



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 9 OF 2019 [MURDER]

CORAM: HON. R.E.ABURILIJ

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK OWINO OTIENO.....ACCUSED

JUDGMENT

Introduction

1. The accused person herein **PATRICK OWINO OTIENO** stands 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 13/4/2019 in Gangu sub-location, South West Alego location, Siaya sub-county, Siaya County, jointly with others not before court murdered Jaconiah Onyango Oriedo.
2. He pleaded not guilty. The prosecution called eight witnesses in support of their case which is summarised herein below.

Prosecution Case

3. PW1 CAO, a minor ruled to be intelligent enough to tell the truth did not witness the deceased's passing. She testified that the deceased was her father and that on the 12/4/2019 at about 6.00 pm she was at home in the company of her grandmother and sister DSA. She further testified that she saw one Christine Ngesa who regularly visited and slept at her father's house as her mother had died.
4. The minor further testified that the following day at around 6am she heard calls from the aforementioned Christine who had spent the night at the deceased's house calling on her to aid in opening the door for her which she did. PW1 further testified that later on in the day she heard that someone had been killed and subsequently learnt that it was her father who had been killed. It was her testimony that she visited the crime scene and saw the deceased's body confirming that it was her father who had been killed. She further testified that she was well acquainted with the accused as he used to work with her father in building houses and further that the deceased regularly visited their home.
5. In cross-examination PW1 restated that the accused and her father worked together as masons and that she used to see him work with her father since she was in Class 4. She further stated that before he passed, the deceased had been arrested in April 2019 and taken to the police station and returned home after one day. She further stated that she knew Pius Otieno Magudho in whose compound the deceased's body was found.
6. She further testified that after she opened the door for Christine Ngesa, she went away and that she did not inquire where her father was. She further stated that she saw Christine after she heard that her father was dead and that she did not know if Christine was married elsewhere. She stated that Christine's home was some distance away from their home and that she had been coming to the deceased's house for some time and years having seen her there in 2018 and 2017. In re-examination she stated that she first saw Christine come to the deceased's house when she was in class five.
7. **PW2 Christine Ngesa Miyaga** testified that her and the deceased were lovers. She recalled that on the 13/4/2019 at 1.15 am she was in the deceased's house when she heard the accused, who she testified had been a friend to the deceased for over five years, call the deceased. She further testified that the deceased inquired from the accused as to whether he had "brought that thing," after which the deceased opened the door as she put on solar lamp while the accused entered the house carrying a phone in his hand.
8. She further testified that the deceased dressed up and left the house in the company of the accused and as she went to close the door she realised that they had locked the door from outside. PW2 further testified that she went back to sleep until 6am when she called PW1 to open the door for her. PW2 testified that at around 11.00 am the deceased's mother sent for her inquiring on the deceased's whereabouts to which she responded by stating that the deceased had gone out with Patrick aka Olindo, the accused herein.

9. She further testified that after a short while, the deceased's nephew, John, informed them that the deceased had been killed in a gruesome way. She testified that she went to the scene and noted that the deceased had been butchered at the neck (jaw), on the face, the head and had a fractured left hand. She testified that there was a metal bar at the scene where the deceased lay. PW2 further identified the accused in court and stated that he had worked with the deceased as a mason for 5 years. She stated that the two were just friends and that the accused knew her home as the deceased used to send him to her home.
10. In cross-examination PW2 stated that she was in the deceased's house on 12th April 2019 and that the deceased left the house with the accused at 1.00 am on 13th April 2019. She testified that the deceased was close to her, a harsh person in his reactions but not violent unless provoked. She testified that on the 10/4/2019 the deceased called her informing her that he had been arrested owing to his agreement with one Pius Otieno Magudho and was at Mweri Police Station. She further stated that prior to this arrest, Magudho's family sent the deceased a message threatening his life and that the deceased's body was eventually found in their property.
11. She further testified that the deceased was arrested on 9th April 2019 and arraigned on 10th April 2019 and given a bond of Kshs. 50,000/= but was to return to court on 18th April 2019 and hearing was to be on 23rd June 2019. She stated that the deceased disappeared on the night of 13th April 2019. It was her testimony that the accused came on the night of 13th April 2019 at about 1.15 am and she had never seen the deceased and the accused quarrel. She further stated that she knew Pius Magudho very well.
12. In re-examination, PW2 stated that on the material night she was in the deceased's house when the accused went for him. She stated that the accused was the last person to be seen with the deceased.
13. **PW3, Fredrick Omondi Odongo** also did not witness the incident and testified that on the 13/4/2019 at about 10.00 am, he was at the home of Jared Otieno milking cows when one Carolyn went and called him and informed him that someone had been killed at Magudho's home and that Consolata Awino the village elder was calling him. He testified that the deceased was his uncle and that the previous night he had left the deceased in his homestead.
14. He further testified that he followed Consolata Awino the village elder to the scene where he found that the deceased had been killed. He testified that the deceased's body had bad injuries including panga cuts on the head, (face). It was his testimony that the deceased was slaughtered like a chicken with his throat slit open and that he had many cuts on the head and was hit with an iron rod on the head, a rod which the deceased used in his masonry. PW3 testified that he called the deceased's brother in Nairobi and notified him of the death as he remained at the scene and waited for the police from Siaya Police Station who arrived and he accompanied them to Siaya mortuary. He further testified that he notified the police that Nyakango, PW2, had information on the deceased.
15. In cross-examination PW3 testified that on the 13th April 2019 he recorded his statement but it was not indicated that Nyakango informed him that she slept at the deceased's house. He further stated that in his additional statement he stated that the deceased had told him that he had received a message from Pius Otieno threatening his life. He stated that the number used was 079128902, a TELEKOM number which he gave to the police but he could not tell if the police used it. He testified that the deceased had a case with Pius Magudho. He further stated that he did not know what offence the deceased had committed leading to his being charged in court and released on bond.
16. **PW4 Consolata Awino Adanga** testified that she was the village elder from Uhanya. She testified that on the 13/4/2019 at 10.00 am she was in her home and heard from people passing by saying that someone was dead at Magudho's home. She testified that she proceeded to the scene where she saw the deceased's body lying down with deep cuts on the head, the jaw and face and hand. She testified that she then went to look for the village elder in that area. She testified that the Assistant Chief went to the scene and called the police and that she had left when the police arrived.
17. She testified that she went to the deceased's home where she found his elderly mother outside the house from whom she inquired of the deceased to which the deceased's mother sent John, the deceased's nephew whom PW4 directed to the scene of the crime only for John to return with confirmation that it was the deceased who had been killed. She further testified that the deceased's body was later taken by police and she recorded her statement at Siaya Police Station.
18. It was her testimony that she did not establish how the deceased was killed neither did she know who killed him and that later, she heard that Patrick Owino was arrested in connection with the murder. She further testified that she had known Patrick, the accused who hailed from Muriemo village in Gang Miriengo as he played football in nearby schools. In cross-examination she stated that the deceased's body was found in Magudho's home. She stated that she did not know when the accused was arrested.
19. **PW5 Ted Ochieng Oriedo**, a retired TELEKOM (K) worker testified that he retired in 2016. He further testified that on 13/4/2019 at 10.00am he was in Nairobi Huruma, Mathare constituency when he received a telephone call from Fredrick Omondi Ochieng Odongo who informed him that Jaconia his brother had been found murdered at Ulaga village near the home of Pius Otieno Magudho.
20. He further testified that he proceeded home the following week on 16/4/2019 in the evening and proceeded to the CID Siaya and went to Siaya Referral mortuary and made burial arrangements after the post-mortem. It was PW5's testimony that he identified the body of the deceased to the police and the Doctor who carried out an autopsy in the company of Fredrick his nephew. PW5 identified the post-mortem report dated 25/4/2019 for the deceased as MFI 1.
21. **PW6 Dr. Biko Opidi** a Medical Officer, Siaya County Referral Hospital testified that he had worked there for 4 years and as such he familiar with the signature and handwriting of Dr. Collins Oginga who carried out the post-mortem on the deceased but was no longer in the hospital.
22. Dr. Opidi testified that the post-mortem revealed that the deceased had a penetrating chest injury over the left chest just below the nipple

measuring 3 cm by 3 cm, that there was a fractured left elbow joint; deep cut wound on the neck running from below the left earlobe to the right earlobe. Internally, he testified that there was the left haemothorax – blood in the lungs and that the deceased had lost a lot of blood and thus generally appeared pale. He stated that all blood vessels on the neck were cut.

23. He further testified that there was a deep scalp wound on the deceased's forehead and right parietal area with degloring nature and exposing the skull and that there was also a linear skull fracture. Further, the Dr. testified that the post-mortem revealed that there was intra cerebral bleeding - over all parietal areas (brain cora).

24. It was his testimony that as a result of the examination, Dr. Oginga concluded that the cause of death was due to sudden cardiorespiratory collapse following severe bleeding from the neck vessels coupled with lung and brain injury following assault using heavy sharp objects. The Dr signed the autopsy form on 25/4/2019 and issued Death Certificate No. 0886848.

25. In cross-examination Dr. Opidi testified that the deceased's date and time of death was 13/4/2019 though the time was indicated as unknown. He further stated that the post-mortem was done 12 days after demise of the deceased. It was his testimony that the instruments used were sharp and that there were penetrating injuries caused by heavy sharp objects.

26. **PW7 No. 236785 Inspector Woman Martha Mecha** attached to Siaya Police Station HQs recalled being called upon by the Investigating Officer Sgt Mang'oli to conduct police identification parade for one Patrick Owino Otieno the accused herein on the 17/4/2019 at Siaya Police Station. She further testified that she went to the cells, took some men together with the suspect and as they were not enough, got some reportees to make a total of 9 men.

27. It was her testimony that she aligned 9 men in a single line with the suspect between No. 5 and 7 and inquired from the suspect as per the Regulations on identification parade, if he wished to change the position to which he responded that he was ok. She further stated that she inquired from the accused whether he would change his clothes but the accused refused the same but that the accused stated that the witness, Christine Ngesa, knew him and when the witness came, she identified him.

28. PW7 testified that the accused indicated that he was satisfied with the identification. In cross-examination, PW7 stated that she conducted the parade identification on 17/4/2019 and that she was not the Investigating Officer. It was her further testimony that the charge sheet showed the accused was arrested on 14/4/2019 and date of appearance in court was on 15/4/2019. She denied any knowledge on how the accused was arrested.

29. **PW8 No. 48210 Sgt Maurice Mang'oli** attached to DCI Kapsabet but previously of DCI Siaya was the Investigating Officer in the matter. He testified that on 13/4/2019 he was at the office when at 10.00 am, the former OCS Siaya Police Station told him to accompany him to the scene of murder. He stated that he accompanied him to the scene where they found the deceased having been slaughtered like an animal and lying in a pool of blood in the deserted home of the deceased Makunyo.

30. Sgt Mang'oli further testified that there was an iron bar besides the deceased and that blood was oozing from the neck and had sprinkled to the house as well and generally was all over the place. It was his testimony that the scene was photographed and body removed to Siaya mortuary awaiting post-mortem which was done after which witnesses recorded their statements and investigations commenced.

31. PW8 further testified that he learnt from one of the witnesses in the case that the accused person went to the deceased's home at around 1.00am while the deceased was sleeping with his woman friend, entered the house and waited for the deceased to wear his clothes and they both left but that the deceased never returned and at 9.00am the deceased was found murdered.

32. He further testified that on the 14/4/2019, he summoned the accused person to the station, interrogated him on where he had gone with the deceased but the accused did not reveal anything relating to the death of the deceased. He further stated that he treated the accused as a suspect and had him charged because he was the last person seen with the deceased. Sgt Mang'oli identified the accused in court and further produced the iron bar found at the scene as PEx. No. 3. He further stated that he then arranged for the identification parade which was conducted and the accused was positively identified by a witness.

33. In cross-examination Sgt Mang'oli stated that he was called by OCS on 13/4/2019 at about 10.00am and that he recorded the statement of PW3 Fredrick who said the deceased had been threatened through a phone call and he gave the OB Number 35/25/2019 and a telephone No. 0779128902. It was his testimony that he investigated the threat, called the owner of the telephone number one Rosemary Ochieng Okanga who was not a witness in the current case.

34. He further stated that he did not know if the deceased and accused had any case pending in court and that he learnt that the accused and deceased worked together and were friends. It was his testimony that the incident occurred on the night of 12th and 13th April 2019 and according to witnesses, the accused was in the deceased's house on the night of 12th and 13th April 2019.

35. In re-examination, Sgt Mang'oli stated that when he called Rosemary, she informed him that she had lost her phone and her line and he recorded her statement. He further restated that the death of the deceased was on the night of 12th and 13th April 2019. Upon questioning by court, Sgt Mang'oli stated that he arrested the accused because he was the last person seen with the deceased and that the incident occurred on 13/4/2019.

Defence Case

36. Placed on his defence, the accused gave a sworn testimony in which he said that he knew the deceased as they had been friends since his Class 4 at Gangu Primary School in the 1980s while the deceased schooled at Nyakado Primary SCHOOL. It was his testimony that after class eight he and the deceased did construction jobs together and remained friends with the deceased until his passing. He further stated that

the deceased separated with his wife Nyakano and that his second wife Nyaganga died 10 years earlier and the deceased never re-married.

37. It was his testimony that on the 12/4/2019 he was at home with his family from morning hours up-to 7 pm when he left home for Siaya to attend his uncle's, Jalang'o's funeral. He testified that he was in the company of his grandfather, grandmother, uncles, friends and many other people. He further testified that among the people he met at the funeral was Martin Ochieng Osodo who he met at around 8.30 pm. The accused further stated that he was given the work of supervising grave diggers and that Martin Ochieng was also among about 20 people digging the grave.

38. The accused further testified that the grave was dug until around 5.30 am on 13/4/2019 and that he left the funeral place at about 8.30 a.m. for his home for a change of clothing and returned after an hour. It was his testimony that during the funeral gathering the chief stood up and announced that the deceased had been found dead and on learning this he took a motorbike and went to the scene where he found the deceased lying dead.

39. The accused further stated that after sometime they returned to the funeral place to bury his late uncle and the following day which was a Sunday he woke up, bathed and went to the deceased's home. It was his testimony that on his way he received a strange call from someone who told him that he was DCIO Siaya and directed him to go to the police station at Siaya which he did.

40. It was his testimony that the DCIO inquired from him as to what had happened to the deceased and when he failed to explain the same he was arrested and placed in cells and taken to court the following day a Monday. The accused denied killing the deceased as he had no intention or reason to kill him. He stated that when he went to the scene where the deceased's body lay, he saw leaves beside his body and a metal bar which the deceased used at work.

41. The accused acknowledged that he knew Christine Ngesa and he denied that he went and picked the deceased on the material night as narrate by Ngesa. He reiterated that he was at his uncle's funeral that night and had 2 witnesses who were with him on the said night.

42. In cross-examination the accused stated that the 12th - 13th night of April 2019 he was not at his home as he was attending to his uncle's funeral from 8.00 pm until the following day – morning at 8.00 pm at a place that about 1½ km apart from the scene of crime. The accused further stated that though the deceased had never re-married he knew the deceased had another married lady who was his friend one Christine Ngesa Mianga who knew him as the deceased's close friend.

43. The accused denied that he went to the deceased's house on the material night and that did he ask to be opened for the door or that he left with the deceased. It was his testimony that on the material night he could not move away from his deceased uncle's home because he was supervising digging of his grave. He further stated that during his working life with the deceased they never fought. He further stated that Christine Ngesa was not his friend but an enemy because she was a wife to his stepfather and that she had refused to leave the deceased despite his encouragement. He further stated that the deceased had chased Christine away but she would return.

44. The accused denied any plans to eliminate either the deceased or Christine or picking up the deceased on the material night. He stated that the metal bar being used by the deceased to work was found where he lay dead and not at his home and that he could not tell how the metal bar reached the scene. He stated that he identified it because they jointly used it for digging holes when building and that he never used to carry it to his home. He stated that he had his own working tools. It was the accused's testimony that prior to the death of deceased, he had worked with him for one week and he had seen him leave with his metal rod to his home.

45. In re-examination the accused stated that Christine Ngesa was somebody's wife specifically one Mr. Owaro Osodo. He stated that he spoke to the deceased about his relation with Christine Ngesa but they never became enemies. The accused denied taking the deceased from his home or killing him. He stated that he could have killed Christine but he could not do so because he was a Christian.

46. **DW2 Martine Ochieng Osodo** testified that on the 12th April 2019 he was at his home from 7 pm to 9 pm then left for the funeral of Lang'o at Gagu sub-location. He testified that he saw Patrick, the accused and sat with him from 9.30 pm as they dug the grave for the deceased. It was his testimony that he stayed with the accused until around 5.30 am when the accused who was their supervisor took them to take tea at the catering place after which he proceeded home.

47. DW2 further stated that he knew Christine Ngesa who was the deceased's mistress and that she had her own husband in the village one Osodo Owaro who had issues with the deceased and the matter had reached the police. He stated that the case involved the deceased burning a house for the son to Christine and the son of Christine also burnt the deceased's house.

48. In cross-examination DW2 stated that Lang'o was being buried at Miriengo village a place that was about 1-2 kilometres away from the deceased's home and that one could go to the deceased's home and return. He further testified that the accused and Christine Ngesa were related as she was his stepmother.

49. He further testified that the deceased burnt Ouma's house and that Ouma was Christine Ngesa's and Osodo Owaga's son. He testified that he was with the accused on 12/4/2019 from 9.30 pm till 5.30 a.m. as well as Oluoch Osodo and many other mourners including Ochieng Jakoyo, Eddy Ochieng, George Obiri, Jacob among others and that they only planned on how to dig the grave.

50. He further testified that he did not know who went to call out the deceased from his house but admitted that one could leave and come back. He further stated that he only saw the accused go to the kitchen. He admitted to knowledge of the disagreement between Osodo and the deceased and further stated that the deceased had seduced Osodo's wife which did not please the villagers.

51. DW3 George Otieno, a driver on the Siaya - Kisumu route testified to knowing the accused and stated that on the 12/4/2019 Jakoyo had died in their area and he was at the funeral. He testified that he left his home at 9.30 pm after listening to news and that while at the funeral he was one of the grave diggers. He stated that he was with the accused and left at about 3.00 a.m. He further stated that he did not know the

deceased but heard that he was killed. He stated that he never saw the accused after he left the funeral place at 3.00 a.m. but saw him at the funeral.

52. In cross-examination DW3 stated that the accused was his village mate and that he met him at the funeral at around 9.30 - 10.00 p.m. where the accused supervised grave diggers and as such he saw the accused throughout but never followed him every moment. He further stated that the accused used to bring jembes and drinks for the grave diggers and that he could leave alone and return. It was his testimony that he left at 3.00 am. and could not tell what could have happened after he had left.

Defence Submissions

53. It was submitted on behalf of the accused that PW2 did not see the accused kill the deceased and that she was the last person to have been with the deceased and further to this that she did not mention any identification parade which was conducted by PW7 the police officer which in any case would have been meaningless since she had known the accused for the past 5 years.

54. It was further submitted that the investigating officer did not carry out any investigations pertaining to the threats received by the deceased nor did he bother to investigate the relationship between PW2 who was lawfully married to someone else. It was further submitted that the accused had no motive to kill the deceased as they had been friends since childhood and also worked together and only learnt of the deceased's passing after the event.

Analysis of the Law

55. 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."

56. The fact and the cause of death of the deceased was proved beyond reasonable doubt by the evidence of PW1,2,3 and 4 all who testified that they visited the crime scene and saw the deceased's body. Further to this PW5 testified that he identified the deceased's body prior to post-mortem being carried out while PW8, Sgt Mang'oli, the investigations officer also testified that he went to the crime scene and saw the deceased's body prior to the body being moved to the mortuary.

57. 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. There was no eye witness called by the prosecution to the alleged murder of the deceased. 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."

58. 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.

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

60. In this case, none of the prosecution witnesses witnessed the attack on the deceased. PW2, who was a mistress to the deceased testified that she was with the deceased on the night of 13/4/2019 when sometime about 1pm, the accused went to the deceased's house and called out the deceased and that the two left her after which she realized that they had locked her inside the house from outside and as such in the morning she had to call on PW1, the deceased's daughter to come and open the door for her. PW1, the deceased's daughter corroborated PW2's testimony to the effect that she heard her call out and opened the locked door for her.

61. In his defence, the accused stated that on the alleged night of the incidence he was at a funeral where he supervised grave digging. He called two witnesses who were grave diggers and who corroborated the fact that he was at the funeral. However, DW2, testified that the funeral was 1-2 kilometres away from the deceased's home and that one could leave the burial site and proceed to the deceased's home and come back. He further testified that he only saw the accused go to the kitchen. On his part DW3 testified that he only saw the accused between 9.30 – 10.00pm. He also testified that the accused occasionally left the funeral site alone.

62. I find the prosecution evidence as told by PW2 that the accused went to the house of the deceased on the night of 13th April 2019 and that the two left together more convincing than the defense given by the accused. The reason for this is because though both DW1 and DW2 both place the accused at the funeral earlier on the alleged night, none of them can account for his whereabouts later in the night when the alleged crime occurred. In fact, DW3 testified that the accused could leave the funeral site alone only to return later. Conversely, PW1, a minor, was firm in her testimony that she was the one who opened the door for PW2 to leave her father's house after she found her locked in. This perfectly corroborated PW2's testimony that the accused visited the deceased the previous night and left with the deceased and that they locked the door from outside. The accused was well known to PW1 and as such the issue of the deceased's identification does not arise.

63. Having arrived at the conclusion above, it is thus evident that the accused was the last person to be seen with the deceased prior to the deceased being found dead. His denial that he went to the deceased's house at about 1.00 am and left with the deceased is a mere denial and I find no reason why PW2 would frame the accused. In my humble view, the prosecution's evidence places upon the accused a statutory burden to discharge a rebuttable presumption that having been the last person to depart with the deceased before the deceased was found dead, he should explain how he parted with the deceased. The statutory rebuttable presumption is spelt out under **Sections 111(1) and 119** of the **Evidence Act**. These 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.”

64. Having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the accused has a duty to give an explanation of how the deceased met his death, or alternatively how they parted company.

65. Regarding the doctrine of “last seen with deceased” I will quote from the case **of Republic v E K K [2018] eKLR** in which Lesiit J discussed it as follows:

“In a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

44. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General of the Federation (2010) I LAW/CA/A/86/C/2009 opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

45. Quoting from the Indian jurisdiction, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:

“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

66. In the instant case, I find that the prosecution has adduced evidence which establishes that the deceased was last seen alive in the company of the accused. As discussed herein above, that was in the evidence of PW2. Her evidence was corroborated by PW1. Albeit the prosecution did not investigate the allegation that the deceased could have been killed by his rival the uncle of the accused who was the husband of PW2 or that the deceased had a case with the persons in whose home the deceased was found dead, the evidence linking the accused to the death of the deceased was overwhelming. I am convinced beyond reasonable doubt that all the circumstantial evidence points to the accused and that it satisfies the principles of circumstantial evidence as set out in numerous authorities including the case of **R. v. Kipkerig Arap Koske & Another [1949] 16 EACA 135**, in which the court of appeal for Eastern Africa had this to say:

“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

67. Evidence of the surrounding circumstances to a crime is said to be the best evidence. Locally courts have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** thus:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”

68. Having considered entire evidence in this case I am satisfied that the circumstances of this case points irresistibly towards the accused person to the exclusion of any other person as the principal offender in the deceased’s death. He was last person with the deceased before he was found dead yet the accused vehemently denies meeting the deceased. I am fully persuaded beyond reasonable doubt that the accused herein was fully involved in the deceased’s death as a principal offender.

69. The next issue to establish is whether the perpetrator had malice aforethought: Malice aforethought is defined under section 206 of the Penal Code. Under section 206 it shall be deemed to be established by evidence proving any one or more of the following circumstances:

“a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.”

70. 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) malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case at the trial.

71. The courts in interpreting the provisions of section 206 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**. 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.

72. In the case of **Nzuki v Republic [1993] KLR 191** where the court stated as follows:

“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).”

73. From the evidence of the doctor who performed the post mortem examination, the deceased death was a result of sudden cardiorespiratory collapse following severe bleeding from the neck vessels coupled with lung and brain injury following assault using heavy sharp objects. PW1,2,3,4 and 8 all testified to the gruesome nature of the injuries sustained by the deceased when they viewed his body at the scene of the crime. In the instant case the natural inference is that the offender intended to kill the deceased or inflict grievous harm to the deceased. There is no evidence involving intoxication or plea of insanity on the part of the perpetrator that could have impaired his judgement.

74. My considered view on analysing the evidence is that the offender intended all these acts leading to the grievous harm and subsequent of the deceased death from the injuries inflicted. I am satisfied that malice aforethought under section 206 (a) and (b) of the Penal Code has been established beyond reasonable doubt. A manifestation of an intention to cause death or serious grievous harm can correctly be inferred in this case involving the accused.

75. I find the accused person herein **PATRICK OWINO OTIENO** unlawfully killed the deceased with malice aforethought. I find him guilty of the offence of murder as charged under section 203 of the Penal Code. I convict him accordingly. Sentence shall be passed after mitigation, victim impact statement and the presentence report to be filed by the Probation Officer Siaya County.

Dated, signed and Delivered in open court at Siaya this 24th Day of November, 2020

R.E. ABURILI

JUDGE

In the presence of:

Mr Ngetich, Prosecution Counsel for the State

Mr Okanda Advocate h/b for Mr Ochieng Ochieng Advocate for the Accused

Accused present in court on bond

CA: Brenda and Modestar