



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO.10 OF 2013

(CONSOLIDATED WITH CRIMINAL CASE NO. 29 of 2013)

REPUBLIC.....PROSECUTOR

VERSUS

JANE CHEBET CHEPKWONY.....1ST ACCUSED

KENNEDY CHERUIYOT NGETICH.....2ND ACCUSED

JUDGMENT

1. The accused, Jane Chebet Chepkwony and Kennedy Cheruiyot Ngetich are mother and son. They are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 22nd day of December 2012 at Ndarugu Farm in Londiani District within Kericho County, they jointly murdered Simon Kipsang Cheruiyot.
2. The prosecution case as presented through its 8 witnesses is that the 1st accused, who was a lover of the deceased, quarreled with the deceased. They fought, and the deceased ran home and called her son, the 2nd accused. They beat up the deceased with big wooden sticks. The medical evidence showed that the deceased died from severe bleeding as evidenced by epidural and subdural haematoma secondary to the cut wounds on the head after assault.
3. PW1, Fancy Chepkoech (Fancy), was a daughter of the employer of the deceased and the 1st accused. The deceased worked as a turn boy on PW1's mother's tractor, while the 1st accused did household chores. On 22nd December 2012, Fancy was at home with her sister Faith Chelangat (PW4). She heard the accused and the deceased, who were in the kitchen, quarrelling. The 1st accused screamed, claiming that the deceased had slapped her. Fancy and her sister peeped through the window to check what was happening. They saw the 1st accused and the deceased fighting outside the kitchen. With the aid of security lights, Fancy saw the 1st accused leave for her house which was 50 metres away from PW1's house. She saw the 1st accused come back with her son and they started beating the deceased using firewood (P exhibit 1). The deceased was lying on the ground. Neighbours had responded to the screams from the homestead and came to rescue the deceased, whom they took into the kitchen, while the two accused persons fled. According to PW1, the deceased was bleeding profusely from the head. The area Chief had brought security personnel who took the deceased to hospital. She learnt the following morning that the deceased had passed away. It was Fancy's testimony that the 1st accused and the deceased were romantically close and appeared to have a love relationship.
4. In cross-examination by Learned Counsel for the accused, Mr. Ngetich, Fancy stated that the incident occurred at 9.00 p.m. She had managed to see the 1st accused and the deceased fight with the aid of security lights. She had peeped from the main house, which is about 15 metres from the kitchen, and seen the 1st accused return with her son, the 2nd accused.
5. Beatrice Chebet (PW2, Beatrice) testified that on 22nd December 2012, she was at home when she heard screams. She came out and discovered that one Faith (PW4) and Fancy Chirchir (PW1) daughters of Catherine Chirchir, were screaming. She rushed to the home and found the deceased, Simon, lying down while bleeding profusely. There was a rungu (club) (P exhibit 2) with a nut lying next to him. She had inquired from Faith and Fancy what had happened and they had told her that the accused had assaulted the deceased. She did not find the accused at the scene. She had left for home when other neighbours came to the scene.
6. Her testimony in cross-examination was that the incident had taken place at night, and there was no electric light in the home, but there was full moonlight. She had seen the rungu next to the deceased. She had not seen the pieces of firewood (P exhibit 1) identified by PW1. She had found the deceased lying in a pool of blood next to the store, not far from the kitchen, which was close to the main house. She had heard Fancy and Faith screaming while she was at her home, about 200 meters away. She knew the deceased before but did not know what he did at the home of PW1.

7. PW3, John Ngetich, was the Chief of Kedowa sub-location. On the night of 22nd December 2012, he was at home when he received a call from a villager who informed him that a person in his sub-location had been injured. He went to Kedowa Police Station, got 2 officers and rushed to the scene. They took the deceased and rushed him to Londiani District Hospital where he was pronounced dead on arrival. According to PW3, they had found the deceased at the home of the 1st accused's employer. When he arrived, he had found the deceased bleeding profusely, and had heard that the deceased had fought with the 1st accused, who was not at the scene when he arrived. His testimony in cross-examination was that he had found many villagers around the home when he went to the scene. He did not know the deceased, who worked for the same employer as the 1st accused. The accused persons had disappeared after the incident.

8. Faith Chelangat (Faith, PW4), testified that at about 9.00 p.m on 22nd December 2012, she was at home with her younger brother, Emmanuel, and younger sister, Fancy Chepkoech (PW1). The 1st accused, who used to assist them in the house, had come at 8.30 p.m and joined them to prepare supper. They had prepared and had supper together. PW4 and her siblings had then gone to the main house and left the 1st accused in the kitchen.

9. Faith and her siblings had then heard the deceased, who worked as their tractor conductor, arrive with the tractor and park it, and then he joined the 1st accused in the kitchen, which was about 5 metres from the main house. After a short while, Faith had heard the 1st accused and the deceased quarrelling but did not hear the words. She then heard the 1st accused screaming that the deceased had slapped her. PW4 had gone to the verandah of the house and peeped in the direction of the kitchen. She had been able to see as there was moonlight. She had then seen the 1st accused come out of the kitchen running towards her house which was about 50 metres from the kitchen calling her son, Kennedy, the 2nd accused.

10. The 1st accused had returned immediately with her son and they had started beating the deceased who was outside the kitchen. The 1st accused was using a piece of wood, while the 2nd accused had a club which had a round metal at the tip. PW4 knew the club as it belonged to the deceased. She had gone back to their house and started shouting for help, and Chebet (PW2) and other neighbours had come. The accused had stopped beating the deceased and had ran away when neighbours came to the scene. The neighbours had taken the deceased to the kitchen and called the Chief who had called the police and the deceased had been taken to hospital. The deceased was unconscious and was bleeding from the head when he was taken to the kitchen.

11. PW4's testimony in cross-examination was that she knew the deceased, who was of medium height and size, very well. The 1st accused had asked her and her siblings why they could not help her (to beat the deceased). Faith had gone to the verandah of the house when she heard the screams. She had heard the 1st accused scream and seen her ran to her house calling her son. She had recognised what the accused were carrying when she peeped through the verandah. She recognised the club as she used to see the deceased with it. The accused and the deceased were fighting outside the kitchen. She testified that the 1st accused and the deceased had a relationship, but she did not know whether they had fought before.

12. Julius Rotich, PW5, lived some 200 metres from the home where the accused and the deceased lived. On 22nd December 2012, he had heard a quarrel from the house of Catherine (the mother of PW1 and PW4). He had gone to the home and found two of Catherine's children, Chebet (Faith, PW4) and Chepkoech (Fancy, PW1). He had seen the deceased, Simon Kipsang Cheruiyot, lying down near the house. He had three cuts on the head and there was also blood and a club on the ground near him. He had used a torch to see, and he realised that the deceased was badly injured. PW5 and others had taken the deceased inside the kitchen.

13. PW5 had called the Assistant Chief Ngetich (PW3), who had gone to the scene with two officers from Kedowa. They had taken the deceased to Londiani District Hospital but he was pronounced dead on arrival. They had then reported the incident at the Londiani Police Station and returned home.

14. His evidence on cross-examination was that he heard screams while at his home, 200 metres away from Catherine's home, and had ran there. He had found two children at the scene, and the deceased on the ground, bleeding. It was 9.00 p.m., and he had used a torch to check and see. He had seen a pool of blood and a club, and the deceased had three cuts which were bleeding. He did not find the accused persons at the scene.

15. Julius Kipkurgat Misoi, the Chief of Kedowa (PW6) testified with regard to the arrest of PW1. His evidence was that on 7th March 2013 at 1.00 p.m., he had received a report that Jane Chebet Chepkwony, a murder suspect, was within his area. He had monitored her movements and had found her hiding in a toilet at the home of Felistus in Jericho within Kedowa. He had arrested her and taken her to the Kedowa police patrol base.

16. The prosecution adduced medical evidence through Dr. Kibos Ezekiel, a Medical Officer in the Department of Surgery at the Kericho District Hospital. He presented the medical report prepared by Dr. Oyoo who had performed the post mortem on the deceased on 28th December 2012 (Exhibit 3).

17. The report indicated that the deceased was of the apparent age of 36 years at the time of his death. He had multiple cut wounds on the head- one measuring 9cm x 9 cm; another measuring 8cm x 1 cm; a third 5 x 0.5 cm; a fourth measuring 3 cm x 0.5 cm and a fifth 4 cm x 1 cm. An internal examination indicated that he had haemothorax or an accumulation of blood in the chest cavity. He also had a fracture of the parietal bone, as well as epidural and subdural haematoma, that is bleeding above and below the dura, which is the outer covering of the brain. The cause of death, according to Dr. Oyoo, was severe bleeding as evidenced by epidural and subdural haematoma secondary to the cut wounds on the head after assault.

18. In cross-examination, Dr. Kibos testified that the object used to inflict the cuts was a sharp object, and the number of cuts, 5 of different dimensions, would be unlikely from a fall unless there was machinery involved, or an accident. It was his testimony further that the corners of a stick can have edges which can result in deep cuts, but a rungu is blunt, and in his view, a sharp object was used.

19. The investigating officer, No. 76793 Corporal Fredrick Ngunu was at the time material to this case attached to Londiani Police Station, Kedowa Patrol Base. On 22nd December 2012, he was at the Kedowa Patrol Base where he was the officer in charge when he was called on telephone at around 11.00 p.m. by the area Assistant Chief, Chebowor sub-location one Mr. John Ngetich (PW3). The Assistant Chief informed him that the deceased had been attacked by known people. PW8 had gone to the scene with one PC Ndonga and the area Assistant Chief, Mr. Ngetich.
20. At the scene, they had found the deceased person lying in a pool of blood at a residence where the 1st accused and the deceased used to work. They had found two young school girls who informed them that the 1st accused and the deceased were workers there, were lovers, and they used to spend nights in the kitchen. The two girls had further informed him that on the material day, there was a quarrel between the 1st accused and the deceased, and the deceased had slapped the 1st accused. The 1st accused had then attacked the deceased then gone home to call the 2nd accused. The accused persons had later returned to the residence and the two of them had attacked the deceased with various weapons.
21. PW8 had found the deceased in the kitchen when he got to the scene. The deceased had bled seriously from the head. He was lying on the floor and did not communicate with PW8. He had several cuts on his head, but PW8 did not notice any other injuries. They had taken the deceased to Londiani District Hospital where he was pronounced dead on arrival. The body was later transferred to the Kericho District Hospital where a post mortem examination was conducted.
22. The 1st accused was later arrested by the Kedowa Area Chief, one Mr. Misoi (PW6) while the 2nd accused was arrested after he was identified by members of the public within Brooke area.
23. According to PW8, at the scene, they had only been able to recover a stick and a rungu (club) fitted with a nut on one of its heads. The two weapons were identified by the witnesses, the two girls. He produced the rungu fitted with a nut (exhibit 2).
24. PW8 further testified that the scene had been processed by scene of crime officers from Kericho. A post mortem had also been performed on the deceased, the results of which were that the deceased died from massive bleeding caused by multiple cuts on the head. During the post mortem, the doctor had informed him that the cuts on the deceased's head were caused by a sharp object. However, the sharp object was never recovered.
25. In cross-examination, PW8 stated that he had found a crowd of over 10 people at the scene, who were there because of the attack on the deceased. He had not seen any alcohol at the scene. He had been informed that the deceased had slapped the 1st accused. He further stated that the 1st accused did not complain about an attempted rape. He could not confirm whether the deceased had the smell of alcohol. He stated that two exhibits that were recovered at the scene, a stick and a rungu.
26. At the close of the prosecution case and upon hearing submissions on behalf of the state and the defence, the court found that the prosecution had established a prima facie case to warrant placing the accused on their defence. The 1st accused elected to give sworn evidence and call no witnesses, while the 2nd accused elected to give an unsworn statement.
27. In her evidence, the 1st accused stated that she used to work as a house girl in the home of Catherine Chirchir, where she used to milk cows and sell chang'aa, which belonged to her employer, Catherine, in the home. On 22nd December 2012, she was at Catherine's selling chang'aa from the kitchen. There was a tractor at the home, and the deceased was the turn boy of the tractor. Customers came from the road construction site to buy chang'aa, and the deceased also came around 7.00 p.m. with the customers. They were drinking in the kitchen, and at around 8.00 p.m., the customers started quarrelling after they got drunk. One of the customers had kicked the lamp and it went off. It was her testimony that when the light went off, she did not know who was fighting whom, and she went outside and screamed. The customers were fighting with the deceased.
28. The 1st accused testified that she knew the deceased, with whom she used to work at Catherine's, and he was her friend. She had screamed because she had wanted people to come and assist the deceased. As it was dark, she did not know what the customers and the deceased were using to fight. One person had responded and gone to the scene when she screamed, and her son had also gone to the scene. It was her testimony that neighbours did not come as they did not like the fact that chang'aa was sold in the home. It was her testimony further that the people who were fighting with the deceased inside the kitchen ran away and left the deceased outside. She did not know these people as they were working for the Chinese road contractor. The deceased had injuries on the body and was bleeding.
29. The 1st accused further testified that Catherine's children were inside the main house and did not come out. They were screaming from inside the house.
30. The 1st accused stated that she was charged in court as she used to work with the deceased, but denied that she and her co-accused assaulted the deceased. Rather, he was assaulted by three strangers working on the road, all of whom were not from the area, one being a Kamba, the other a Meru and another.
31. With regard to her having left the scene, her testimony was that she had left when Julius (Rotich PW5) called the Chief as she was afraid of the Chief as she was also drunk. She had gone to sleep at a neighbour's home and had returned to Catherine's home on 23rd December 2012. They had cleaned up the place and removed the alcohol that they had hidden. She did not know what had happened to the deceased but was informed by Catherine that she had been called by the Chief and informed that the deceased had died.
32. According to the 1st accused, the deceased used to drink chang'aa. He had started quarrelling with customers over campaigns. When the (unnamed) person and her son came, she, her son and the unnamed person had assisted the deceased and put him in the kitchen.

33. It was her testimony that she was arrested 3 months after the incident, and that she was still at Catherine's home. Catherine had told her not to go and write a statement when her children went as it would be known that they were selling alcohol. She denied being involved in the death of the deceased.

34. In cross-examination, she stated that she was employed by Catherine Chirchir, who had left her the home as she had a bar at Chepseon and was not sleeping at home. Her home was close to Catherine's, about 50 metres across a road. She used to sleep in Catherine's kitchen sometimes. The deceased did not live at Catherine's as he had his own home nearby. She conceded that he was a workmate and her lover. She further confirmed that there were three children in the home, Faith Chelangat (PW4) Fancy Chepkoech (PW1) and a neighbour's child who used to sleep in the home.

35. The 1st accused maintained that on the material night the 22nd of December 2012, she was selling chang'aa at the home. She denied that she had eaten with the children, whom she stated had eaten in the main house. The deceased had come with customers, who used to come on weekends, and one of them had knocked down a lamp. It was raining hard so there had been only 3 customers and the deceased. She had gone outside and started screaming when the customers and the deceased started fighting.

36. Her son, the 2nd accused, had come when she started screaming, as well as one other person. Her son used to sleep in a canteen that he used to guard for her brother, which was about 50 metres from her house. Her son had found her with Julius (PW5), but no-one else heard the screams. It was her testimony that neighbours did not bother with her screams but only came to see, then left. She reiterated that the kitchen was dark after the customers knocked down the lamp and so she did not know what they used to beat the deceased.

37. On his part, the 2nd accused, Kennedy Cheruiyot Ngetich, elected to give an unsworn statement. He stated that he was 30 years old, born in Londiani in Kericho County, and was the son of the 1st accused.

38. With respect to the events of 22nd December 2012, he stated that he had gone home on 20th December 2012. He was going home for Christmas from his place of work, Chagaik estate in Brooke. He stayed with his mother and small brothers. On 22nd December 2012, he had gone to the junction (Londiani Junction). He had returned home at around 9.00 p.m. and his small brothers had given him food, which he had eaten then gone to his uncle's kiosk, about 200 metres from his home, where he was sleeping. He had opened the door but before he went in, he had heard screams from his home. He had returned home and heard the screams were coming from his neighbour, Catherine's home. He had gone to Catherine's and had met Julius and his mother. He had asked them what was happening and they had told him that some drunk people had been fighting with the deceased.

39. The 2nd accused stated that he had gone to where the deceased was and had shone his phone torch on him. He had seen that the deceased was bleeding from the nose and mouth. He had told Julius to look after the deceased as he knew that the deceased was his mother's friend. He also told the said Julius that he would go to sleep as people would turn on him if they found him at the scene, and he left and went to sleep.

40. The following morning, he had woken up and gone home. His small brothers had informed him that the Chief had come with police and taken Simon to hospital and Simon had died at the hospital.

41. The 2nd accused denied that he had been involved in the death of the deceased. What he knew of the incident was what his mother had told him: that the deceased had been beaten by customers.

42. The 2nd accused stated that he had stayed at home on the 23rd and 24th of December 2012, then had returned to work on 5th January 2013. He had continued with his work till 5th July 2013 when he was arrested at a bar in Brooke.

43. In his submissions on behalf of the accused, Learned Defence Counsel, Mr. Ngetich, argued that there had been contradiction in the evidence on the nature of lighting at the time of the incident. PW1 had stated that there were security lights, while PW4 had said that there was moonlight. His submission was that the evidence of PW4 on the lighting did not corroborate the evidence of PW1.

44. It was also his submission that there were serious contradictions on the type of weapon used to assault the deceased. He observed that the investigating officer had alleged that the accused persons had used a club, while PW1 and PW4 had testified that the accused had used firewood, which were serious contradictions that the court should take into account.

45. Counsel further observed that the accused had mentioned two men whom the 1st accused had testified had fought with the deceased. His submission was that the prosecution should have arrested these two other persons who could have assisted their case. He also wondered why one Julius Rotich, whom the accused had mentioned was not arrested with the two accused persons. I observe here that Julius Rotich had testified as PW5.

46. It was also Mr. Ngetich's submission that what happened on 22nd December 2012 between the 1st accused and the deceased was provocation. He noted that PW1 and PW4 had said they heard the 1st accused screaming that she had been slapped; that they stated that they had heard a commotion and could not see who was in the kitchen. It was his submission that the prosecution never took into account the issue of provocation, which is why PW1 screamed. According to Mr. Ngetich, PW8 had carried out shoddy investigations and failed to take into account the fact that the deceased was drunk; the two other visitors who had been mentioned by the 1st accused in her defence were never arraigned in court, and he prayed that the accused be acquitted.

47. In his brief submissions, Mr. Ayodo for the state submitted that the state would rely on the submissions made earlier after the close of the prosecution case. He urged the court to find that the prosecution had proved its case beyond reasonable doubt and the two accused persons should be convicted. In the said submissions, Ms. Keli had submitted that the state had established a prima facie case against the accused.

She had pointed out that both the *mens rea* and *actus reus* had been established by the prosecution witnesses. The accused had been seen to assault the deceased, and the 1st accused had even asked PW4 to assist in assaulting the deceased. The two accused persons had assaulted the deceased with weapons, and the manner of the assault indicated that they did not intend the deceased to survive. The fact that they had gone into hiding implied guilt on their part.

48. I have considered the prosecution evidence and the evidence of the 1st accused, as well as the unsworn statement of the 2nd accused. The accused are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 204 provides that any person found guilty of the offence of murder shall be liable, upon conviction, to the death penalty. Section 203 of the Penal Code states that **“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

49. Malice aforethought is defined in section 206 of the Penal Code as follows:

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;

50. In order to discharge its burden of proving its case against the accused, the prosecution must establish the death of the deceased, the cause of death, and that it was the accused persons who, with malice aforethought, caused the death of the deceased.

51. The prosecution has established the death of the deceased, and the cause of death. The post mortem report produced by Dr. Kibos Ezekiel (exhibit 3) indicated that the cause of death of the deceased was severe bleeding as a result of epidural and subdural haematoma secondary to the cut wounds on the head after assault.

52. Who caused the injuries to the deceased that resulted in his death? There were two eye witnesses to the assault on the deceased. The evidence of PW1 and PW4, the two daughters of Catherine, the employer of the 1st accused and the deceased, was that they had heard the 1st accused scream that the deceased had slapped her. The 1st accused had then ran to her home and returned with her son, the 2nd accused. The two had then assaulted the deceased, using pieces of firewood and a rungu fitted with a nut (exhibit 2) which belonged to the deceased. The two accused persons had then run away after the two girls screamed and neighbours came to the scene.

53. One of the neighbours to arrive at the scene was PW2, Beatrice Chebet. She testified that she had ran to the scene from her home about 200 metres away when she heard PW1 and PW4 screaming. She did not find the accused at the scene, but she was informed by the two girls that the accused had assaulted the deceased. She had found the deceased lying on the ground, with the rungu beside him.

54. The evidence of PW3, the Assistant Chief, and that of the investigating officer, was based on what the two eye witnesses had informed them about the incident. What does emerge from their evidence, however, is that when they arrived at the scene, there were neighbours at the scene, but the two accused persons were not at the scene.

55. I believe this case turns on the evidence of PW1 and PW4. The two girls knew the two accused persons and the deceased. They testified that the 1st accused and the deceased were lovers, a fact that was confirmed by both accused persons. PW1 and PW4 had prepared and had supper with the 1st accused, and then she had left for the kitchen where she used to spend nights with the deceased. The deceased had come home with the tractor, parked it, and then gone into the kitchen, where a quarrel ensued between him and the 1st accused. PW1 and PW4 had heard the 1st accused scream that the deceased had slapped her, then had run to call her son. Together, the two accused persons had assaulted the deceased and had ran away after neighbours were attracted to the scene by the screams of the two girls.

56. The accused deny causing the death of the deceased. The 1st accused alleges that the deceased was beaten up by some three people who were drinking chang'aa in the kitchen which the 1st accused used to sell for Catherine, the mother of PW1 and PW4. She initially said she did not know who was fighting with whom as a lamp in the kitchen had been knocked down, then asserted that the deceased had fought with some three people, whom she named by their ethnicity, over politics. I note, however, that the issue of the presence of customers at the home arises only in the defence by the 1st accused. It was not put to any of the prosecution witnesses, and it is clearly an afterthought intended to divert attention from the accused.

57. The defence in this case is a mix of denial and what appears to be, from the submissions of the defence Counsel, a defence of provocation. As I understand it, the defence submission is that the 1st accused was provoked when she was slapped by the deceased, and this explains her attack, with her son, on the deceased. However, the evidence indicates that when she was slapped, she ran to her house and returned with her son, and they proceeded to attack the deceased. Had there been provocation, the time it took for her to ran to her home, get her son, arm herself and return to assault the deceased was sufficient for passions to have cooled. Further, it is not possible to explain the actions of the 2nd accused on the basis of provocation.

58. The accused have argued that there was contradiction on the nature of the light available at the material time. PW1's testimony was that she was able to see the accused and the deceased from security lighting. The neighbour, PW3, testified that there was moonlight. PW4 also testified that there was moonlight. From the evidence, I am satisfied that the two eye witnesses were able to see and recognise the accused assaulting the deceased. The nature of light available at the time did not detract from their ability to tell who was involved in the attack. These were people they knew, whom they interacted with on a daily basis as they worked for them.

59. The accused also submitted that there was doubt as to what caused the injuries from which the deceased succumbed. The deceased had multiple cut wounds which the post mortem report indicated resulted from a sharp object. The evidence of PW1 and PW4 was that the deceased was assaulted with pieces of firewood and a club fitted with a bolt. It is not clear from the evidence whether the accused had other weapons besides the firewood and the club which could have caused the multiple cuts on the deceased's head. However, the accused had ran away after the assault and were not arrested until after 3 months in the case of the 1st accused, and almost 7 months in the case of the 2nd accused. It is not possible, therefore, to tell whether they had another weapon that could have caused the cuts on the deceased's head.

60. The question, however, is whether the absence of such a weapon is fatal to the prosecution case, once it is established that it was the accused who assaulted the deceased. The law is that the absence of a weapon is not, of itself, fatal to the prosecution case. It was held in **Criminal Appeal No. 75 of 2014 Kazungu Katana Ngoa vs Republic** that the absence of a murder weapon was not fatal to a conviction. In that case, the Court of Appeal sitting in Malindi stated as follows:

“This Court has in the past had occasion to deal with the question and in Ekai vs Republic (1981) KLR 569; held that failure to produce the murder weapon of itself was not fatal to a conviction and that as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. Similarly, in Karani vs Republic (2010) 1 KLR 73; the court stated that:-

‘The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.’

61. In the present case, two weapons which the accused had been seen to assault the deceased with were found at the scene. They may have had another, sharp, object, but even in the absence of the sharp object that was said to have caused the multiple cuts on the deceased's head, I am satisfied that it was the accused who, with malice aforethought, caused the death of the deceased.

62. The 1st accused quarrelled with her lover, the deceased. She was allegedly slapped by the deceased. She ran home and called her son, the 2nd accused, and they assaulted the deceased together. They ran away when neighbours came to the scene, and were not arrested until after three and seven months respectively after the incident. The 1st accused was found hiding inside the toilet of a neighbour, while the 2nd accused had been identified by members of the public at a bar in the Brooke area.

63. The nature of the attack upon the deceased demonstrated that the accused had malice aforethought: for two people to attack one person, with firewood, a rungu fitted with a nut, and another sharp object demonstrates an intention to cause death or grievous injury to the deceased, or indifference whether death or grievous bodily would result.

64. I am satisfied therefore that the prosecution has proved its case against the accused beyond reasonable doubt. As provided under section 215 of the Criminal Procedure Code, I accordingly convict the accused of the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

Dated Delivered and Signed at Kericho this 26th day of September 2018.

MUMBI NGUGI

JUDGE