REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 24 OF 2017

(Consolidated with Criminal Case No. 2 of 2018)

REPUBLIC.....PROSECUTOR

-VERSUS-

1. JONES MWITA MARWA ALIAS KURATI MARWA

2. DANIEL NYAUCHO MATATIRO..... ACCUSED

JUDGMENT

1. The lifeless body of **Rodgers Mwita Itumbo** *alias* **Jackson Masaka Mwita** (hereinafter referred to as '**the deceased'**) lay about 50 metres from a drinking den operated by one **Susan Boke Robi** with its intestines protruding in the evening of 29/10/2017. That was in Migingo village, Bukira South Location in Kuria West Sub-County within Migori County.

2. On completion of police investigations **Jones Mwita Marwa** *alias* **Kurati Marwa** was charged on 08/11/2017 with the murder of the deceased with others then not before Court in **Criminal Case No. 24 of 2017**. **Daniel Nyaucho Matatiro** was later charged on 08/03/2018 with the murder of the deceased with another then before Court in **Criminal Case No. 2 of 2018**. They both separately denied the information and the cases were consolidated on 20/03/2018 where the two pleaded to a joint information. They denied the information and a trial was ordered. I will refer to **Jones Mwita Marwa** *alias* **Kurati Marwa** as '**the first accused person'** and to **Daniel Nyaucho Matatiro** as **'the second accused person'.**

3. In a bid to prove the information, the prosecution called a total of eight witnesses. **PW1** was **Joseph Maseke Mwita,** a brother to the deceased. **Susan Boke Robi** testified as **PW2.** She was the owner of the place where she sold the local alcoholic brew known as *'chang'aa'*. **PW3** was one **James Mwita Maru** a neighbor of the deceased. **No. 209404 AP Corp. William Kibet** was one of the arresting officers and testified as **PW4**. **PW5** was one **Rodi Wansu Abrahams Chacha,** a Clinical Officer attached to Kehancha Sub-County Hospital. **PW6** was **Francis Gicheine** the Senior Assistant Chief of Nyamotobo Sub-Location in Bukira Sub-Location in Kuria West Sub-County. **No. 111653 PC Jackson Kyalo** attached to DCI Kehancha testified as **PW7**. The Investigating Officer **No. 54282 PC John Meli** testified as **PW8.** For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. On 29/10/2017 at around 05:30pm PW1 walked into PW2's drinking place in the company of one **Samuel Boke** (not a witness) and partook some *chang'aa* up to around 06:00pm when they were joined by the deceased. They all sat inside one of the houses in the PW2's homestead which was set aside for those drinking. There were some other people in the house drinking while others sat outside the house, but within the homestead. There were others who also sat outside the gate to the homestead. The deceased informed PW1 that he wanted to first pay a debt of Kshs. 50/= to PW2 and walked out of the house. On return the deceased complained that some people were not fair to him. PW1 asked the deceased to sit down which he obliged. Shortly, one of the people who were inside the house, **Waira Mwita** (not a witness), walked out and 5 minutes later the deceased left for home.

5. After a short while there were screams outside the house PW1 was in and a lady rushed to the door and told them that someone was being killed. PW1 ran outside and saw the accused persons herein and Waira Mwita fighting the deceased. PW1 intervened but not before the first accused person removed a knife and stabbed the deceased on the left thigh. The first accused person then attacked PW1 with the knife and PW1 evaded, but his T-shirt was torn by the knife. The second accused person and Waira Mwita then held the deceased and the first accused person stabbed him on the stomach. PW1 could not stand seeing the deceased's intestines coming out and as he advanced against the first accused person, the second accused person pulled him back and the first accused person stabbed PW1 on the buttocks. Having overpowered both the deceased and PW1, the three attackers escaped.

6. PW1 rushed home and was taken to Mother Soul Brit Health Centre by **John Maiseru** (not a witness) where he was admitted for a day. He was however sure that the deceased had died. On discharge, PW1 recorded his statement with the police.

7. PW1 explained that although the incident took place at around 06:30pm it was still not dark, and he could see without any obstruction. He

clearly saw the knife which was used by the first accused person to stab the deceased and himself and identified it before Court. PW1 also knew the attackers as they were his neighbors. He also witnessed the post mortem examination on the body of the deceased and identified two photographs of the deceased showing the protruding intestines. It was the evidence of PW1 that he had only taken *chang'aa* worth Kshs. 50/= only hence he was still very sober.

8. PW2 was busy serving her customers when she heard screams in the homestead. Since she was outside the gate to her homestead PW2 rushed to find out what it was all about. As PW2 approached the gate to her homestead she met the first accused person at the gate holding a knife in his hand while running away. She went into her compound only to find the deceased lying down with intestines protruding. PW2 also testified that it was still clear and there was enough sunlight and visibility was not hindered in any way. That, when the police visited the scene PW2 was arrested and taken into police custody at Kehancha Police Station until the following day when she was released after being informed that the first accused person had been arrested. PW2 did not however see the second accused person at the scene as there were so many customers. PW2 however did not rule out the possibility of the second accused person having been at the scene on the day in issue.

9. PW6 was called by one of his elders in the evening of 29/10/2017 and informed of the death of the deceased. He visited the scene and confirmed that the deceased had died. He then called the Assistant County Commissioner for Teranganya and informed him accordingly and who in turn informed the police. PW6 did not know the deceased.

10. PW8 visited the scene in the company of his colleague police officers. They viewed the body of the deceased and searched the house of PW2 for any links including blood stains in vain. They photographed the body of the deceased and interviewed several people among those who had gathered thereat. The police later collected the body and took it took it Migori County Referral Hospital Mortuary for preservation and post mortem examination.

11. PW8 continued with the investigations and recorded statements from several potential witnesses with the assistance of his colleague police officers. In the morning of 30/10/2017 PW8 was informed by the OCS Kehancha Police Station that the first accused person had been arrested and was at the Chinato Administration Police Camp. He proceeded thereat in the company of PW7 and took custody of the first accused person and took him to Kehancha Police Station. Later PW8 interviewed the first accused person who informed him that he had been invaded by the relatives of the deceased and escaped to Chinato AP Camp. The first accused person also led the police to a bush where the knife that was allegedly used to stab the deceased was recovered. Later in the day PW8 escorted the first accused person to Kehancha Sub-County Hospital where he was mentally examined and certified fit to stand trial.

12. PW8 organized for a post mortem examination which was conducted by **Dr. Sylvester Olango** on 06/11/2017 at the Migori County Referral Hospital Mortuary. PW3 identified the body of the deceased prior to the said examination which examination was witnessed by PW7 and PW1. PW8 arraigned the first accused person in Court on 07/11/2017 vide Criminal Case No. 24 of 2017 and on 08/11/2017 the first accused person pleaded to the information on the murder of the deceased. He denied committing the offence.

13. PW4 arrested the second accused person on 07/02/2018 and handed him over to PW8. The second accused person was mentally assessed on the same day and was arraigned before Court on 09/02/2018. He formally took plea on 08/03/2018 in Criminal Case No. 2 of 2018 and denied committing the offence. The twin cases were consolidated on 20/03/2018 and fresh pleas were taken with Criminal Case No. 24 of 2017 being the lead file.

14. PW5 produced the mental assessment reports for the accused persons as exhibits whereas PW8 produced the knife, the photographs and the Post Mortem Report as exhibits. It was the testimony of PW8 that the accused persons escaped after committing the offence and were arrested later.

15. The prosecution then rested its case with the foregone evidence and on consideration of the evidence this Court placed the accused persons on their defenses. The accused persons opted for and gave sworn testimonies. The first accused person recalled that on 29/10/2017 he took alcohol at a homestead in Migingo village he could not recall and could not remember what happened on that day and even how he returned home. That, he was arrested on the following day when he had gone to collect his identity card. He did not know the deceased and that he only saw the second accused person for the first time during the plea taking in Court. He denied ever surrendering at the Chinato AP Camp as alleged.

16. The second accused person stated that on the 29/10/2017 he went to see one **William Chacha** (not a witness) for a debt and on missing him he returned home. That, he stayed at home with his wife, **Margaret Nyamohanga** (who testified as **DW1**) and after lunch he took the cattle for grazing. That, he stayed in the fields until around 06:30pm when he returned home and DW1 served him food, ate and went to bed. That, he continued with his normal daily duties up to 07/02/2018 when he was arrested by police officers at his home who were accompanied by PW1 and taken to Chinato AP Camp and later to Kehancha Police Station. That, he demanded to know why he had been arrested but in vain. He denied ever drinking alcohol and could not possibly have been at the said PW2's homestead as alleged. He also did not know the deceased and denied recording any statement with the police. He further denied knowing the first accused person and that he saw him for the first time at plea taking.

17. DW1 reiterated the whereabouts of the second accused person as given by the second accused person. She however confirmed that the second accused person drinks *chang'aa* but denied that he ever went out drinking on that day. DW1 further stated in cross-examination that the deceased was her family member, but he lived at Nyamongo and she occasionally used to see him at the trading centre when visiting his family in Musweta village. That, the family of the second accused person and that of the deceased were in the same Musweta village. DW1 also used to see the first accused person at the trading centre and she was aware that he lived at Nyamongo in Tanzania. She also knew that the deceased resided in Musweta village but worked in Nyamongo village.

18. The accused persons closed their cases and the matter was set for judgment with leave to Counsels to file written submissions. None however filed any submissions.

19. I have carefully considered the evidence on record as well as the exhibits. As the accused persons are charged with the offence of murder,

the prosecution must prove the following three ingredients:

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '*actus reus'* ***of the offence;***

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the *'mens rea'* ***of the offence.***

I will therefore consider each of the issues independently.

(a) **Proof of the fact and cause of death of the deceased:**

20. It is not in dispute that the deceased person in this matter died. That position is confirmed by all the witnesses who testified except PW4 and PW5. The first limb is hence answered in the affirmative.

21. As to the cause of the death of the deceased, PW8, with the consent of the defence, produced a Post Mortem Report which was prepared by Dr. Sylvester Olango on 06/11/2017 after conducting the post mortem examination on the deceased. The said report indicated that the deceased had sustained a deep cut wound on the abdomen and another deep cut wound on the left leg. The report gave the possible cause of death of the deceased as the injury to the abdomen which perforated the colon. The likely object used was sharp. Since there is no any other evidence contradicting that evidence on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb is also answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons:

22. This issue is aimed at establishing whether the accused persons caused the death of the deceased and if so, whether it was by an unlawful act or omission.

23. The identification of the accused persons therefore remains a very cardinal issue. This Court is under a legal duty to weigh the evidence of the witnesses with such greatest care and to satisfy itself that in all circumstances, it is safe to act on the same. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under; -

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

24. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

25. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

26. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

27. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

> **"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."**

28. It is also important to note that even in cases of uncorroborated single-witness-evidence there can still be a legal conviction. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

> **"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. .....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."**

29. With the foregone legal guidance, I will now turn to the record. The incident that led to the death of the deceased took place at around 06:30pm. According to PW1 and PW2 it was still clear, and visibility was not hindered at all. PW1 narrated how the deceased was attacked by the accused persons together with one Waira Mwita who escaped and is still at large and stabbed in the abdomen. PW1 described the role played by each of the three people. He was also injured in the process of rescuing his brother, the deceased. PW2 corroborated the evidence of PW1 to the extent that PW2 had left the first accused person seated and drinking *chang'aa* inside her homestead as she served the other customers and then met him at the gate of her homestead running away from the direction where the deceased and PW1 were while holding a knife. PW2 immediately saw the deceased lying on the ground with his intestines protruding. The Post Mortem Report also confirmed that the deceased died out of the stab at the abdomen that perforated the colon. That is the exact place PW1 stated that he saw the first accused person stabbing the deceased at such a close range as the second accused person and their accomplice held the deceased. PW1 identified the knife in Court during the hearing.

30. The first accused person stated that on the material day he went drinking at a woman's homestead in Migingo village, but whose name he could not recall. The first accused person however contended that he was totally drunk that he did not know what happened and could not even explain how he reached home. He also contended that he did not know the deceased as well as the second accused person whom he only met for the first time at the time of taking plea. PW2 testified that she owned the premises and used to personally serve her customers. She confirmed that on that day she saw the first accused person, PW1 and the deceased. The deceased infact repaid a debt. These three people were among many other customers who were seated inside the homestead of PW2 while drinking.

31. As to whether the first accused person was so intoxicated to an extent of not knowing what happened, the starting point is the law. Intoxication has been provided for as a defence to a criminal charge under **Section 13** of the **Penal Code** Chapter 63 of the Laws of Kenya and provides that: -

> **"13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.**
>
> **(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –**
>
> **(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or**
>
> **(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**
>
> **(3) ……**
>
> **(4) ……**
>
> **(5) For the purposes of this section, "intoxication" includes a state produced by narcotics or drugs."**

32. From the reading of the entire section it appears that the defence of intoxication is very narrow in its application. The defence can be raised in two instances. **First**, under **sub-section 2(a**) in which case the burden of proof is on the accused person to satisfy the conditions therein. **Second**, under **sub-section 2(b)** in which case the burden remains on the prosecution. The Court of Appeal for Eastern Africa in the case of **Kangaro s/o Mrisho vs. R (1956) 23 EACA 532** referred to the case of **Cheminingwa vs. R**, in which it was stated: -

> **'It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of**

establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."

See: **Joshua Matata Ndonye v R, [2001] eKLR,** CR No. 122 OF 1991 (Kwach, Shah & O'Kubasu JJ. A).

33. The Court of Appeal cases of **Manyara v. R (5) (1955) 22 EACA 502**, **Nyatike s/o Oyugi (1959) EA 322** among others remain very relevant on this issue.

34. In this case the first accused person contended that because of the intoxication he did not know what he did and as such he did not even know that the deceased was injured. In that case the burden squarely remains on the prosecution. It is hence for this Court to ascertain, from the evidence, if the accused person was so drunk that he was driven to temporary insanity or that he did not know what he was doing.

35. As said before there is no doubt that the first accused person took *chang'aa*. PW1 narrated how the first accused person in conjunction with the second accused person and another person attacked the deceased. It was the first accused person who first stabbed the deceased on the left thigh. When PW1 intervened to rescue the deceased, the first accused person attacked him with the knife he had and cut his T-shirt. Then as the second accused person and their accomplice held the deceased it was the first accused person who stabbed the deceased at the lower abdomen and the deceased fell. The first accused person also stabbed PW1 on the buttocks before the three attackers fled. PW2 met the first accused person at the gate running away while holding a knife immediately after the deceased fell. The first accused person did not go to any other place but proceeded home and slept until the following day.

36. In the case of **Joshua Matata Ndonye vs. R (2001) eKLR** the Court of Appeal accepted the argument by the appellant's wife that her husband was not so drunk as to be unable to form the necessary intention; if he had been he would have been unable to overpower her. On similar footing I find that although the first accused person was drunk he was not so drunk to be unable to attack both PW1 and the deceased and run away to his home. Had he been that so drunk he would not have played his role in the attack in the superb manner he did. The attack was well executed and the first accused person acted with precision and power in a manner that cannot be undertaken by a totally drunk person. The defence of intoxication therefore fails.

37. The second accused person denied ever being at PW1's homestead on the date in issue. He categorically stated that he never used to partake any form of alcohol and as such he could not have been at PW2's place. However, it was his wife, DW1, who testified that '*…I am aware that my husband drinks chang'aa but on that day he did not go out to take chang'aa.…*' The second accused person also stated that he did not know the deceased at all. However, DW1 stated that *'…the deceased is a family member, but he lived at Nyamongo whereas he used to visit his family in Musweta. The families are in the same village in Musweta.…*' DW1 therefore corroborated the evidence of PW1 that the attackers were his neighbors.

38. It is hence apparent that the second accused person was not truthful. His defence cannot hold and is hereby disregarded. On the same breath, the second accused person's position that he was not at PW2's place as alleged cannot as well hold. That leaves the position by PW1 that the second accused person was a neighbor to the deceased and PW1, that they were indeed family members, was at the scene and played a role in the death of the deceased materially uncontroverted.

39. I have carefully addressed my mind to the facts and the law in this case alongside the defenses tendered. It is not in doubt that the accused persons were well known to PW1 and PW2. There was nothing that came to the fore to demonstrate that PW1 and/or PW2 were mistaken on the recognition of the accused persons. The incident took place before night fall.

40. I also carefully observed the demeanors of the witnesses as they testified and those of the accused persons as they tendered their defenses. Unlike the accused persons, I found the prosecution witnesses very stable, consistent and truthful and I believed their testimonies. The prosecution testimonies were not shaken on cross-examination.

41. Having cautioned myself on the dangers of relying on single-witness-evidence in respect to the second accused person as well as the need to test the evidence properly even in cases of corroboration (like in the case of the first accused person) and in the circumstances of this case, I am satisfied that the evidence of PW1 and PW2 on the recognition of the accused persons was water-tight and the defenses did not outweigh or create any reasonable doubts on that evidence. The accused persons were hence positively identified by recognition as the attackers, together with Waira Mwita, who caused the death of the deceased. Their names were also readily given by PW1 and PW2. (See the Court of Appeal case of **Simiyu & Another vs. Republic (2005) 1 KLR 192)**. The identification was hence free from error. Needless to say, the joint acts of the accused persons were contrary to law and had no justification. The second ingredient is therefore answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice afterthought:

42. I will now consider the third limb as to whether there was malice aforethought on the part of the accused persons in committing the offence at hand. The starting point is the law. **Section 206** of the Penal Code defines *'malice aforethought'* as follows:

"206. Malice aforethought 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 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.

c. An intent to commit a felony.

d. An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.

43. In the case of **Joseph Kimani Njau vs R (2014) eKLR,** the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171,** and in dealing with the issue of malice aforethought held as follows: -

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; The intention to cause death;

i. The intention to cause grievous bodily harm;

ii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55". (emphasis added).

44. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

"*There was a complete absence of motive and there was absolutely nothing* on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

45. From the evidence in this case it is not clear why the accused persons attacked the deceased. Further, the killer stab was only one. I am therefore unable to imply any malice aforethought in the circumstances of this case. I find the third ingredient in the negative.

46. As the foregone analysis does not therefore support a conviction in respect of the information of murder, the accused persons are hence found not guilty of the murder of the deceased and they are hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused persons, but of course without any malice aforethought.

47. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinbefore, this Court finds the accused persons guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is accordingly convicted.

48. As I come to the end of this judgment I must highly appreciate the efforts and commitment by the investigating officer, the Prosecution Counsel **Miss Monica Owenga** and the Defence Counsel **Mr. Muniko** in this matter which made it possible to begin and complete the full hearing in a record of two months from the time the cases were consolidated.

DELIVERED, DATED and **SIGNED at MIGORI this 28th day of June 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Muniko Counsel for the Accused persons.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant