



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 19 OF 2018[MURDER]**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ISAIAH OTIENO OKWIRI.....ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person herein **ISAIAH OTIENO OKWIRI** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which are that on the 2/5/2012 at Ambira village, Ugunja sub-county within Siaya County, the appellant and another not before court jointly murdered Jaconiah Onyango Oriedo.
2. The accused person pleaded not guilty. The prosecution called eight witnesses in support of their case which is summarised herein below.

**Prosecution Case**

3. **PW1 Andrew Owino Oluoch** testified that on the 2/5/2012 at about 5pm while he was at work running a posho mill, a young girl called Anyango informed him that Isaiah Otieno and Bernard Otieno, his cousins, had attacked PW1's parents. He testified that he rushed home on a motorcycle and found hundreds of people gathered at their home and upon entering his mother's house found her lying on her bed writhing in pain. It was his testimony that the deceased informed him that the accused and his conspirator had gone home, broken the window, forced themselves in the deceased's house and cut her with a panga. It was his testimony that the deceased's head was cut, deeply, her intestines were dangling outside, and her forehead was swollen and loose showing blunt object used.
4. PW1 testified that the deceased informed him that she might die and together with Claris and the deceased's grandchildren, they put her on a motorcycle and rushed her to Ambira Sub County Hospital where he also found his father Lucas Oluoch admitted at that hospital with cuts on the head and swollen joints.
5. It was his testimony that when they arrived at the Hospital. The deceased was given first aid, her intestines were tied and an ambulance was called from Siaya Hospital and at 8 pm they left for Kisumu but the deceased passed on along the way at Kisian.
6. PW1 testified that the deceased told him to care for her granddaughter and further that Isaiah and Bernard had attacked and cut her. PW1 testified that he had known the accused since childhood. He further testified that the deceased told him everything including where she had kept her money.
7. It was his testimony that he called the police and briefed them of what had happened and the following day he went and recorded his statement at Ugunja Police Station. He testified that he went to the scene with a police officer who took photographs and that they also went to Ambira Hospital where they saw his father and then proceeded to Siaya Hospital Mortuary where he paid postmortem fees and a postmortem was done on the deceased's body.
8. PW1 testified that the other accused, Bernard, surrendered to the police and was arraigned in Kisumu High Court where he was tried, convicted and sentenced whereas the accused herein disappeared and only reappeared in 2015 after PW1's father had passed on.
9. In cross-examination, PW1 stated that a week to the incident, the accused herein had quarreled with the deceased and hit her with a jembe, forcing the deceased to report to the police and Hospital but that PW1 intervened and persuaded his mother not to pursue the case against Isaiah- the accused herein He further testified that the accused and his co-conspirator had accused the deceased of witchcraft.
10. **PW2 Jacinta Akoth** testified that on 2/5/2012 she was at home having left the farm, passed by the home of Thomas Oluoch where she heard children screaming so she stood at the gate. She testified that she saw the accused and one alias "pokot" whom she had known since

1998. It was her testimony that she saw Isaiah carrying a panga and "pokot" carrying a small jembe. She further testified that the accused and pokot pushed the deceased's window and it fell inside after which they forcefully opened the door, entered inside it and after a short while they got out and that she saw the accused wipe the panga which had blood, on the grass. She testified that the distance from where she stood to where the accused and his colleague were was about 20 metres.

11. She further testified that the deceased's grandchildren were around and crying moving around the compound and after the accused left, PW2 left and called one child who refused to approach her then PW2 entered the deceased's house where she found the deceased crying saying Ongoma (Isaiah) and 'pokot' had killed her. It was her testimony that the deceased's head was soaked in blood and she was lying on her bed.

12. PW2 further testified that another lady, Claris, also entered the deceased's house and they tried to take the deceased to Ambira Hospital but as they were trying to lift her, reaching the door another lady saw them and screamed saying the deceased's intestines were pouring out forcing them to tie the deceased's stomach using a leso when Owino, PW1, the deceased son came with a motorcycle and took her to Ambira Hospital and PW2 later learnt that the deceased had succumbed. It was her testimony that she saw the accused very well. In cross-examination she stated that she heard screams from children who were in the home of the deceased, and that the children included Dennis, Praxedes and "Aunty."

13. **PW3 Claris Auma Opondo** testified that on the 2/5/2012, she was returning from bathing going home at about 4pm when upon reaching her home, she heard screams so she turned and checked and saw the accused, her brother -in-law in the company of 'Pokot', cut Lucas Oluoch with a panga. She further testified that a neighbour was also screaming and that the accused left Lucas and started chasing PW3, forcing her to run to the home of James Okwiri.

14. It was PW3's testimony that she turned again and saw the accused and 'Pokot' go to the home of the deceased whose door was locked with a padlock. It was her testimony that they went to the window, broke it and saw the deceased inside. She further testified that the accused had a panga and a knife while 'Pokot' had a club and a jembe. It was her testimony that the accused and pokot went, destroyed the door and entered the deceased's house wherein the accused pulled a knife which he was holding and stabbed the deceased in the stomach as 'Pokot' hit the deceased with a jembe on her head and they left her for dead.

15. PW3 testified that the assailants took a very short time and left the deceased's house and after they were done, she left, went to Ambira Centre and called the deceased's son who went on a motorcycle and carried his mother to Ambira Hospital where she followed them at Ambira, and the deceased was taken to Kisumu for treatment. She testified that in the morning at 8am, she heard screams in the home that the deceased had passed on. In cross-examination PW3 testified that from where she stood facing the house of the deceased watching the accused hack the deceased was a distance of about 15 metres and it was in broad daylight.

16. **PW4 Dr. Okun Benjamin Ochieng** based at Siaya County Referral Hospital testified that he had the deceased's postmortem for done by **Doctor Lavender K.G.** a Medical Officer, in 2012 before Medical Services were devolved to the counties but who could not be traced and as such he was ready to produce the results on her behalf.

17. Dr Okun's testimony was that the postmortem was done on 8.5.2012 by Doctor Lavender K.G.O. who signed the report. He further testified that the deceased's body was identified by Andrew Owino and Celine Auma and CPC Chrispinus Lumwachi and that the deceased was said to have been cut severally by a person well known to her.

18. He further testified that on general observation of the body, it was clean, female, black race approximately 60 years of good nutrition and average physique whereas the Postmortem changes were as follows:

- a) There was rigor mortis - stiffness of the body, time of death was 6 days earlier.
- b) Externally, the body was in one piece, no fractures on limbs. There was an epigastric stab wound (below the chest) which was longitudinal 3cm long penetrating the skin into the abdomen. There was also a transverse cut on the cranial vertex with a skull fracture cut - fracture across the top of the head
- c) The Respiratory, cardiovascular, nervous, spinal column and genital system were normal whereas the intestinal system revealed that the intestines were perforated.
- d) The head had transverse skull fracture along the coronal plane.
- e) Death was due to severe head injury due to trauma by a heavy bladed object. The death certificate was issued as No 301685.

19. In cross-examination, he testified that he had been in practice for 5 years and had done many postmortems. He noted that the deceased's body was clean, there was no limb fracture and that the stab wound protruded into the abdomen but what caused the death was the skull fracture injury. He stated that metal blades are planes.

20. **PW5 Geoffrey Ouma Onyango** testified that on the 2/5/2012 at about 4pm, he was at home with his mother Jacinta Akoth Ochieng when he saw two people assaulting his grandfather. It was his testimony that he knew the two people because they were his cousins. He further testified that they were the accused-identified in court and 'Pokot' and that the accused had a knife and a panga while 'Pokot' had a wooden plank and a jembe. He testified that 'Pokot' was jailed and was serving prison term.

21. PW5 testified that he went to the rescue of his grandfather and took him to Ambira hospital where they received information that their grandmother had also been assaulted. He testified that the deceased was brought on a motorcycle by Owino and that she had been cut on the

head and her abdomen leading to intestines perforation. It was his testimony that his grandmother was transferred to Kisumu but she died on the way. He testified that he accompanied the team taking the deceased to Kisumu but they returned her to Siaya Mortuary and thereafter reported to the police and recorded statements.

22. He testified that he had known the accused since he was born and that he had never disagreed with him and that the accused was traced and arrested but 'Pokot' surrendered himself to the police.

23. In cross-examination, PW5 testified that the incident took place at about 4pm. He stated that he saw the accused and Pokot assaulting his grandfather on a path as he was coming from his home which was near his grandfather's home. He further stated that while he was with his grandfather in Ambira Hospital, he saw his grandmother brought to Ambira with serious injuries. He further stated that he did not see the accused injure his grandmother because he was at the hospital. He further stated that he had not been shown the murder weapons.

24. PW6, Praxedes Achieng Owino a minor who was certified as possessing enough intelligence to give evidence following voire dire examination testified that on the 2/5/2012 at about 3pm she was home with her grandmother the deceased who was sick. It was her testimony that her sisters had gone to fetch firewood so her grandmother told PW6 to accompany them to bring firewood and instructed her to lock the door.

25. She testified that as she was going but before reaching her sisters, she heard someone screaming from the house of her grandmother so she informed her sisters and they ran back to the house of the grandmother. She further stated that when they reached the gate, they saw two men standing at the house of the deceased, one carrying a panga and another a jembe. It was her testimony that she knew the two men before as Ongoma and 'Pokot' who come from the same clan as she did. She testified that Ongoma was the accused herein and that she saw him carrying a panga.

26. It was her testimony that the accused pointed the panga at her as she was approaching him and she ran away but returned shortly and entered the house looking for her grandmother whom she found inside the house. It was her testimony that the deceased was crying and when PW6 asked her what had happened and whether grandfather had died, the deceased responded in the negative but stated that **"Ongoma has killed me"** and further stated that **"I can't let you see how Ongoma has killed me."** PW6 testified that the deceased was bleeding from the nose and PW6 rushed out and found people outside whom she informed that her grandmother has been injured so they entered the house of the deceased to check on her.

27. It was her testimony that she saw the people tie the deceased's abdomen and further that they called her father who worked at a nearby Centre and he arrived on a motorcycle and took the deceased to a nearby Hospital at Ambira. She testified that she followed them to Ambira Hospital but was told to go back home. She testified that later, she recorded her statement at Ugunja Police Station concerning what she saw on that day. It was her testimony that she knew the accused as Ongoma and that she had never quarreled with him.

28. In cross-examination, PW6 stated that she was now 17 years old but that the incident happened in 2012 when she was 12 years. It was her testimony that she recorded her statement in 2018 when she was 15years. It was her testimony that she vividly recalled what happened. She stated that the route to the place they were to fetch firewood was in front of the gate and that she was alone when she went to join her sister and brother, Jecinta Atieno and Edwin Odhiambo but she did not go far.

29. She further stated that she returned after hearing screams of her grandmother. It was her testimony that she knew the accused whom she referred to as "father" (uncle) and who is also known as Ongoma or Isaiah Otieno. She stated that she saw the accused with one panga and 'Pokot' with a jembe. She further stated that she had not testified in court before. She further stated that she saw the accused and 'Pokot' leave the deceased's house and that she did not know whether her sister testified in this case or in any other case.

30. **PW7 No 85579 PC Chrispinus Lumwaji** based at Central Nairobi DCI carrying out general investigations duties testified that on 2/5/2012 at about 5.18 pm he was at Ugunja Police Station performing personnel duties when one Bernard alias 'Pokot' went to the station and reported that he had murdered one Mary Onyango. It was his testimony that he booked the report and placed him in cells and informed IP Nyaga the Deputy OCS. PC Lumwaji testified that they left for Ambira Hospital led by the son to the deceased Mary, who had gone to the station to report the matter.

31. He further stated that he investigated the case involving Bernard and at Ambira Hospital they found the deceased Mary Onyango admitted in the said hospital with her husband Lucas who had a cut on the head and complained of pain all over the body. He testified that the deceased had a cut on the head, abdomen and leg.

32. It was his testimony that they left the hospital and proceeded to the scene where they were informed that the deceased's husband had been attacked by Isaiah Otieno and 'Pokot' on the road and that the accused and his accomplice then proceeded to the house and attacked the deceased. PW7 testified that he met children at the house who briefed him that the accused person and 'Pokot' had gained entry into the house after breaking a wooden window using a jembe and that it was 'Pokot' Bernard who carried the jembe used to break the window while Isaiah, the accused herein, carried a panga and that after breaking the window and entering the house, Bernard opened the door then Isaiah gained entry into the house before they committed the offence after which they got out and Isaiah left with his weapon while the jembe was thrown out.

33. He further testified that when they accessed the bedroom of the deceased, they found blood in the middle of the beddings and further noted that the bedroom window was broken and pieces of wood were on the ground. He testified that they left the scene and he made a signal reporting the incident.

34. It was his testimony that the deceased and her husband were transferred for further treatment to Kisumu from Ambira and that the following day the suspect Bernard alias 'Pokot' was taken to Ukwala Law Courts facing charges of attempted murder. He testified that he then received a report that Mary Onyango had died on her way to Kisumu for treatment and he went back to the scene together with a photographer whom he guided on how to take photographs of the scene.

35. He testified that the accused Bernard 'Pokot' was then charged with Murder vide Criminal Case No. 31/2012 at Kisumu High Court and PW7 recovered the wood/timber from the broken window, a jembe and a wooden plank, which exhibits were produced in the murder case at Kisumu. It was his testimony that the panga was never recovered. PW7 testified that he had never seen the accused before and that the accused escaped and that at the time of his transfer, the accused had not been arrested.

36. In cross-examination, PW7 stated that he investigated the case and that the other suspect was Bernard alias 'Pokot'. He stated that he was accompanied to the scene by Deputy OCS IP Nyaga and that the son of the deceased went to report and found Bernard had also reported saying he had the deceased.

37. It was his testimony that when he was bonded is when he learnt that the suspect who was at large was arrested. He stated that he was informed from the Police File that the exhibits were produced in Criminal 31/2012 at Kisumu. He stated that he did not get the knife and that photographs were taken and produced in the Kisumu case involving Bernard. He further stated that Bernard went alone to the Police Station and said ***"I have murdered Mary Onyango."***

38. PW8 Linah Akoth the Deputy Registrar of the High Court at Kisumu testified that in her service she had come across **HC Cr. Case No. 31/2012 at Kisumu: State Vs Bernard Otieno Okello**. She stated that the court file in issue had the statement of offence which was the Information for Murder. She further stated that the victim was Mary Onyango Oluoch who died on 2/5/2012 and that Benard Otieno Okello was charged jointly with another not before court with murder of the deceased Mary Onyango.

39. It was her testimony that the case was concluded and judgment delivered by Chemitei J on 31/7/2014 with a verdict finding the accused guilty of Murder. She further stated that there were exhibits produced by the Investigating officer on 14/11/2013 which included a jembe, broken timber, blue in colour, postmortem report, photographs Certificate of photographs among others which she wished to produce and she produced the entire case file **Kisumu HC CR Case No. 31 of 2012 as an exhibit No. 2**.

40. In cross-examination PW8 stated that the charge sheet stated ***"jointly with another not before court"***. She further stated that she had the original file which she had produced before court. It was her testimony that the accused appealed vide Cr. 205/2014 at Kisumu and the Court of Appeal upheld the accused's conviction and sentence being reduced to a term of 30 years from death sentence. In re-examination, she stated that the accused was not acquitted but that his death sentence was substituted.

#### **Defence Case**

41. The accused gave a sworn testimony stating that he was married with 8 children, worked as a fisherman and that he was aware that he was charged with the murder of Mary Onyango Oluoch.

42. It was his testimony that he was arrested with an assault case on 2/5/2012 when he was at the lake doing his fishing. He testified that when he goes fishing he stays away for some time before returning home. It was his testimony that he returned home from fishing on 8/10/2018 having been fishing since 2/5/2012 when he found the deceased had died and been buried. It was his testimony that the deceased was the wife to his uncle and that he had no grudges with the deceased.

43. He testified that Benard Otieno Okello was his paternal cousin and that he had a step brother, George Onyango Okwiri, who had issues with his mother who had poisoned his mother's poultry. He testified that he went to the Police and was given a letter to the Veterinary Officer. He produced OB. No. 27 of 26/11/2018. He testified that he was arrested on allegations that he had assaulted George Onyango Okwiri but that the case was withdrawn when he revealed that he was his brother and had also withdrawn the chicken poisoning case.

44. He testified that when the assault case was withdrawn, he was told that he had another High court case at Kisumu. It was his testimony that he was brought to Siaya High Court and shocked when he heard that there was a murder charge brought against him. He stated that he did not know what happened to the deceased as he was in good terms with her.

45. It was his testimony that he had issues over a piece of land with the 2<sup>nd</sup> witness and that the 6<sup>th</sup> witness who was a mother to the 2<sup>nd</sup> witness sells Simba Waragi and lies whenever arrested by the Police that he had sent the police to arrest her. When shown photographs of the deceased, the accused identified the deceased and stated that he could recognize the homestead and house of the deceased.

#### **Defence Submissions**

46. It was submitted on behalf of the accused that comparing the testimonies in the High Court Criminal No. 31 of 2012 and the testimonies in the matter herein PW 1 and PW 5 were the prime witnesses in the two cases but none of them confirmed the accused as the deceased's murderer. It was submitted that this was because PW 6 in the present case did not testify in the previous criminal No. 31 of 2012 and neither did PW 1 and PW 3 in criminal 13 of 2012, testify in the present case and as such there was an inconsistency in the application of the evidence in the previous matter to this present one.

47. It was further submitted that the accused was misidentified as the minors who were called as witnesses had since advanced in age and could probably have a fade in their memories. It was further submitted that two of the minors that testified in criminal No 31 of 2012 did not testify in the present case and as such the investigating officer, PW 8 who inherited the investigations from one PC Chrispinus Lumwachi should have considered the case as fresh and carry out an identification parade rather than rely on the evidence that was collected by his predecessor.

48. It was submitted that the contrast in witness testimonies in criminal case No 31 of 2012 and the instant case created a cloud of doubt on the prosecution especially that the investigating officer as to the accused's alleged role in the murder of the deceased which amounted to a mere suspicion and not prove of his role. Reliance was placed on the Court of Appeal case of **P.O.N. v Republic [2019] eKLR** (Ouko, (P), Gatembu & Murgor, JJ.A) where it was held that ***".....no amount of evidence based on suspicion, no matter how strong may be a basis for***

***a conviction. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not....”***

49. It was submitted that the prosecution’s burden to prove “beyond reasonable doubt” in the instant case was tainted with anomalies and based on the inconsistent evidence adduced, the court could not be moved to make a conviction. Reliance was placed on the case of ***May v O’Sullivan (1955) 92 CLR 654***, where it was held that, ***“when at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not “whether the evidence as it stands, the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted”***

#### **Analysis of the Law**

50. 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 ingredients 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”.**

51. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of PW1, the deceased’s son who after the incident happened, took the deceased to hospital at Ambira and subsequently to Kisumu when the deceased passed on at Kisian en-route to the hospital in Kisumu. PW1 further paid for and attended the deceased post-mortem. PW1’s evidence was corroborated by both PW1 and PW2.

52. PW4, Dr. Okun produced the post-mortem report done by Dr. Lavender K.G. and signed by Dr. Lavender K.G.O that confirmed that the deceased had passed on and that the cause of death was severe head injury due to trauma by a heavy bladed object.

53. The issue in dispute is whether the said death was caused by unlawful act of omission or commission on the part of the accused person.

54. PW1 testified that he was called to the scene of crime where he found his mother seriously wounded. He testified that as they were en-route to the hospital, the deceased informed him that he had been attacked by the accused and Bernard who cut her. It was his testimony that the deceased further implored him to take care of her grandchildren and also revealed to him where she kept money which he testified that he found.

55. PW2 testified that on the material date she heard screams and saw the accused and Pokot armed with a panga and jembe respectively. It was her testimony that she saw the accused and Pokot broke into the deceased’s house and after a few minutes they came out with the accused wiping his blood soaked panga on the grass. It was her testimony that she went to the deceased’s house and found her crying in pain saying that Ongoma, the accused and Pokot had killed her. She testified that the deceased was soaked in blood.

56. PW3 testified that she was returning from bathing when she heard screams and saw her brother in law, the accused, attack Lucas Oluoch who was the deceased’s husband after which the accused proceeded to break into the deceased’s house where she saw the accused stab the deceased in the stomach with a knife while Pokot hit her on the head.

57. PW6, the deceased’s grandchild testified that on the material date she had left the deceased at home and was proceeding to fetch firewood with her siblings who had left earlier but on reaching the gate saw the accused and Pokot armed with a panga and jembe respectively forcing her to run away. She testified that she saw them enter the deceased’s house and when she returned to the house on hearing the deceased scream, after the accused and Pokot had left, she found the deceased bleeding. It was her testimony that upon inquiry, the deceased stated that, “Ongoma has killed me,” and further told PW6 that, “I can’t let you see how Ongoma has killed me.”

58. In his defence, the accused denied committing the offence. He stated that he was a fisherman and that he usually goes on long fishing expeditions before returning home. He testified that on the 2/5/2012 he was arrested with an assault case. He also stated that on 2/5/2012 he went on a fishing expedition and returned on the 8/10/2018 when he learnt that the deceased had died and been buried.

59. From the evidence above it is clear that several witnesses testified that the deceased made a dying declaration in which he named the accused and Pokot as the persons who had assaulted him. 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:

***“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.”***

60. In ***Philip Nzaka Watu vs Republic [2016] eKLR***, the Court of Appeal said 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.”**

61. In this case, four witnesses, that is, Andrew, Jacinta, Claris and Praxedes all testified that they each talked to the deceased before she died and the deceased responded to each that it was Ongoma also known as Isaiah, the accused herein who had ‘killed’ her. Both the accused and the deceased were well known to all the witnesses, they all had familial ties in one way or the other. Therefore, they were familiar with the accused and his name or identity. The incident happened during day time at about 4pm. Therefore, it was clear that the deceased was referring to the accused as the person who had assaulted her. The dying declaration having been consistently repeated to several witnesses, and it being clear that the accused was identified as the person who assaulted the deceased, it is my humble view that the dying declaration was sufficiently corroborated and was safe to rely upon. The death of the deceased was therefore proved beyond reasonable doubt to have occurred due to an unlawful act on the part of the accused herein and one Bernard Otieno Okello, his accomplice who was convicted in Kisumu HC CR Case No. 31 of 2012 with the murder of the same deceased and sentenced to death. The appeal by the said Bernard to the Court of Appeal vide CRA 205 OF 2014 was not successful as against conviction which was upheld.

62. The evidence adduced in Kisumu HC CR Case No 31 of 2012 which case file was produced before this court by the Deputy Registrar of the Court points to the accused herein and Bernard as the two people who attacked and unlawfully killed the deceased Mary Onyango Oluoch. The accused herein then went at large hence the delay in prosecuting him.

63. I have considered the accused person’s defence and submissions. I find the defence an afterthought and amounted to a mere denial. The submissions do not alter the watertight evidence adduced by prosecution witnesses in this case, as the accused in the company of Bernard the convicted murderer were seen in broad daylight, break into the deceased’s house and brutally attack her after assaulting her husband on the way.

64. On whether the unlawful killing of the deceased by the accused and his accomplice was with malice aforethought, from the evidence of the doctor who performed the post mortem examination, the deceased Mary Onyango Oluoch suffered several injuries caused by a blunt object as well as a sharp object. The injuries included a long stab wound below the chest, perforated intestines and a skull fracture across the head. It was the conclusion of the doctor that the cause of death was severe head injury due to trauma by a heavy bladed object. PW2, PW3 and PW6 all testified that the accused and his accomplice were armed with a panga nad jembe respectively. Section 206(b) of the Penal Code, states as follows:

**“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.”**

65. In **Daniel Muthee v Republic [2007] eKLR**, the Court of Appeal whilst addressing the issue of malice aforethought stated 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.”**

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

67. Accordingly, I find that the prosecution have proved beyond reasonable doubt that the accused herein **Isaiah Otieno Okwiri** and his accomplice convicted murderer Bernard Otieno Okello with malice aforethought, murdered the deceased Mary Onyango Oluoch. I find the Accused person herein guilty of murder as charged under section 203 of the Penal Code and convict him accordingly.

68. Sentence after mitigation, presentence report and victim impact statement.

69. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 30th Day of November, 2020**

**R.E.ABURILI**

**JUDGE**

In the presence of:

Mr Ochanyo Advocate holding brief for Mr Mirembe advocate

Accused in Prison remand with no internet connectivity to court

Mr Kubebea Prosecution Counsel Present

CA: Brenda