of the people she had mentioned had weapons.

34. **PW6 George Owino Onyango** testified that on the 11/3/2017 at around 4.00 a.m., there was a funeral in our village in the home of Kakodhe where he and others were in the home of the deceased digging the grave with Odhiambo, Oluoch, Kevin, Agunda, Martin alias 'Mato'-1st accused and O-2nd accused. He identified the two accused persons in court and stated that after they were done digging the grave, they were given some money by the person who had assigned them the work of digging the grave and they proceeded to the home of 'Nyamache' where they found W inside the house taking chang'aa. They ordered for cigarettes but 'Nyamache' told them that she had sold all cigarettes to W. He further testified that **W** shared out to all of them his cigarettes but that O and 'Mato' were not satisfied with the cigarettes shared out by W. He stated that W left the house and shortly thereafter, 'Mato' and O followed him. Him and his other entourage stayed in that house for a short time and then parted ways with his colleagues and at around 7-8.00 a.m. he heard screams of mourning which

he thought emanated from the place they had been digging the grave but on going to find out where screams were coming from, he found the body of the deceased **PW** lying on the ground where they were told to keep a distance awaiting the police to arrive. From a distance he saw **W** with cuts around the neck.

35. In cross examination, **PW6** stated that they were in the house of 'Nyamache' where chang'aa was sold when Martin asked for cigarettes and 'Nyamache' told him she had sold all cigarettes to **W**. He reiterated that Martin and O were not satisfied with cigarettes given by **W** so they started complaining that how could **W** buy all cigarettes and that they said that he was playing with them.

36. He further stated that when **W** left, the two-Martin and O followed him complaining that **W** could not have all cigarettes. He further stated that he did not follow them outside nor did he see the person who killed **W**. He admitted that he was drunk because he had taken some alcohol but that he was sure it was Martin and O who followed **W**. He further reiterated that he never saw any other person follow **W** after the latter left the house of 'Nyamache.'

37. **PW7 No 48210 Sgt Maurice Mang'oli** testified that on the 11/3/2017 at about 8.00am the Deputy DCIO CIP Sirorey told him to accompany OC crime IP Ayub Kadi to a murder scene reported at Kanyaboli village, in Ojwando sub location where they found the deceased along a foot path lying dead with a deep cut at the right side of the neck. Sgt. Mang'oli testified that they received information on suspects involved in the murder of the deceased **PWO** and that he arrested the 2nd accused at the scene and had the scene photographed and a sketch plan drawn by the scene of crime officer CPL Wamalwa. They then proceeded to look for the 1st accused within the village and went to his house where they recovered a T-shirt and a vest stained with blood. Sgt Mang'oli testified that it was a Yellow Arsenal T shirt with black and blood stained and a white vest and that the 1st accused was also wearing another Arsenal T-shirt yellow with blue stripes. He produced the two Arsenal T-shirts –yellow/black as exhibit 1, white vest as exhibit 2 and light yellow/blue Arsenal t-shirt as exhibit 3.

38. Sgt. Mang'oli further testified that at the scene they recovered a packet of cigarettes which they found from the deceased's pocket with pieces of cigarettes said to have led to a quarrel and death of the deceased. He testified that the accused persons were escorted to Siaya police Station and the body taken to the mortuary. He produced a packet of cigarettes as exhibit 4. He stated that the 1st accused was taken to hospital for taking of blood samples for forensic examination and that he interrogated other witnesses whose statements were recorded and which statements implicated the accused persons. He identified the exhibit memo and report from the Government Chemist.

39. In cross-examination Sgt. Mang'oli stated that at the scene where they recovered the deceased's body, they found more than 10 people but that they did not recover any weapon connecting the accused persons to the murder at the scene but only recovered the cigarettes from the deceased's pockets. Sgt. Mang'oli further stated that at the scene they found volunteers/ informers who gave them information on what exactly happened.

40. Sgt. Mang'oli further stated that they submitted the long sleeved T-shirt and the vest to the Government Chemist for analysis. He further stated that the accused was wearing the light yellow short sleeved T-shirt and that as an investigating officer he was under a duty to request for blood samples. Sgt. Mang'oli further stated that he informed the 1st accused of his right to refuse to offer his blood samples.

41. **PW8 Dalmas Kibet Kipsang** testified that he was a Government Analyst based at Kisumu Government Chemist with a BSc in Analytical Chemistry from Kenyatta University and having worked at Government Chemist for 6 years. He stated that he had a report regarding the accused person Martin Omondi received under request on the 20/3/2017 at Kisumu Government Chemist from one CPL Maurice Mang'oli of DCI Siaya, and that he following exhibits were received: -

- i. A blood stained T-Shirt *marked A1*
- ii. Right hand swab of Martin Omondi *marked 'A'*
- iii. Left hand swab of Martin Omondi *marked 'B'*
- iv. Blood sample from Martin Omondi *marked 'C'*
- v. Blood sample and finger nails from the deceased **PW** *marked 'D'*

42. Mr. Kipsang testified that from the analysis, the DNA profile generated by the blood stained T-shirt 'A1' matched the DNA profile of the deceased **PW** while the DNA profile generated by profile of the left hand swab of Martin Omondi had mixed DNA profiles of **PW** and Martin Omondi leading to the conclusion that blood in the left hand of the 1st accused person Martin Omondi was from both the 1st accused and the deceased. The witness signed the report on 8/6/2018 and stamped it. He produced the report as exhibit 6.

43. In cross-examination Mr. Kipsang stated that sample 'A' had mixed blood of the deceased and the accused person Martin Omondi however he could not tell how long the blood had been on the hand but that indeed there was contact.

44. **PW9 Dr. Biko Opidi** from Siaya County Referral Hospital testified that he had a postmortem report of **PWO** done by one Dr. Hassan with whom they had previously worked for 2 years at Siaya County Referral Hospital and as such he was familiar with his handwriting. He stated that Dr. Hassan had since resigned from the Hospital in early 2018. Dr. Biko testified that the postmortem form revealed that on the 16/3/2017, the body of **PWO** was identified by JOO and John Odhiambo Opiyo to DR Hassan at Siaya County Referral Hospital. The report showed that on examination of the body, externally there was presence of a cut wound on the right anterior lateral aspect of the neck extending to the left anterior lateral aspect of the neck and that inspection of the respiratory system revealed the trachea was severed. Inspection of the cardiovascular system revealed that major vessels of the neck were also severed while the digestive system revealed the oesophagus was severed.

45. As a result of Dr. Hassan's examination, he established the cause of death to be haemorrhage due to severing of carotid artery and the jugular vein. He stated that from the conclusion, the body had a severe cut wound on the area where major vessels pass through. He clarified that the carotid artery supply blood to the brain from the heart.

46. In cross-examination Dr. Biko testified that the deceased's body was well preserved and that blood samples were also collected from the body of the deceased for further analysis. He stated that from the severing of blood vessels on both sides of the neck, one dies very fast because the brain dies 4 minutes after lack blood supply. He further testified that formalin preserves body tissues the way they are.

47. **PW10 Nicholas Oluoch Ochieng** testified that he knew the deceased and further that on the 10/3/2017 at around 11.00 pm he was at a funeral at Kagothe together with Owino Othuol, Agunda Sewe, Kevin Barrack, Odhiambo Omamo, O O and Martin. He further testified that they went to take alcohol at the house of Seline Ohula where they found PW seated and drinking something in a bottle but he could not tell what it was. He stated that Owino Othuol bought drinks for them after which Owino Othuol asked for a cigarette from PW and the latter gave him a cigarette and gave another piece to Barrack. That **W** then stepped out and Martin asked Seline for a cigarette who informed him that the cigarettes were finished as she had sold all cigarettes to PW. He stated that Martin then told O that they should go and snatch cigarettes from PWO but Odhiambo Omamo told Martin not to do such a thing and instead go and buy his own cigarettes. PW 10 identified the 2 accused persons in court and stated that on that night, Martin was dressed in yellow long sleeved T-shirt with some black in the sleeves while O had a checked shirt. He further testified that there was a bright lamp light in Seline's house and so he was able to see the two very well. He further stated that when Martin and O left him in Seline's house, following PW, he did not see them carrying anything in their hands and that he later returned to the funeral but did not see Martin and O and as he was tired, so he went to his home to sleep until the following morning when he woke up at 8.00 am and went to his farm and Enroute, he met some people who were saying that someone had died at the place where they had a funeral the previous night. He joined the people and on arrival at the scene, they found that it was PWO who was dead and lying on his side in a pool of blood with a cut on the neck.

48. In cross-examination, PW10 stated that they were drinking chang'aa brew and that they found PWO at the chang'aa place. PW 10 could not tell if PW was already drunk as he was holding a bottle and that they were given chang'aa in bottles made of glass but W had a plastic bottle. Mr. Ochieng further testified that they stayed in the den for a few minutes after their arrival before the issue of cigarettes arose. He stated that when Martin and O left the changaa house they said they were going to buy their own cigarettes but he did not follow them so he did not know where they went and further that when they left he did not see them carrying anything. He stated that he did not know what caused the death of the deceased PW and that when he went where the deceased was lying, he saw a cut on the deceased. Mr. Ochieng further testified that after leaving the house of Seline he went to the funeral place but did not stay until morning as he went to his home.

49. In re-examination PW 10 testified that before Martin and O left following PWO, Martin had told O that they go and snatch **W's** cigarettes but Odhiambo Omamo discouraged them and told them to go and buy their own cigarettes.

Defence Case

50. The 1st accused Martin Omondi Owino gave an unsworn statement and testified as DW1. He stated that he knew that he was facing a murder charge and that he knew the deceased PWO. He stated that on the 11/3/2017 he was in Ndayi village going to Kanyaboli when he discovered that he was being chased and police stopped him and pointed a gun at him and arrested him and was beaten up by the police. He stated that the police were in the company of Godfrey Agutu, the Assistant Chief and that they put him in the land cruiser and took him to Siaya Hospital and injected him on his left hand. That they took his clothing after which he was taken to the police cells and charged with murder. He further testified that he did not know what killed PWO and that one Baba Juju was never called to testify. He also stated that despite the doctor saying that his clothes had bloodstains, he got blood stains when the police assaulted him.

51. The 2nd accused WOO testified as DW2 and stated that on the 11/3/2017 he was attending the funeral of his brother PO who died in Nairobi and his body brought on 10/3/2017 and buried on 11/3/2017. He stated that he went to the funeral at 11 pm on the 10/3/2017 and found Omondi Owino digging the grave whom he joined and they finished the work at 3 am on 11/3/2017. He further testified that his sister Lilian Atieno gave him Kshs. 200/= to buy his colleagues chang'aa so he led the eight of them to a home and that enroute they met OW who was drunk carrying some more chang'aa and cigarettes. He stated that Martin asked WO for a cigarette and the deceased responded saying he could not give Martin a cigarette because Martin had not done any farm work for the deceased to merit a cigarette. They then proceeded to the chang'aa home and left Martin and the deceased on the way. He testified that Chang'aa was in the home of an in-law, A. On reaching the changaa place, DW2 ordered for chang'aa and shared among the 7 of them. He testified that Martin and the deceased were still behind and that later Martin and the deceased arrived and Martin asked for a cigarette from the chang'aa seller who informed him that it was finished as she had sold all to PWO. Mr. Okwayo further testified that Odhiambo Omamo told Martin that he knew cigarettes could be found at the home of another in-law Hellen Aduda. That they went and bought cigarettes and shared then he parted with Martin as he went to the funeral place and left for his house at 5 am. He stated that he was with Agunda Sewe and Nicholas Oluoch and parted with them at 5 am on 11/3/2020 and that when he parted with Martin and the deceased, he did not know where they went as he left them behind.

52. He stated that on that morning of 11/3/2017 he heard noises and screams emanating from the funeral place while he was at his house and saw a crowd of people standing and as he moved near he saw PO had been cut with a panga. He further testified that he was among the people who assisted to carry the deceased to the vehicle together with Odhiambo Omamo. He stated that Martin Omondi Owino was not present at that moment and that on reaching the police, they were placed in cells after offloading the deceased's body at the mortuary and told to record statements and assist in investigations as they were with the deceased the previous night. He maintained that he did not know what killed the deceased PWOi and that he did not kill the deceased PWO.

53. In cross-examination Mr. Okwayo testified that he went to the scene where the deceased lay and saw injuries on him and they were sharp cuts. He testified that they were panga cuts and that O had been killed about 50 meters away from the funeral place.

54. Mr. Okwayo further testified that the previous night Martin asked for cigarette from the deceased but the deceased declined and that they went to take chang'aa in the house of Seline Atieno and that he was the first to leave. He further testified that he heard screams at about 6 am after he had left the funeral at 5 am. He testified that he was alone at his house and that he lived with his mother and brother in the same

home.

Submissions

55. No submissions were filed by either the prosecution or the defence after leave of court was granted by the court.

Analysis and Determination

56. I have considered the evidence adduced by the prosecution witnesses and the defences proffered by the two accused persons. In **Anthony Ndegwa Ngarivis Republic [2014] eKLR** it was held that to sustain a conviction on a charge of murder under **Section 203** of the **Penal Code**, the prosecution is required to prove beyond reasonable doubt the following key elements of the offence:

a. The fact and the cause of death of the deceased.

b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - “actus reus”.

c. That the said unlawful act of omission or commission was committed with malice aforethought - “mens rea.

57. **The fact and the cause of death of the deceased** was proved beyond reasonable doubt by the evidence of **PW1,2,3,4,5,6,7** and **DW2**, the 2nd accused person. The cause of death was confirmed though the evidence of **PW9 DR. BIKO APIDI**, who produced a postmortem report confirming the cause of death, as prepared by Dr. Hassan who conducted a post-mortem examination on the deceased's body and concluded that the cause of death to be haemorrhage due to severing of carotid artery and the jugular vein.

58. **The only issue in dispute is whether the said death was caused by unlawful act of omission or commission on the part of the accused person.** There was no eye witness called by the prosecution to the alleged murder of the deceased and the only link between the two accused persons and the offence is that they were allegedly the last persons seen with the deceased prior to his death. That leaves the prosecution and the court with circumstantial evidence.

59. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of **Sawe v Republic [2003] eKLR** 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 shifts to the party accused.”

60. 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 gets 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.

61. 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.

62. In this case, the only circumstantial evidence linking the accused persons to the commission of the crime is the testimony of **PW2**, **5**, **6** and **PW10** who all testified seeing the accused persons following the deceased after he left the premises of the chang'aa den owned by **PW5**, **Seline Ohula**. **PW2** **Stephen Odhiambo** testified that he heard **Martin**, the 1st accused; tell the deceased in *Dholuo* that the deceased was the one who had beaten **Martin** when the latter stole a goat and that it was **Martin's** day to deal with the deceased.

63. **PW4**, **Mr. Omondi** the Senior Assistant Chief of the area where the crime was committed testified that the 1st accused had threatened to kill both him and the deceased who was a member of the *nyumba kumi* group after they found him to have stolen a goat. The testimony of **PW8** **Mr. Kipsang** the Government Analyst who produced the Government analyst report was to the effect that blood in the left hand of the 1st accused **Martin Omondi Owino** was from both accused and the deceased **PWO** and further that the T-shirt recovered from the 1st accused on being examined had mixed blood of the deceased and the 1st accused person **Martin Omondi**.

64. In his defence, the 1st accused denied the events of the night of 10/3/2017 leading up to the morning of 11/3/2017. However the 2nd accused **WOO** testified that he was with both the 1st accused and the deceased the material night in the company of five other colleagues who had been attending a funeral of his brother and after digging the grave his sister gave him money to go and buy them changaa. He stated that they took changaa together at the house of **PW5** and that he parted with the 1st Accused **Martin** and the deceased at around 5 am and left for his house.

65. From the above circumstantial evidence of the prosecution witnesses and **DW2**, I am persuaded that the 1st accused was the last person

seen with the deceased prior to his death. The doctrine of last seen was discussed in the Supreme Court of India case of **Anjan Kumar Sarma v State of Assam, Criminal Appeal No. 560 of 2014** in which the following principles were set out:

“18. The circumstances of last seen cannot by itself form the basis of holding the accused guilty of the offence . . . There must be something more establishing connectivity between the accused and the crime.

21. It is clear from the above that in a case where the other links have been satisfactorily made out and circumstances point to the guilt of the accused, the circumstances of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstances of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”

66. I have no doubt, having heard all the prosecution witnesses who stated that they were with the 2 accused persons on the material night that the said witnesses were telling three truth. That evidence adduced by the prosecution in my view, establishes without doubt that the 1st accused was the last person with the deceased. The 1st accused was not under any duty to establish his guilt or say anything or give any incriminating evidence. He did not mention anything to do with meeting the deceased or DW2 on the material night. Under sections 111 (1) and 119 of the Evidence Act, a statutory rebuttable presumption exists. In this case it exists against the accused person who followed the deceased after a spat on the issue of a cigarette. The two sections stipulate as follows.

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the 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 defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

67. The 1st accused had a rebuttable burden to explain either how the deceased died or met his death; or, how he, the 1st accused parted with the deceased. The 1st accused did not give any explanation of how he parted with the deceased and the deceased was found dead. Neither did he claim that he left the deceased alive. What the accused did was to deny the happenings of the night of 10/3/2017 leading upto the morning of 11/3/2017.

68. Accordingly I am satisfied that the 1st accused person lied in his defence. Having considered the evidence of PW2, 5,6,10 and that of the 2nd accused I have no doubt that the deceased was last in the company of the 1st accused prior to his death and that the accused did not discharge the statutory burden created under sections 111(1) and 119 of Evidence Act. The evidence of Mr. Kipsang, the Government Analyst further place the deceased's blood on the 1st accused's hand and clothing.

69. In the Court of Appeal case of **Ernest Abanga alias Onyango v R CR. A NO.32 of 1990(UR)**, supra, the Court of Appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.”

70. The accused in this case has not attempted to explain facts which he was reasonably expected to be able and interested to explain. The 1st accused has in fact totally ignored explaining the facts of the early mornings of 11/3/2017. He claimed that the blood found on him was as a result of being assaulted after being arrested but the prosecution evidence of the Government Analyst is clear that the blood in the hand of the 1st accused belonged to the deceased and in addition, the blooded tshirt had mixed DNA blood of the 1st accused and the deceased. In my view, if the 2nd accused had participated in the brutal killing of the deceased, some blood would have been found on him linking him to the deceased. This was not the case here.

71. I believe the testimony of the 2nd accused that he was with the 1st accused and others and that he parted with the 1st accused person and the deceased after they had bought cigarettes at a nearby home of Hellen Aduda. He stated that after buying cigarettes from Hellen, he left the deceased and the accused behind.

72. All the circumstantial evidence adduced in this case points irresistibly to the 1st accused person's guilt and exonerates the 2nd accused. No evidence has in my view been put forth to incriminate the 2nd accused. The circumstances of this case taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability the offence was committed by the 1st accused and

none else. The killing of the deceased was unlawful as no justification has been given for such heinous crime. Life is sacrosanct and no person has any right to take away the life of another except by law provided. The 1st accused has not given any justification for killing the deceased hence the killing was unlawful and was caused by the 1st accused.

73. ***On whether the 1st accused had malice aforethought when he unlawfully killed the deceased***, 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.

74. 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.

75. 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.***

76. 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.

77. While 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.”

78. It was further stated in ***Nzuki v Republic [1993] KLR 191*** 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).”

79. Applying the above principles to the present case, I am persuaded that there was evidence from PW2 of the 1st accused having promised to revenge against the deceased whom he claimed beat him up when the 1st accused stole a goat. Further, that there was evidence from PW2 that the 1st accused was holding a panga on the material night and that even before they reached the chang’aa den, there had been a scuffle on the way between the 1st accused and the deceased, which scuffle was quelled by PW2.

80. 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, such non-recovery is not fatal to the prosecution's case as the assailant had ample opportunity to dispose it off considering the time the deceased left the chang'aa den and when he was found dead on the foot path, and when the 1st accused was arrested.

81. Further, the fact that the evidence was not clear on the murder weapon does not weaken the prosecution's case. 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.’

82. 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.”)

83. 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.

84. 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.

85. In the instant case, the postmortem report showed that *externally, there was presence of a cut wound on the right anterior lateral aspect of the neck extending to the left anterior lateral aspect of the neck and that inspection of the respiratory system revealed the trachea was severed. Dr. Hassan found that inspection of the cardiovascular system revealed that major vessels of the neck were also severed while inspection of the digestive system revealed the oesophagus was severed.*

86. *The cause of death was found to be as a result of haemorrhage due to severing of carotid artery and the jugular vein. Dr. Biko concluded that from the body of the deceased, it had a severe cut wound on the area where major vessels pass through as the carotid artery supply blood to the brain from the heart.*

87. From the above evidence and the fact that the 1st accused was carrying a panga which was sharpened both sides and his threats to deal with the deceased for beating him for stealing a goat earlier on, I have no doubt in my mind that the 1st accused had the necessary malice aforethought to kill the deceased on the material night and had been waiting for the opportune time to execute the heinous act, which opportunity availed itself on the material night. In my humble view, the accused person planned to execute the heinous act by carrying a double edged sharpened panga that he was to use to accomplish his mission. With the kind of injuries suffered by the deceased, I conclude that the 1st accused had the necessary intention to kill or cause grievous harm to the deceased, and he did accomplish the mission.

88. I find and hold that the prosecution has proved its case against the 1st accused beyond any reasonable doubt and established all the elements of murder contrary to section 203 of the Penal Code. I reject the defence proffered by the accused which was a mere denial of involvement against the overwhelming evidence by the prosecution witnesses and the 2nd accused that the accused was with the 2nd accused

and PW2 on the material night in the company of the deceased and others and that he had the necessary motive for killing the deceased. I find the evidence by PW2 and the defence by the 2nd accused credible. I find no reason why the witnesses who were with the 1st accused would lie about him if he was not with the deceased on the material night. All these witnesses were well known to the 1st accused and there was no proven allegation that they could have framed him.

89. I proceed and find the 1st accused person MARTIN OMONDI OWINO guilty of the offence of murder as charged under section 203 as read with section 204 of the Penal Code and convict him accordingly.

90. As against the 2nd accused, I find that the evidence linking him to the offence is not sufficient to convict him for the offence of murder. I find him not guilty of the offence as charged and I acquit him and discharge him from the Information of Murder accordingly.

91. Therefore, unless otherwise lawfully held, the 2nd accused person **WOO** is hereby set at liberty. Appropriate Sentence to be imposed on the 1st accused person after mitigation, victim impact statement and presentence report to be filed.

Orders accordingly

Dated, signed and Delivered at Siaya this 27th Day of July 2020 via Microsoft teams. Accused persons at Siaya GK Prisons. Their advocate present in court.

R.E. ABURILI

JUDGE