



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 24 OF 2017[MURDER]

CORAM: R.E.ABURILI J

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS NYAKWAKA.....1ST ACCUSED

KOYO OBUCHI.....2ND ACCUSED

JUDGMENT

Introduction

1. The two accused persons herein **JULIUS NYAKWAKA and KOYO OBUCHI** are jointly 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 22nd Day of September, 2017 at about 7.30am or thereabouts at Bondo Nyakasumbi village within Siaya County, they jointly murdered one **DISMAS WANJALA JUMA**.
2. The accused persons pleaded not guilty to the Information and the prosecution called eight witnesses in support of their case which is summarised herein below. Placed on their defence, the accused persons denied committing the offence of murder.

Prosecution Case

3. **PW1 Cecilia Ameyo Khisa**, the deceased's widow testified that on the 22/9/2017 at or about 7.30 am while at her house in Bondo Nyakasumbi together with her husband, the deceased, Dismas Wanjala Juma who was a mason and preparing to go and work, she heard the sound of motorcycles from outside and on checking, she saw 2 people alight from a motorcycle, one armed with a panga and another with a club.
4. It was her testimony that she returned into the house and the said two individuals followed her and started struggling with and pulling her husband from the house as the deceased resisted. She testified that the two individuals took her husband outside the house and as he escaped, they chased him towards the road towards Bondo and she followed them. PW1 testified that her husband ran but that he fell down and that was when the two individuals caught up with him, held him and started assaulting him, with one of the attackers cut him using a panga while the other used a club to hit him on the head after which they boarded a motorcycle and left. PW1 stated that from her house to the road where her husband was hit it was a distance of about 20 metres.
5. PW1 further testified that she immediately boarded a motorcycle to Bondo Police Station where she reported the incident after which the police went to the scene and collected her husband and took him to Bondo District hospital then they went for her and took her to the hospital where they did not find doctors and subsequently took her husband to Owen's Private Hospital where he was treated but unfortunately died at about 10.00am. The police then took the deceased's body to the morgue and she then called and notified her father in-law of what had transpired.
6. PW1 testified that she then went to Bondo police station and the police took her back to the scene where the deceased had been assaulted. She testified that she had not known the deceased's assailants before but that she identified them. She further stated that she was able to see how the two people were dressed adding that one of them was dressed in a green jersey but that she could not recall how the other person was dressed. She further stated that she saw several cuts on both sides of the deceased's head, the hand and leg.
7. It was PW1's further testimony that only 2 people killed her husband. She further testified that she witnessed the deceased's post-mortem after which the family was given the deceased's body for burial. PW1 identified the deceased's assailants as the accused persons in the dock stating that the first accused whom she pointed out to the court had a panga and stated that she saw him cut her husband while the second accused had a rungu which he used to hit her husband. She further stated that she saw the accused persons as they went into the house and

pulled her husband, when they alighted on the motor cycle and as they assaulted her husband. She stated that she was the deceased's only wife having been married to him for 7 years and were blessed with 3 children aged between 7 years and one year.

8. In cross-examination, PW1 stated that she had seen the accused persons three times, at the scene and twice in court. She stated that she was never called to the police station to identify the accused persons. PW1 was firm that she saw the two accused persons assault her husband and that the first accused was dressed in a green jersey which information she gave to the police when she made her report.

9. She further stated that after assaulting her husband, the accused persons boarded the same motorcycle they had arrived on and left. It was her testimony that the motor cycle rider was standing waiting for the accused persons to finish the assault after which they boarded it and left. She stated that she told the police what she saw and that she recorded her statements in Kiswahili.

10. In re-examination, PW1 stated that she told the police how one of the accused was dressed in a green jersey and maroon trouser and further that the motorcycle rider was the one who carried the two accused persons.

11. **PW2 Werangai Wawire Kwanda**, the deceased's father testified that on the 23/9/2017 he was at his home when he received information from PW1, his daughter in law, that his son Dismas Wanjala Juma had been killed by people in Bondo. He further testified that he went to Bondo and that he and PW1 were taken to the mortuary where he identified the deceased's body to the doctor who carried out the post-mortem on the deceased's body. PW2 testified that the deceased's body was cut all over, on the head, legs, hand and private parts. It was his testimony that he recorded his statement after which they were given the deceased's body for burial at home. He further testified that the deceased was his first born son who had lived together with PW1 for about 8 years. He stated that PW1 was the only wife to the deceased.

12. **PW3 John Odhiambo** testified that on the 20/9/2017 he was in his homestead with the deceased who was his worker at a hostel that he owned and that the deceased was helping him dig holes. It was his testimony that at about 10.00am he saw two people chasing each other and on checking he saw a girl being chased and as he moved nearer and asked them what was happening, they told him that the deceased had kept their wife in his house.

13. He further testified that at 2.00pm on the same day, the said 2 people went to his house and told him that unless he sent away the deceased, they were going to kill him. It was his testimony that he knew the 2 young men. He stated that he had known one of them for 2 weeks as he used to bring PW3 bricks but that he had not known the other prior to that day of 20/9/2017. He testified that when the two young men went to his home, they sat with him under his tree for about 20 minutes and so he was able to see them well as they spoke one on one.

14. PW3 testified that the following day which was on 21/9/2019, his sister in law Grace Onyango went and told him that the two people who had visited PW3 the previous day were saying that they would return at night to burn his houses because he was keeping the deceased. He testified that he reported the same to Bondo Police Station and was given a phone number to contact in case of anything after which he retired home at 7.30 p.m. and alerted the deceased on what he had heard.

15. It was PW3's testimony that the following which was on 22/9/2017 at about 6.30 am, he heard screams from outside the house of the deceased and that the deceased was screaming saying **"mzee kuja unisaidie, wananimaliza mzee"** translated as **old man come and help me, they are finishing me**. PW3 testified that he checked through his window and saw 2 people chasing the deceased with one wielding a panga to cut the deceased. He testified that this was very close to his house. He testified that he saw the man who used to bring him bricks also chasing the deceased. He further testified that he knew the wife of the deceased, PW1, who was following the deceased as the deceased ran screaming asking for help while being chased by the two young men.

16. PW3 identified the two young men whom he saw chasing the deceased on the morning of 22/9/2017 as the two accused persons in the dock. It was his testimony that the first accused person had worked for him before therefore PW3 knew him before 20/9/2017 when he went to the home of PW3 and spoke to PW3 concerning the deceased whereas the second accused had accompanied the 1st accused when they went to warn PW3 of his worker, the deceased of the consequences of having an affair with the wife of the first accused. PW3 further stated that the first accused was carrying a panga and lifting it up and when he saw the first accused after the deceased was injured, they (two accused persons) were on a motor cycle and were going away (escaping) from the scene.

17. It was PW3's further testimony that the crime scene was in front of his gate about 50 metres away and that he got out of the house and went to the place where the deceased was and found him with cuts. He stated that the two accused persons and a motorcycle rider were on the motorcycle and were escaping from the scene of crime. He testified that he later recorded his statement at Bondo Police Station.

18. In cross-examination, PW3 stated that as he got out of his house he saw the 2 accused persons leaving the scene on a motorcycle. He reiterated that he knew the first accused person who had previously done some work for him specifically being that he had taken some bricks to PW3's house. PW3 testified that he did not mention to the police immediately the identity of the 1st accused and further that he was not asked by the police to inform them whether the accused person had gone to his house on the previous date.

19. PW3 further stated that he saw the 2nd accused person when went to PW's house in the company of the 1st accused person previously. He further stated that the lady who was being chased was staying in the deceased's house when the deceased's wife was present. PW3 further stated that when the 2 accused persons went to PW3's house threatening the deceased, the 2nd accused carried something like a sword. He stated that he did not give the police the description of the 2nd accused person.

20. In re-examination, PW3 stated that he only realized that a lady was in the deceased's house when he saw her being chased. He further stated that when the accused persons went to his house, the 2nd accused was carrying a sword. He further stated that he saw the 2 accused persons on 21st and 22nd September 2017 as they demanded that he evicts the deceased from his plot.

21. **PW4 No. 43449 PC Omulo Okwako** formerly stationed at Bondo Police Station and currently stationed at Malaba Police Station testified that he was in Bondo from January 2013- August 2018. It was his testimony that on 22/9/2017 at about 10.00am he was at Bondo Police Station Crime Branch Office when he was called by Mr. Kiarie the then OCPD Bondo to accompany him to the scene of crime at Ndori Trading Centre where one of the suspects was allegedly seen escaping towards Kisumu direction. He testified that he got into the station's motor vehicle and as they left the police station towards Ndori market along Kisumu- Bondo road, the OCPD gave him further information that they were looking for a murder suspect who had escaped from the scene of crime at Bondo.

22. It was PW4's testimony that after passing Gobei trading centre before reaching Ajigo market, he saw a person walking along the road towards Kisumu direction wearing clothes whose description he had been given being blue jeans and a stripped green t-shirt with yellow stripes. He testified that he alerted the OCPD and alerted the driver to stop but before the driver stopped the vehicle, the suspect started running away into the bushes and maize plantation forcing PW4 to jump out of the police vehicle and chase the suspect while raising an alarm. He testified that he even fired 3 rounds of ammunition to scare him off.

23. It was PW4's testimony that with the help of members of the public, he managed to arrest the suspect and took him to the highway where they had packed the vehicle as he had chased the suspect for about 1 kilometer from the main road. He stated that on reaching where the vehicle was, a group of about 10 police officers arrived with the 1st accused person who had already been arrested and they then drove back to Bondo police station where the 2 accused persons were booked and placed in the cells by the investigating officer in this matter.

24. PC Okwako identified the person he arrested as the 2nd accused in the dock and also identified the clothes which the 2nd accused is said to have been wearing on the material day. He stated that he had not known the 1st accused prior to that date. He further testified that he learnt that a murder report had been made to the police station at about 7.30 am that very day.

25. In cross-examination, he stated that he went to look for the person whose mode of dress was given to him by the OCPD. He further stated that there were several police officers on the same mission. It was his testimony that they were directed to the sites by criminal intelligence officer.

26. **PW5 Dr. Thedeus Owiti** a Senior Medical Officer at Ndiwa Hospital in Homabay County testified that he had carried out an autopsy on the body of Dismas Wanjala Juma on 25/9/2017 at Owens Maternity Nursing Home. It was his testimony that the body was identified to him by Werangai Wawire Kwanda of ID/No.4382887.

27. He further testified that rigor mortis had set in on the deceased's body and that externally there were obvious injuries on the body, listed as follows:

1. A deep cut wound on the frontal region of the head with underlying fracture of the skull with linear fracture edges of 7"x1x2 cm.
2. Deep cut wound on the occipital (back of head) with linear fractures of the skull measuring 5x6x2cm and
3. Deep cut wound on right parietal region with fracture of the skull measuring 7x1x2 cm with linear edges.

28. It was Dr. Owiti's testimony that the deceased's head had a massive subdural hematoma with **associated** head (skull fracture in 1, 2, and 3 above and that the brain tissue had similar cut wounds commensurate with the deep cuts on the skull. He noted that the upper limb had a cut wound on the right wrist joint disarticulating the wrist and that the deceased also had a cut wound on the posterior aspect of the right forearm with linear fractures on the epilateral ulna and radius. He further noted that the deceased's right tricep muscles were degloved. It was his testimony that the deceased's lower limbs had a deep cut wound on the lateral aspect of the right thigh measuring 5x1x3 cm. The Doctor formed the opinion that the immediate cause of death was subdural hemorrhage caused by deep cut wounds on the head. He concluded that the underlying cause of death being assault on the head with a sharp object identified as a panga. Specimens were collected for further forensic examination. He issued a Death Certificate No. 0893451 and produced the deceased's post-mortem as P -Exhibit. 1.

29. In cross-examination, Dr. Owiti reiterated that he examined the deceased's body on 25/9/2017 and further that the deceased must have died less than 24 hours prior to the autopsy.

30. **PW6 Dalmas Kibet Kisang**, a Government Analyst based at Kisumu Government Chemist testified and produced a Government chemist analyst report dated 24/7/2018 regarding a request by PC Shadrack Mwandwa of DCI Bondo requesting for examination of exhibits A and B and whether there was any genetic relationship between them. It was his testimony that Exhibit A was a blood stained green jumper whereas Exhibit B was blood from the deceased Dismas Wanjala.

31. He testified that they tabulated the generated DNA profiles for blood seen on the green jumper and on blood of the deceased and concluded that the DNA profile generated by the blood stains from the green jumper matched the DNA profile of the deceased Dismas Wanjala. He signed the report on 24/7/2018 which report he produced as an exhibit in court.

32. In cross-examination PW6 stated that upon receipt of exhibits they do preservation and proper storage and that there was no way any other blood could have mixed with exhibits submitted to them. It was his testimony that they cut the blood stained spot on the jumper and preserved the same for examination. In re-examination, he reiterated that they do proper storage of exhibits to avoid contamination from other exhibits.

33. **PW7 Samuel Odhiambo** Owuor a motorcycle rider from Bondo, Nyawita Sub Location who rides from Nyakasumbi stage testified that on 22/9/2017 at about 7.00am he was at the stage of Sinapanga junction in the company of 5 other riders waiting for customers when one Gina Otis passed the stage carrying 2 customers, one of whom was known as 'Omwami' - Julius but the other was unknown to him.

34. He testified that 'Omwami' called PW7 and said "Kevo, tumeshamaliza hiyo kazi" in Kiswahili translated as "Kevo, we have finished that job" and upon inquiry, 'Omwami' further told him that "tumeuua" translated as **we have killed**. PW7 testified that when he asked Omwami "wapi"- where, 'Omwami' showed him behind him.

35. It was PW7's testimony that he then looked and saw a group of people gathered then he proceeded to the scene where he saw a person lying motionless on the ground in a pool of blood with bad cuts on his head and hand. He stated that he later learnt that the person whom he had seen injured had died.

36. PW7 testified that a police land cruiser left the scene with the injured person followed by many motorcyclists who were saying they were waiting for Otis who had carried the murderers, the people who had killed the deceased. He testified that Otis was later arrested by his fellow motorcyclists and taken to Bondo Police Station. It was his testimony that Otis carried 'Omwami' Julius who had spoken to PW7 and told PW7 that 'they' had finished the job. PW7 further identified '**Omwami**' as the 1st accused Julius Nyakwaka but he could not identify the person who sat with Julius on the motorcycle as PW7 could not see the person's face. In cross-examination, he stated that they found the injured person on the road.

37. **PW8 No. 50823 CPL Suleiman Opondo** testified that he was not in Bondo when the incident occurred but that his colleague No. 85809 PC Shadrack Mwendwa, who was indisposed, investigated the case and was subsequently transferred to Naivasha. It was his testimony that the investigating officer, on the 22/9/2017, while in the office received a report from the OCS Bondo Police Station of a Murder in Nyakasumbi village within Bondo Township and that he and other police officers went to the scene and found the body of one Dismas Wanjala Juma.

38. He further testified that while at the scene, the investigating officer and his colleagues were informed of the presence of Julius Nyakwaka who was arrested and acting on information, they found the 2nd suspect Koyo Obuchi at Anjiko market and arrested him after which both were escorted to Bondo Police Station. It was his testimony that during investigations the first Accused led the police officers to a place where the panga believed to be a Murder weapon was recovered in a bush as well as clothing believed to be the 1st accused person's which were taken to the Government Analysis Kisumu. He produced both the panga and the clothing as exhibits.

39. In cross-examination, PW8 testified that the 2nd accused was arrested on his way to Kisumu at Anjiko market. He further testified that there was no identification parade done in respect of the 2nd accused and further that he was not aware that the 2nd accused was not known to the witness. In re-examination, it was his testimony that from the statement of PC Mwendwa, exhibit 5 & 7 were recovered from the 1st accused and did not belong to the 2nd accused as he had erroneously stated.

Defence Case

40. Placed on their defence the 1st accused gave sworn testimony stating that he came to learn that the deceased had an intimate relation with his wife. It was his testimony that on the 25/7/2017 she informed him that she wanted to visit her parents and that she left home on the 27/7/2017 saying she was visiting her parents but that she never informed him of her arrival at her parents' home.

41. It was his testimony that on the 29/7/2017 upon arriving at Sinapanga, he received a call from his workmate alias '**Moi**' who wanted to borrow a sledge hammer from him as he had seen the 1st accused person's wife washing clothes and hanging them on a line somewhere. The first accused testified that he proceeded to Nyakasumbi where on arrival he found his wife washing clothes and on her seeing him, got shocked, threw the clothes and entered the house on the plot. He testified that he knew the owner of the Plot as he had made bricks for him before and together they entered the house where they found the deceased and the 1st accused's wife where they spoke and he left with his wife.

42. He further testified that on the 22/9/2017, he left for work at 7 am and on arrival he received a call from the deceased's landlord, PW3, informing him to proceed to the plot where the deceased resided, which he did and on arrival, he found his wife lighting a jiko. It was his testimony that the deceased got out of the house wielding a panga saying, "**Julius toka toka hapa, Leo utajua Mimi ni mwanaume kama wewe.**" He stated that he ran around the plot as the deceased wanted to cut him with a panga and that he then picked a root of a tree which he used to hit the deceased with, prompting the deceased to drop the panga which they both struggled to get, with him overpowering the deceased and cutting the deceased because he was angry.

43. It was his testimony that he never went to the deceased's house on a motorcycle but on foot and further that he did not plan to kill the deceased as he would have killed him when he found him with his wife. In cross-examination, the 1st accused reiterated his testimony in chief and further stated that there were no witnesses to the incident except PW3 who had called him and informed him that his wife had gone to the deceased's house again. The 1st accused further denied knowing the 2nd accused and stated that he only met him in court.

44. The 2nd accused in his defence gave sworn testimony and denied the charges brought against him. He stated that on the material date he was at his place of work, a construction site, when his boss told him to go out of the home to the road to wait for people delivering materials which he did. It was his testimony that at about 9am a police vehicle came and the officers inquired from him as to what he was doing and for his identity card and where he came from upon which he was taken into custody and he was charged with the offence. He also denied knowing the 1st accused or any witness. In cross-examination he reiterated that he had never met the 1st accused prior to being charged in court. He further stated that he would not call his boss whom he named as Bob Atiang in court as a witness.

Analysis and determination

45. I have considered the evidence adduced by all the prosecution witnesses and the defence. The main issue for determination in this murder trial is whether the prosecution have proved the charge of murder against the two accused persons beyond reasonable doubt.

46. Section 203 of the Penal Code provides thus:

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

47. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These elements are:

- a) The fact of the death of the deceased
- b) The cause of such death.
- c) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person (s), and lastly
- d) Proof that the said unlawful act or omission was committed with malice aforethought.

48. **On the fact of the death of the deceased DISMAS WANJALA JUMA**, there is no doubt. PW1, the deceased’s wife who witnessed the incident testified that she saw the deceased being assaulted by two people on the material morning and she ran and reported the incident to Bondo Police Station. The police went to the scene and took the deceased to Bondo Hospital and subsequently transferred him to Owens Private Hospital where despite treatment, the deceased succumbed to his injuries. PW2, Werangai Wawire Kwanda, the deceased’s father testified that he received a report of the deceased’s passing on the 23/9/2017 from PW1, the deceased wife and further that he identified the deceased’s body to the doctor who performed a post-mortem. PW5, Dr. Owiti also produced a post mortem report as an exhibit certifying death of the deceased. Therefore, on the fact of death of the deceased **Dismas Wanjala Juma**, I entertain no doubt whatsoever that there is proof of death of the deceased beyond reasonable doubt.

49. **On the deceased’s cause of death**, PW5 Dr. Owiti in his examination of the deceased’s body noted that the deceased had deep cuts to the front and back of the head all leading to fractures on the skull as well as deep cut wounds on the right wrist joint, right tricep muscle and lower limb all which led him conclude that the deceased died as a result of subdural haemorrhage caused by cut wounds to the head.

50. **On whether the death of the deceased was caused by an unlawful act or omission**, PW1 saw the deceased being assaulted using a panga and a club and there is no doubt that from the post-mortem results of several cut wounds on the body of the deceased, the deceased was unlawfully killed.

51. **On whether the unlawful killing of the deceased was caused by the two accused persons herein**, PW1 testified that on the material morning of 22nd September 2017 at about 7.30 am she heard sound of a motorcycle two people alighted and got into her house whilst armed with a panga and club respectively, pulled the deceased out and as he ran out, they ran after him. He fell and the 1st accused person cut him with a panga while the second accused hit him using a club after which they left on a motorcycle whose rider was waiting for the killers to finish their job. She identified the two accused persons in the dock as the people she saw that morning as they struggled with her husband and they ran after him.

52. PW3 who had previously been visited by the two accused persons on 20th and 21st September 2017 when the duo went to his homestead to warn him to fire the deceased or the deceased would be killed testified that on the material date at around 6.30am he heard screams from outside his house, of the deceased screaming saying “*mzee kuja unisaidie, wananimaliza mzee*” translated as old man come and help me, they are finishing me. It was his testimony that the crime scene was in front of his gate and that he got out of the house and went to the place where the deceased was and found him with cuts. He stated that he saw the two accused persons and a motorcycle rider and they all escaped from the scene of crime. This witness was emphatic that the two accused persons had visited his house on two occasions previously and demanded that he sacks the deceased or they kill the deceased. He stated that he knew the 1st accused prior to being visited on the two occasions as he had taken to him bricks and that during the visit by the two, he spent time with them hence he came to know and recognized the second accused very well.

53. PW7 Samuel Odhiambo Owuor testified that on the material date at around 7am, one Gina Otis a motorcycle rider passed the stage carrying 2 customers, one of whom was the 1st accused who called PW7 and said “*Kevo, tumeshamaliza hiyo kazi*” in Kiswahili translated as “*Kevo, we have finished that job*” and that upon inquiry the 1st accused ‘*Omwami*’ further told PW7 that “*tumeuua*” translated as- “*we have killed.*” PW7 testified that when he asked the first accused “*wapi*”-where, ‘*Omwami*’ the first accused whom he knew very well showed him behind him. PW7 then went to the scene and indeed found the deceased lying motionless in a pool of blood. PW7 identified **Omwami** as the 1st accused but he could not identify the 2nd accused as he did not see his face whilst on the motorcycle.

54. PW8 produced exhibit 4 a green jumper recovered from the 1st accused, which was taken to the Government Chemist and analysed together with blood from the deceased and the results showed that the said jumper belonging to the 1st accused had DNA profile that matched the DNA profile of the deceased Dismas Wanjala Juma. The Government Analyst **Dalmas Kibet Kisang’s** report was produced as P exhibit. No. 2a while exhibit and 2b was the exhibit memo. No DNA was done on the panga and other clothing exhibits.

55. In his defense the 1st accused did not deny cutting the deceased but stated that the deceased had wronged him by taking his wife and when he went to get his wife back, the deceased got out of the house welding a panga threatening to cut him and in the ensuing struggle he snatched the panga from him and cut him out of anger. He denied knowing the 2nd accused prior to being brought to court. Similarly, the 2nd accused denied knowing the 1st accused prior to their appearance in court and further denied the charges brought against him stating that he was arrested at a construction site. The 2nd accused indicated to court that he would not call his boss as a witness though his defense was based on the fact that he was arrested while at work. PW4 PW4 PC Okwako testified that he saw the 2nd accused dressed in the manner described to him, gave chase and arrested the 2nd accused as he attempted to escape by boarding a vehicle at Anjiko market.

56. I have considered both the prosecution evidence and the defense set forth by the accused persons and in my considered view, the prosecution evidence is more believable than that of the accused persons. The evidence by PW1, the deceased's wife is corroborated by that of PW3 in terms of the identity of the accused persons. PW1 had the opportunity to see both accused persons as the attack on the deceased unfolded. It was early in the morning at around 6.30am and as such there was nothing to interfere with her eyesight. PW1 in identifying the 1st accused testified that the 1st accused was dressed in a green jersey. PW6, the Government Analyst based at Kisumu testified that he received, from the police, a blood stained green jumper as well as the deceased's blood sample and upon testing found that the DNA profile generated from the bloodstained green jumper matched the deceased's DNA profile. Further to this, it is noteworthy that both accused persons had on two previous occasions visited PW3 calling on him to fire the deceased or they would kill the deceased. PW3 testified that he sat with the accused persons under a tree on two occasions in broad daylight and was able to identify or recognize both of them. Furthermore, he knew the 1st accused very well as the latter used to take or sell bricks to PW3. I find no reason why PW3 would frame the two accused persons with this heinous offence.

57. Based on the foregoing, I hereby find the defences raised by the 1st accused person that he was attacked by the deceased when he went to check on his wife that morning not truthful. I further dismiss the evidence by the 1st accused that he was alone that morning as he was seen by PW1 and PW3 in the company of the 2nd accused person and a motorcycle rider. PW7 was clear that the 1st accused person was with another, both being carried by Otis when the 1st accused person told PW7 that they had killed and when PW7 went to where the 1st accused had pointed to him, he found the deceased lying in a pool of blood. PW7 testified that he knew the 1st accused as a builder and a brick maker, corroborating the testimony of PW3 that the 1st accused had taken to PW3 bricks. The 1st accused also conceded in his defence that he knew the PW3 as the person who was housing the deceased, whom he claimed was having an affair with his wife. The 1st accused also stated that he was a brick maker. I am satisfied that the 2nd accused person was arrested while running away from the scene of crime and that he was positively identified by PW1 and PW3 as the person who was in the company of the 1st accused person that morning as they ran after the deceased and hacked him to death. PW1 was clear that he saw the 2nd accused use a club to hit the deceased as the 1st accused used a panga to cut the deceased. PW3 was clear that when the 1st accused went to his house on two previous occasions on 20th and 21st September 2017 he was with the 2nd accused and that the latter was carrying a sword and both demand that the PW3 sends away the deceased from the plot.

58. I am satisfied on the evidence adduced that both the accused persons herein participated and were jointly and actively involved in the violent attack on the deceased on the 22/9/2017.

59. On whether the accused persons had malice aforethought when they unlawfully killed the deceased, the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. In **Republic v Gedion Wambua Koko & 2 others [2019] eKLR** Muchemi J cited the East Africa Court of Appeal decision in **Republic v Tumbere S/O Ochen [1945] 12 EACA63** in determining whether malice aforethought had been established, which considered the following elements:

- (1) *The nature of the weapon used.*
- (2) *The manner in which it was used.*
- (3) *The part of the body targeted.*
- (4) *The nature of the injuries inflicted either a single stab/wound or multiple injuries.*
- (5) *The conduct of the accused before, during and after the incident.*

60. This being a murder charge, the prosecution must prove mens rea and *actus reus*. The mens rea of murder is traditionally called malice aforethought and it connotes an existence of culpability or moral blameworthy on the part of the accused person. In the case of **Joseph Kimani Njau v Republic (2014) eKLR** the Court of Appeal stated:

“In both criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution ...”

61. In the instant case, the post-mortem report reveals deep cut wounds on both the front and back parts of the head which led to fractures in the deceased's skull as well as deep cut wounds on the deceased's right wrist joint, tricep muscle and lower limb. The injuries on the head caused internal bleeding that damaged the brain. The nature, severity and multiplicity of the injuries leave no doubt that the accused persons were determined to end the life of the deceased or to cause him grievous bodily harm. This is covered under Section 206 (a) of the Penal Code. Furthermore, the accused persons had on two previous occasions visited PW3 and warned him to evict the deceased from the plot or they would go and kill him. In my humble view, the accused persons had a premeditated intention to eliminate the deceased. From the evidence as a whole on record, there was nothing to show that when the accused persons went to the deceased's house that material morning, they found the 1st accused's wife allegedly lighting a jiko in the deceased's residence as the evidence from PW1 which I find credible is that she was the wife to the deceased and that she was present with her husband that morning. There was no indication or suggestion made to her that she was in the company of the 1st accused's wife. The evidence by the 1st accused was pure lies. He claimed that he never knew the 2nd accused and that he never went to the home of the deceased with the 2nd accused and or on a motor cycle yet he was seen very well by PW1, PW3 and PW7 on a motorcycle and with another person apart from the rider. The 1st accused cannot be believed. I am therefore unable to find that this was a crime of passion as the 1st accused person would have wished this court to believe.

62. I am satisfied that the prosecution has proved beyond reasonable doubt that the unlawful killing of the deceased **DISMAS WANJALA JUMA** was jointly premeditated by the two accused persons **JULIUS NYAKWAKA and KOYO OBUCHI**. Accordingly, I find the two

accused persons herein **JULIUS NYAKWAKA and KOYO OBUCHI** guilty of the offence of murder as charged and I convict them accordingly.

Dated, Signed and Delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE