



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 22 OF 2017[MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

PASCAL OCHIENG OYOKO.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein PASCAL OCHIENG OYOKO is 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 September, 2017 are that on the 6th Day of September, 2017 at about 9.00 pm at Kochiengu SubLocation in Rarienda Subcounty within Siaya County, the accused person murdered one Linda Atieno. The accused pleaded not guilty to the Information. The prosecution called eleven witnesses in support of their case which is summarised herein below. Placed on his defence, the accused gave sworn testimony.

The Prosecution's Case

2. **PW1 Angeline Adhiambo Odhiambo** the mother to the deceased Linda Atieno testified that on the night of 6.9.2017 at about 9pm after she had taken her dinner, the accused person herein went to her home looking for the deceased who was her daughter but she informed him that the deceased was not around. She stated that the deceased was at the time studying from the bedroom so on noticing the presence of the accused, she walked out of the house and suddenly there was a bang on the door and upon inquiry, the deceased stated that the accused had cut her with a panga after which she sprawled on the floor while screaming and saying **"Pascal has killed me."**

3. PW1 then screamed and people gathered and assisted her to take the deceased to Odede Private Hospital. The deceased was by then bleeding profusely and doctors were stitching the wounds but blood was oozing and PW1 noticed that her daughter had difficulties breathing. At around 12.00 a.m., the deceased succumbed to the injuries. PW1 then went to report the matter to the area Assistant Chief who went to the hospital and confirmed that the deceased had passed on.

4. PW1 later identified the deceased's body to the doctor who carried out the postmortem. She stated that she knew the accused for a long period of time as he regularly visited her older son Barrack Ochieng Odiembo. She further identified the accused in court by pointing at him. She added that when the accused went to her house asking for the whereabouts of the deceased, he was dressed in a white/black stripped shirt and faded jeans.

5. PW1 further testified that the Assistant Chief brought the accused and 'his' panga to the police station. She identified the bloody dress worn by the deceased on the material day that she was allegedly killed. She further stated that she had never had any disagreement with the accused.

6. In cross-examination by Mr. Odongo advocate for the accused, PW1 reiterated that she was in her bedroom but not asleep when she heard the banging of the door by the accused who said that he wanted to see the deceased. She further stated that she did not open the door but then heard a bang of the door after which she saw the deceased leave the bedroom for the sitting room. She further stated that when the incident happened, she was using a solar lamp which lit the sitting room.

7. In re-examination, PW1 stated that she heard the voice of the accused, which she knew, as he called out for the deceased.

8. **PW2, Janet Adhiambo Odhiambo**, the deceased's elder sister testified that on the 6.9.2017 at around 9.00 p.m. she was in the house with her mother PW1 and the deceased when they heard someone knock the door and upon inquiry the person knocking answered that he was Pascal who upon further inquiry, stated that he wanted Linda, the deceased in this case. PW2 stated that she opened the door and saw the accused whom she was able to identify as there was light in the house from a solar lamp and further that she knew Pascal because he used to go to their house regularly and weekly for a long time. She reiterated that she had known Pascal for a long time and that he used to visit PW2's home regularly, to meet Barack Ochieng, her sister's son. PW2 further stated that she opened the door and saw the accused after

which the deceased got out and started talking to the accused. PW2 then returned to the house and closed the door partially as the deceased and the accused spoke for some time, when suddenly, PW2 heard the accused tell the deceased not to get out, as the deceased was getting into the house. PW2 testified that the deceased then got back into the house screaming and calling out on PW2 and saying that Pascal had cut her with a panga on her neck. It was PW2's further testimony that she saw blood oozing from the deceased's neck and that the deceased fell on her (PW2) and they both got out. That their mother, PW1 went with the deceased to hospital and that later, their mother returned and reported that Linda had passed on.

9. In cross examination, PW2 stated that the accused was dressed in a white and black striped shirt and light blue jeans and that she left the deceased speaking to the accused when she returned to the house and that the two remained conversing for almost one hour. She further stated that she could not tell if there was any other person who joined the accused and the deceased within that time.

10. In re-examination PW2 stated that when the deceased returned to the house screaming, she followed her but did not see any other person.

11. **PW3, Joseph Oyoko** testified that the accused was his son and that on the 6.9.2017 at 10.00 p.m. or thereabouts he was having dinner in his house with his children namely. 'Bishop', Martha, and his wife Consolata in the absence of the accused. He further testified that as they were eating, a lady, Nyalego, went to his home screaming inquiring whether they had seen the accused to which they answered in the negative and they proceeded to eat and went to sleep.

12. PW3 further testified that he did not see the accused that night but that at around 3 am, he went to the home of one Odongo where the accused used to sleep and asked the accused whether he heard the screams to which the accused informed him that he had cut his girlfriend Linda using a panga but that the accused declined to show PW3 the panga. PW3 testified that he went Aram Police Station and recorded his statement.

13. In cross-examination, PW3 confirmed that the accused was his last born child and that he (the accused) never used to sleep in PW3's homestead but at Odongo's, his brother's home. PW3 further reiterated that at around 3am, Nyalego went to his house screaming and crying and further that he noticed that there were many screams in the area prompting him to go find out from the accused as to what had happened.

14. **PW4 Odhiambo Owuoche** testified that on the 6.9.2017 at 9.00 p.m. a lady, Angeline Adhiambo, who was his neighbour approached him at his house asking him to take an injured girl to hospital. He accompanied the lady and found the injured girl bleeding from the neck after which they went to Odede private hospital. He testified that the following day, he was called to Rang Police Station where he recorded his statement.

15. In cross-examination, PW4 stated that he wrote Angeline's name on a piece of paper in the morning so as to remember it. In re-examination, he stated that he knew the lady who called him as a neighbour but did not know her real name but that the previous day before coming to court, he had written it down so that he does not forget it.

16. **PW5 No 23/217 Chief Inspector Micah Chepkwony** testified that on 13.9.2017 at about 10.10 a.m. while in his office he received the accused as a suspect accused of having allegedly committed murder on 6.9.2017 at Ochiengu sub-location in Rarieda Sub-County. He further testified that it was alleged that the accused had killed a lady called Linda Atieno Odiembo after which PW5 recorded the accused person's statement in which the accused outlined the reasons why he committed the offence.

17. The accused person's counsel Mr. Odongo objected to the production of the accused person's statement under inquiry and after a trial within a trial was conducted, this court found that the statement under inquiry as recorded from the accused person was recorded without adhering to the requirements under the law and the statement was thus found to be inadmissible and rejected.

18. **PW6 Kelly Okoth Ooko** testified that on the 7.9.2017 at about 9.00 p.m. he was at a neighbour's home together with his daughter Angeline and son Onyango when he heard screams from the home of Odiembo, where the deceased hailed from. He testified that Mama Linda whom they called "Cinderella" was screaming saying "*Kujeni mtusaidie, Pascal anaua Linda*" "*come and help us, Pascal is killing Linda.*"

19. PW6 further testified that in the company of his daughter and son, they went to Odiembo's home where they found the deceased surrounded by people and she appeared confused and bleeding from the left side of the neck. They took the deceased to the house where they tried to stop the bleeding and afterwards called George, PW4, a motorcyclist with whom they took the deceased to hospital.

20. It was PW6's testimony that he sat with Linda on the motor cycle and inquired from her as to what had happened to her to which she revealed that Pascal had cut her with a panga as she did not want to be in an intimate relationship with him so he was not happy. He further testified that Linda subsequently passed on. He stated that, that evening, he had seen the accused and the deceased Linda standing when he was on his way to the home of Ongili. He further stated that he knew the accused as they used to play football together and that the accused was in High School when PW6 was in primary school.

21. In cross-examination by Mr. Odongo, PW6 reiterated that when he was at Ongili's home, he heard Mama Linda, also called "Cinderella" screaming after which he rushed to the scene immediately where they found the deceased bleeding and that he did not see the accused in the compound nor witness the accused cut the deceased. He also told the court that the deceased was his cousin.

22. **PW7 Peter Ouma Odongo** the Assistant Chief for Ochiengu Sub-Location, East Uyoma Location, Madiany Division, Rarieda Sub-County, Siaya County testified that on the 7th day of September, 2017 at around 1.00 a.m. he was asleep in his home when he was woken up by a call from Angeline Adhiambo Odiembo who briefed him on what had happened that night from 9 p.m. PW7 testified that Angeline told him that the accused herein went to her house and called out the deceased and after a short while they heard the girl crying and on getting out, they found the deceased cut on the neck and bleeding profusely. He further testified that Angeline went to his home on a motor-bike after calling PW7 and they proceeded to Odede private Hospital where they found Linda dead after which he called the OCS Aram Police

Station and informed him of what had happened.

23. PW7 further testified that together with the OCS, they proceeded to the scene of crime where they found blood stains at the veranda and inside Angeline's house. He further testified that at around 6.30 a.m. he received a call from the OCS who told him that the accused had surrendered himself to the Police Station, and that a panga that the accused had used to kill the deceased had been recovered from where the accused had hidden it, in a deserted house. He stated that he went to the accused's home and engaged the accused's parents and that the accused's father showed him the panga. He further stated that the accused's mother also gave him an unsigned hand written note by the accused to the effect that the deceased and the accused should be buried together as husband and wife. PW7 stated that he had known the accused for a long time as he hailed from his area. The handwritten note was however not subjected to a handwriting expert hence it was not produced in evidence.

24. In cross-examination, PW7 stated that the note he received from the accused's mother appeared to be written in two handwritings. He further stated that the panga was handed over to him by the accused's father who told him that he recovered the panga from the deserted house which panga PW7 later surrendered to the Police Station.

25. **PW8 No.233222 Chief Inspector Abdul Rahim Abdullah** testified that on the 7.9.2017 at about 2.40 a.m. while asleep in his house, he received a telephone call of a murder report from Assistant Chief of Ochienga sub-location, Mr. Peter Odongo, who informed PW8 that at Nyamasore village in his sub-location, a girl named Linda had been assaulted by her boyfriend on 6.9.2017 at about 9.00 p.m. and she died at Odede Private Hospital while receiving treatment.

26. PW8 then went to the Police Station and accompanied by P.C. Mulwa, PC Kaparo and P.C. Driver Oyiego in a station Land Cruiser, they proceeded to the scene but before reaching the scene they passed by Odede Hospital where they found Linda dead. He stated that after viewing the body, he saw a cut on the left side of the deceased's neck. He testified that he left the body and went to the scene where he found the deceased's family members Janet Odhiambo and Angelina Odhiambo.

27. PW8 further testified that he saw blood stains on the veranda, outside the house and in the house-sitting-room and upon interrogating Janet Odhiambo, she informed him that the accused herein visited the house and asked to speak with the deceased but when the deceased went to the door, the accused cut her with a panga on her neck after which the deceased was escorted to Odede Hospital.

28. PW8 testified further that he returned to Odede Hospital and escorted the body of the deceased to Madiany Mortuary then he returned to the Police Station at about 6.10 a.m. but that while he was at the Report Office, the accused arrived at the police station and identified himself and told him that he was the one who cut Linda with a panga as she had been abusing him and that he wanted to marry her. He further stated that he then placed the accused in the cells and inquired from the accused on the location of the murder weapon to which the accused said that he hid it in a deserted house in his home area.

29. PW8 testified that he then called the Assistant Chief and directed him to go and locate the alleged deserted house and search for the panga which was done to no avail as the panga was later recovered by the accused's father who gave it to the Assistant-Chief and the Assistant Chief took it to the Police Station. PW8 identified the panga before court and noted that it had blood stains.

30. In cross-examination, PW8 stated that the panga was brought by the Assistant Chief in a paper bag although the witness could not recall how the paper bag looked like. He further stated that his failure to visit the scene where the panga was recovered did not amount to a dereliction of duty.

31. PW8 further stated that he got a narration of what happened from PW2 Linda's sister who said that they witnessed the assault on the deceased and further that the accused told him that he had cut the deceased using a panga which he considered to be a confession.

32. In re-examination, PW8 stated that the panga was recovered by the accused person's father and further that the accused person surrendered to the Police station and told him that the panga he used to cut Linda was kept in the deserted house so he instructed the Assistant Chief to trace the panga after which the Assistant Chief told him that he recovered the panga from the accused's father. He reiterated that the Assistant Chief availed the panga in a paper bag.

33. **PW9 Dr. Willis Ochieng Odhoch** a Medical Officer at Migori County Hospital testified that he used to work at Bondo Sub-County Hospital until July 2019 and that he carried out the postmortem on the deceased Linda's body on the 18.9.2017. He stated that the body was identified to him by James Odhiambo Owamo and Samson Odhiro Oduor at 12.01 p.m. at Madiany Sub-County Hospital.

34. Dr. Odhoch testified that on external examination of the deceased's body, he found that there was cyanosis of mouth- lips and further that there was a big cut wound on the neck extending from the anterior neck to the left 7 cm deep and 13 cm wide and that the **cleptomustoid** was completely transected. Internal examination revealed that the trachea (windpipe) was completely cut, the left external carotene artery was cut but the rest of the systems were normal. Dr. Odhoch concluded that the cause of death of the deceased was Anoxic hypoxia (respiratory failure caused by transected trachea). He issued a burial permit No. 708326 on the 18.9.2017. He added that the immediate cause of death was due to lack of air entry through the windpipe which was completely cut.

35. On being cross examined by Mr. Odongo Counsel for the accused person, PW9 testified that the Postmortem was done at Madiany Hospital because the doctor was called upon by Madiany Hospital which has a Mortuary to conduct the Post Mortem. He further stated that he was not aware whether the Madiany Hospital was gazetted to conduct Post Mortems. He reiterated the cause of death to be as per the Post Mortem Report.

36. **PW10 No.67008 CPL. Christopher Chege** the Investigating officer in this case testified that on 8.9.2017, he was in the office at Rarieda C.I.D. when he was instructed by the. CIP Micah Chepkwony to investigate this case of murder against the accused herein.

37. PW10 testified that the accused surrendered himself to their station saying that he had murdered Linda Atieno the deceased after which he recorded statements of witnesses and visited the scene of crime as detailed to him by C.I.P. Keah who had already visited the scene earlier on the 8.9.2017. he stated that on arrival at the scene, at Nyamasore Village, he collected exhibits in respect of the said murder, namely; bloodstains from the homestead of the deceased, a panga which was handed to the station by the area Assistant Chief, a white table cloth stained with blood and the clothes which the deceased wore on the material day which were blood stained. He also collected a handwritten note from the accused's house which was recovered by the area Assistant Chief, written in English Language and allegedly written by the accused. Counsel for the accused objected to the production of the handwritten note on the ground that it offended Section 70 of the Evidence Act, an objection which was upheld by the court. The witness identified the accused as the person who surrendered to the Police.

38. In cross-examination, PW10 stated that he went to the scene of crime on 9.9.2012 after being instructed on 8.9.2017. He stated that the scene was a residential house and that when he went to the scene, it had not been sealed as a crime scene and the occupants of the house continued with their lives as usual. He further stated that he never noted any interference with the scene of crime but admitted that it was a requirement that a crime scene be secured.

39. PW10 further stated that the panga was not recovered at the deceased's home but that it was recovered by the area Assistant Chief who took it to the Police Station. He stated that he knew it was recovered in a house in Ochienga Village where the accused lived. PW10 admitted that he did not dust the panga for finger prints of the accused person and refuted the claim that many people had handled the panga before it was brought to him. He further stated that he did not recover any clothing from the accused person.

40. In re-examination, PW10 stated that he visited the scene of crime after being instructed, to see what had happened and to collect any exhibit from the scene that would connect the suspect with the offence.

41. **PW11 Richard Kimutai Langat** the Government Analyst working in Kisumu testified that on the 26.9.2017, he received some exhibits and Exhibit memo under Escort of Police Officer Christopher Chege of C.I.D. Rarieda, he received Police vide CR6B4/114 of 2017. He testified that the following items were received to determine their DNA genetic relationship:

- a) **Bloodstained panga marked "A"**.
- b) **Blood sample from deceased Linda "B"**.
- c) **Blood stained cloth of deceased "C"**
- d) **Blood stained Table Cloth "D"**
- e) **Dry blood stains found inside the house "E"**
- f) **Blood stained soil collected outside the House "F"**

42. PW11 testified that on Preliminary examination, the panga item "A" and Table Cloth Item "D" were moderately stained with human blood whereas Item "C" the deceased's cloth had human Blood stain and Item "F" Soil collected from outside the House had human blood.

43. He further testified that DNA was extracted from Items A – F and subjected to DNA analyzer and they generated DNA profiles which he tabulated from the DNA profiles generated. From blood stains on the deceased's cloth "C" was a mixed DNA profile of the deceased Linda Atieno and an unknown male person while DNA profile generated from blood stains on the panga item "A" and the table cloth Item D and blood from outside the House and inside the House matched the DNA profile of the deceased Linda Atieno Odiembo. He wrote the report on 12.1.2018 and signed it.

44. In cross-examination, PW11 stated that the panga was wrapped in a paper and had blood stains. He further stated that he would not know why the cloth was heavily stained as splattering of the blood depends on the nature of the cut. He further stated that there was only female DNA on the panga, table cloth and the soil.

The Defence Case

45. Placed on his defence, the accused gave sworn statement denying the events of 6/9/2017 as given by the prosecution witnesses. He testified that on the 7/9/2019 he woke up early and his friend Erick Ochieng called and informed him that the police were looking for him and advised him to go to Aram Police Station. He further testified that at 6.30 am he arrived at Aram Police Station where he found the OCS and some officers who asked him his name and also inquired if he knew Linda Atieno which he denied.

46. He further testified that he was taken to the cells until 20/9/2017 during which time the OCS called him and told him that he was charged with the offence of Murder. He stated that on the 6th September 2017 he never saw the deceased as he spent at his place of work until midnight, when he went home.

47. In cross-examination, the accused reiterated that on the 6/6/2017 from 9.30 am until midnight he was at Rading Trading Centre where he operated DSTV decoder business which he had done since 2015. He testified that many customers visited his business but that he would not call them as his witnesses because they did not know anything about the case. He also stated that he was not willing to call any witness including his father Joseph Oyoko whom he denied seeing on the 6/9/2017. The accused further denied knowing the deceased or her sister, PW2 or having any relationship with the deceased.

Accused's Submissions

48. Counsel for the accused person filed written submissions. It was submitted on behalf of the accused person, materially, that the identity of the assailant of the deceased on the material night remains unknown as the prosecution presented no physical or documentary evidence attaching or connecting the accused to this offence. The accused person's counsel further submitted that the evidence adduced fell short to warrant a conviction leading to the inevitable conclusion that the prosecution had not proved its case beyond reasonable doubt and as such the court ought to acquit him under Section 322 (2) of the Criminal Procedure Code.

Analysis and determination

49. I have considered the evidence adduced by the prosecution witnesses and the defence proffered by accused person. I have also considered the submissions filed by counsel for the accused person, urging this court to find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt and that therefore this court should acquit the accused of the Information of murder.

50. The issues for determination in this case flow from the ingredients of the offence of murder which I will assess below.

51. 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 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 with malice aforethought - "mens rea".

52. The fact and the cause of death of the deceased Linda Atieno Odiembo was proved beyond reasonable doubt by the evidence of **PW1**, and **PW6** who testified that they took the deceased to hospital for treatment only to be told later that the deceased had succumbed to her injuries. PW1, the deceased's mother testified that she identified the deceased's body prior to the doctor for post-mortem and that she witnessed the post-mortem. The cause of death was confirmed through the testimony of **PW9 DR. Willis Ochieng Odhoch**, who carried out the post-mortem on the deceased's body and arrived at the conclusion that the cause of death was Anoxic hypoxia (respiratory failure caused by transected trachea) and he issued a burial permit No. 708326 on the 18.9.2017. PW9 testified that the immediate cause of death was due to lack of air entry through the windpipe which was completely severed-cut.

53. Accordingly, the prosecution proved beyond reasonable doubt that there was death of the deceased Linda Atieno Odiembo.

54. On whether the said death was caused by unlawful act of omission or commission, and on the part of the accused person., from the injuries sustained by the deceased which were the severing of the trachea, it is clear to this court that the deceased died as a result of an unlawful act as there was no evidence of self inflicted injury and neither was there evidence of self defence or defence of property.

55. On whether it was the accused person herein who inflicted the fatal injuries on the deceased Linda Atieno, no witness stated that they saw with their eyes the act of the accused cutting the deceased. The evidence of PW1 and PW2 was circumstantial. They were clear in their respective testimonies that they were in the house with the deceased Linda who was studying and that the accused person herein whom they knew very well knocked the door to their house and asked to speak to the deceased Linda. That the deceased Linda then went outside and that is when she returned into the house screaming and saying that Pascal had cut her then she fell. They screamed and sought help to escort her to hospital but she succumbed to the injuries as stated by PW9. PW1 and PW2 were clear that they were sure it was the accused person who called out the deceased. In addition, PW 6 stated that as he escorted the deceased Linda to hospital, she was talking and he interrogated her and she told him that she had been assaulted by the accused on account that she had decided to terminate their relationship.

56. All the above evidence is circumstantial. 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."

57. 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. Suspicion, however strong cannot sustain a conviction.

58. Where circumstantial evidence is the only available 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.

59. In this case, none of the prosecution witnesses directly witnessed the attack on the deceased. PW1 testified that she was in her bedroom when the accused knocked at her outside door looking for the deceased and after the deceased went to the door to meet the accused, PW1

heard a loud bang followed by the deceased screaming and saying that the accused Pascal had cut her with a panga. PW2 who was also in the same house that night together with PW1 and the deceased testified that the accused knocked at the door looking for the deceased. PW2 was sure it was the accused as there was light from the solar lamp and that she saw the accused who was well known to her as he regularly visited her nephew Barack Ochieng. The accused person was, from the evidence of PW1 and PW2 well known to the two witnesses and PW1 stated that she knew his voice when he told her that he wanted to see Linda then she told him that the person he was looking for was not around. She stated that the deceased was studying from the sitting room.

60. PW2 further testified that the deceased also got out to talk to the accused and s PW2 left them talking for about an hour after which the deceased returned to the house screaming and yelling that Pascal had cut her with a panga. PW3, the accused person's biological father testified that the accused was his last born child and that he was awoken at 3am on the material night by screams from PW1 who went to him and asked him where the accused was. PW3 then proceeded to the compound where the accused used to sleep but he never found the accused and that at about 3am, when he went to the said house where the accused used to sleep, he found the accused and on inquiring from him on whether he had also heard the screams from the area, the accused told PW3 that he –the accused had cut his girlfriend Linda with a panga. PW6 testified that he helped take the deceased to hospital and that as he held the deceased on the motorcycle on their way to hospital and inquired from her as to what had happened, the deceased told him that Pascal the accused had cut her with a panga after she had told him that she did not want an intimate relationship with him.

61. PW7, the area Assistant Chief testified that at 6am on the 7/9/2017 he received a call from the OCS Aram Police Station informing him that the accused had surrendered himself to them claiming that he had killed his girlfriend and that he subsequently was able to retrieve a panga alleged to be the murder weapon with the help of the father to the accused.

62. The panga which was taken to the Government Analyst for analysis was produced as an exhibit and from the Government Analyst report, the blood on the panga matched the DNA profile of the deceased Linda Atieno Odiembo. The accused person's blood was not taken for DNA comparisons.

63. In his defence, the accused denied having committed the offence. He stated that on the material day he ran his DSTV business till midnight. He stated that there were many customers who visited his shop but that he could not call any as they knew nothing of the incident.

64. From the evidence of PW1, PW2 and PW3, it is clear to this court that the accused had an intimate relationship with the deceased Linda and it clearly appears that they had differences on that material day over their relationship which led to the accused arming himself with a panga and proceeding to the deceased's home and cutting him. Albeit none of the prosecution witnesses actually saw the accused cut the deceased, the incident occurred immediately after PW1 and PW2 had confirmed that the accused who was well known to them had visited their house and knocked on their door, asking for the deceased and the deceased went outside their house to talk to the accused. She was seen running back into the house screaming and saying that the accused Pascal had cut her with a panga.

65. The evidence of PW1, PW2 and PW6 to the effect that the deceased Linda told them that the accused had cut her with a panga amount to a dying declaration. Under section 33(a) of the Evidence Act, a statement made by a deceased person relating to his cause of death is admissible in evidence. The section provides:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

66. In **Philip Nzaka Watu v Republic [2016] eKLR**, the Court stated the following on admission and reliance on a dying declaration:

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

67. The post-mortem report indicates that the deceased died of cut injuries on her neck and as a result, she lacked air entry through the windpipe which is consistent with the attack by the accused using a panga as corroborated by the testimonies of PW1,2 and 6. The panga which was produced in court as an exhibit had mixed DNA profile of the deceased and an unknown male. I observe that the accused person's blood was not taken for DNA profiling and therefore there is no evidence that the unknown male person could have been the accused herein. However, the panga which was recovered by the Assistant Chief from the father of the accused person was found to have blood stains which matched the DNA profile of the deceased Linda Atieno Odiembo.

68. Regarding the defence of the accused denying any involvement in the death of the deceased, the evidence of the accused avoided the happenings of the night that the incident occurred. Moreover, the alibi defence was discounted by the dying declaration made by the deceased to the 3 witnesses who gave similar accounts of the said declaration. Further, the accused person's own father was clear that after the incident, he looked for the accused from where he normally slept but he was not there and later at 3am when he went to check on him again, he found the accused and on asking him whether he was aware of the happenings, the accused told him that he had cut his girlfriend Linda with a panga but that the accused refused to show him where the panga was. The Assistant Chief's evidence that he recovered the blood stained panga from the father of the accused is credible evidence. I find no reason why he would lie to the court. The father to the accused could have decided to hide part of the evidence on how the panga was recovered by the Assistant Chief in a bid to cover up the sins of his son but he revealed that he spoke to his son and his son told him that he had cut his girlfriend Linda with a panga. He avoided saying that he later recovered the panga from the deserted house and gave it to the Assistant Chief, perhaps in an attempt to save his son but I

believe the testimony of the Assistant Chief that it was the father of the accused person who handed over to him the panga which was surrendered to the police and DNA done.

69. In the circumstances, the alibi defence by the accused person was properly displaced by the evidence of PW1 and PW2 who knew the accused very well and who testified quite firmly that it was the accused who went to their house that evening asking for the deceased. PW1 was in the bedroom and only heard the voice of the accused whom she asked who he was after hearing the knock on the door and the accused identified himself as Pascal. PW2 on the other hand saw the accused very well as there were solar lights on and she got out and saw him as he talked to the deceased Linda.

70. I find that PW1 and PW2 positively, by voice and physical recognition, respectively, identified the accused who was well known to them as he was a regular guest at their home, and they even knew his home that is why PW1 ran to his home immediately after the incident and asked his father on the whereabouts of the accused, as the person who visited their house the material night at about 9 am asking for Linda and that Linda went outside to speak to him and that they spoke for some time before Linda ran back into the house screaming and saying the accused Pascal had cut her with a panga. The accused person's father, PW3 did not deny that he is the one who gave the Assistant Chief the panga which the accused had told him that it was hidden in the deserted house nearby and which PW3 retrieved.

71. The evidence of PW3 on what the accused who was his last born son had told him the night of the incident was not suggestive of any bad blood between son and father that would make the father frame the son with the commission of such a heinous crime.

72. Accordingly, I find and hold that the prosecution proved beyond reasonable doubt that it was the accused and no other person who attacked and cut the deceased causing her fatal injuries.

73. On whether the unlawful killing of the deceased Linda was actuated by malice aforethought, from the evidence of the doctor who performed the post mortem examination, the deceased suffered severe injuries caused by a sharp object. The injuries were a cut windpipe as well as a severed carotene artery. Section 206(b) of the Penal Code provides:

“206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances

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(a)

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

74. In **Daniel Muthee vs Republic [2007] eKLR**, the Court addressed the issue of malice aforethought as follows:

“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.”

75. The accused person denied assaulting the deceased and causing her fatal injuries. He also denied knowing her or even meeting her the material day or night yet he had been seen by PW6 standing with her near the road that evening. The accused person was under no duty to give any incriminating evidence against himself. However, I find that he is a pathological liar. He lied to this court that he did not know Linda yet his own father testified that the accused told him that he had cut his girlfriend Linda with a panga. That evidence by his father on what his son told him was admissible unlike the evidence of a statement under inquiry which this court found was not taken in accordance with the law. The accused was not under any duress when his father asked him whether he had heard of what had happened in the neighbourhood.

76. In the circumstances of the present case, it can also be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause instant death or grievous harm and therefore malice aforethought can be inferred under section 206(b) of the Penal Code.

77. I have considered whether there were any circumstances that could weaken the inference of guilt on the part of the accused. The evidence implicating the accused which included the deceased having named the accused as her assailant; the deceased having suffered serious injuries that resulted in her demise; all point irresistibly to the death of the deceased having been premeditated otherwise why would the accused visit his lover at night while armed with a panga, if at all he wanted to mend a broken relationship? He must have done so with the sole intention of eliminating her.

78. Accordingly, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused had malice aforethought when he unlawfully killed the deceased. I find the accused person **Pascal Ochieng Oyoko GUILTY** of the offence of murder contrary to section 203 of the Penal Code. I convict him accordingly. Sentence to follow after record, mitigation, presentence report ad victim impact statement to be filed by the Probation Officer Siaya County.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 19th Day of October, 2020

R.E. ABURILI

JUDGE