REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 17 OF 2016

REPUBLIC……...PROSECUTOR

VERSUS

MELITA OLE KAIPON…….ACCUSED

JUDGEMENT

1. MELITA OLE KAIPON, the accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The brief facts were that on the night of 12th day of September 2016 at around 2200 hrs at Nomaiyanat village Kimana Location in Loitokitok Sub-County within Kajiado County murdered **KAIPON TORONKEI**.

2. He pleaded not guilty to the information on both the charge and particulars. The trial commenced in earnest where he was represented by learned counsel Mr. Chege and the prosecution conducted by Mr. Akula, the senior prosecution counsel.

3. The prosecution was therefore required to prove all the ingredients of murder contrary to section 203 beyond reasonable doubt.

4. In order to discharge that burden of proof the prosecution summoned eight (8) witnesses in support of the prosecution case whose brief testimony was as follows:

> PW1 Christine Wakesho testified as the wife to the deceased that on the 12/9/2016 she was at home with family including her late husband. According to her recollection of events PW1 stated that the family had their evening meals and retired to their respective houses for the night. It was only at 2200 hrs when the wife of the accused came knocking with a complaint that she was being beaten by Melita Kaipon, the accused. In evidence of PW1 she required the deceased to intervene by restraining his son **Melita**, the accused from assaulting her further on that night. It was further the testimony of PW1 that the deceased cautioned the son who was also next to where the wife was standing. The wife was let into their house to spend the night. According to PW1 the deceased followed shortly towards the gate to go and close it. In a span of a moment PW1 heard the voice of the deceased uttering the following words in Swahili ***"mtaita nimewekwa kisu"*** *(taita I have been stabbed with a knife)*. There was pandemonium and screams from PW1 which attracted attention of his other sons and neighbours. PW1 further deposed that on that night he could see the accused moving towards his house through their gate.

5. The family upon hearing the sad news PW2 Kaipon Joel to be this court that he rushed to the scene. He found his late father on the ground and appeared not have any pulse. In his testimony PW2 stated that he went to pursue the accused whom he caught up with him next to their gate and apprehended him by conducting quick search and interrogation.

6. In the meantime together with PW3 Peter Kaipon who had joined in made arrangements to have the deceased taken to the hospital. However the police were to be waited to visit the scene. That same night PW2 and PW3 told this court that they managed to disarm the accused of the sword which was used to inflict bodily harm to the deceased. When shown the blood stained sword both PW2 and PW3 positively identified it as the one obtained from the accused. The witnesses PW2 and PW3 alluded to the fact that later the deceased passed on and his body was taken to the mortuary.

7. The police had already been telephoned and the occurrence of the incident reported. This is evidenced by testimony of PW4 IP Charles Moita. PW4 further told this court that on arrival at the scene they found the deceased on the ground and the accused having been arrested by family members and neighbours. According to PW4 he confirmed that the deceased had sustained severe fatal injuries. The murder weapon being a blood stained knife was also recovered from the accused. As the matter was now a police case PW4 testified that the body was taken to Loitokitok District Mortuary. The arrangements were made on 15/9/2016 to have a postmortem carried out. In addition PW4 testified the blood stained clothes being a T-shirt and khaki trouser worn by the accused on the fateful night were taken from him for purposes of further investigations. During that night PW4 further stated that he was able to observe and notice that the deceased had sustained a deep cut on the left side of the chest.

8. The prosecution also called Kelvin Sokoine as a witness as PW5. Kelvin Sokoine testified that on the night of 12/9/2016 his attention was drawn from a distress voice from the home of the deceased that he has been killed. He further testified that on entering the homestead he confirmed when he saw the blood stained body of the deceased. In addition PW5 testified that he had to participate with the rest of the family members PW2 and PW3 to ensure that the accused does not run away. This according to PW5 was done until the police arrived and took over control of the scene.

9. PW6 Dr. Mwongela a qualified medical doctor testified to the effect that on 15/9/2016 he was required by the police to conduct a postmortem on the body of the deceased. The doctor presented the postmortem report with the positive findings on examination that the deceased body had blood stained face, deep cut wound left side of the scalp 7cm, cut wound left ear, posteriorly stab wound left side of chest 5cm, collapsed left lung stab wound to posterior aspect of the heart. According to PW6 the deceased died of hemorrhage from stab wound to the chest.

10. PW7 Assistant Superintendent of Police testified as a gazetted scenes of crime officer. His testimony was that on 1/12/2016 he received an exhibit memo together with a multimedia storage device containing photographs of a scene of murder. PW7 further testified that on request he produced and developed the photographs which showed various views of the scene. He produced before court the photos and the exhibit memo as evidence referenced as exhibit 1A and 1B.

11. PW8 PC Maxwell Ogutu, the police detective who conducted the investigations placed before court the summary put together of the witnesses and materials in support of the case. PW8 further identified in his testimony the blood stained clothes, the murder weapon, a sword, the postmortem report by PW6, the photographs on the scene and also recorded witness statements. In his testimony on evaluation of the evidence and all material particulars he recommended that the accused be charged with the offence of murder.

12. At the close of the prosecution case the accused was placed on his defence. He elected to give unsworn statement. He denied that he murdered his father the deceased. In his explanation the accused gave a chronology of events on how he spent part of the day having drinks in various bars before leaving for his house at 7pm. In his testimony the accused told this court that on arrival at home he found his wife had not taken their sick child to the hospital. When accused tried to seek for an answer the wife left for his father’s house. The accused further testified that he was angered and decided to follow her and find out what was the problem. According to the accused there was an altercation with his father the deceased. This happened by the deceased taking a club and started to inflict harm. There was a struggle in which the accused told this court that he managed to disarm the deceased of the club. In addition the accused further testified that he could only notice many people and some saying that *mzee* has been stabbed with a knife.

13. The accused denied that he was the one who inflicted the stab wounds on the deceased.

SUBMISSIONS BY DEFENCE COUNSEL:

14. The defence counsel Mr. Chege submitted that the prosecution has a duty to prove all the elements of the offence of murder. He further submitted that in the instant case the evidence adduced fail short of that requirement. Mr. Chege contended and argued that the incident happened in the night. There was no direct testimony as to how the deceased met his death. According to Mr. Chege, learned counsel the murder weapon cannot be said to be in possession of the accused on the fateful night. There is a possibility that the deceased was the one who could have carried the sword in his waist.

15. Additionally counsel submitted that the prosecution failed to produce photo evidence and any other independent testimony that the sword (read knife) was recovered from the accused. Learned counsel alluded to the testimony of PW2, PW3 and PW5 who were at the scene but did not see PW4 recovering the knife from the accused. The learned counsel further argued and submitted that the blood stained clothes produced as exhibit 2 – 4 came about by the injuries inflicted on the accused by his brothers. There is no evidence according to learned counsel that the blood on the accused's clothes was that of the deceased. In the circumstances learned counsel submitted that there is no cogent evidence tendered by the prosecution to link the accused with the offence. Learned counsel placed reliance on the case of ***Daniel Musyoka Muasya & 2 Others v Republic Mombasa HCCR. No. 42 of 2009 eKLR***.

SUMBISSIONS BY THE PROSECUTION COUNSEL:

16. In a rejoinder to the defence submissions the senior prosecution counsel Mr. Akula submitted that the prosecution evidence is watertight pointing at the guilty of the accused. According to Mr. Akula, the court has the advantage of going through the evidence of PW1 – PW8 who in the outset establishes a nexus between the accused and the death of the deceased. Mr. Akula invited the court to pay attention to the testimony of PW1 the mother of the accused who was at the scene of the crime.

17. Additionally, Mr. Akula submitted that when PW1 raised an alarm where PW2 and PW3 arrived and found the accused not far away from the body of the deceased. In support of proof of the elements of the charge against the accused person learned prosecution counsel placed reliance on the following authorities; ***Republic v Godfrey Ngotho Mutiso [2008] eKLR, Republic v Tubere S/O Ochen [1945] 12 EACA 63, James Masomo Mbatha v Republic [2015] eKLR, Daniel Anyango Omoyo [2015] eKLR.***

18. In his submissions basing the arguments in the jurisprudence of these cases learned counsel for the prosecution invited the court to find malice aforethought was manifested by the actions of the accused. Mr. Akula, further submitted that this court should look at the nature of injuries and nature of the weapon used. Mr. Akula further submitted that the prosecution evidence by PW1 – PW8 was mainly circumstantial but of such a nature that proved all the ingredients of murder. In this regard learned counsel relied on and cited the following authorities; ***Mohamed & 3 Others v Republic 2 1 KLR, Mwangi & Another v Republic [2004] 2 KLR 32.***

19. In summary Mr. Akula contended that the defence testimony did not dislodge or create a doubt in the prosecution case. In the circumstances Mr. Akula urged this court to find that the prosecution has provided sufficient evidence to proof the offence of murder against the accused beyond reasonable doubt for a verdict of guilty and conviction on the charge to be ordered.

ANALYSIS AND DETERMINATION:

20. I have considered the entire case, the submissions by both counsels and the analysis from their respective stand point. At this point the standard of review is for this court to examine the sufficiency of evidence on each of the ingredient of the charge of murder against the accused.

21. In our penal code murder has been defined in section 203 in the following terms; ***"any person who with malice aforethought causes the death of another person by any unlawful act or omission is guilty***

of murder."

22. The offence of murder has therefore the following ingredients to be proved by the state beyond reasonable doubt:

a. The death of a human being.

b. That the death of the human being was unlawfully caused.

c. That in causing death the perpetrator had malice aforethought.

d. That the accused person singularly or jointly participated in killing the person.

23. It is trite law that each of the ingredients outlined above ought to be proved beyond reasonable doubt. However the standard of proof of beyond reasonable doubt does not mean proof to the hilt or proof beyond all iota of doubt. Lord Denning observed in the case of ***Miller v Minister of Pensions [1947] 2 ALL ER 37 at 373 – 374*** by stating as follows:

> **"Proof beyond reasonable doubt does not mean proof beyond a standard of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible, but not in the least probable the case is beyond reasonable doubt, but nothing short of that will suffice."**

24. I now proceed to deal with each element of the offence:

1. The first ingredient of the offence is whether the deceased Kaipon Toronkei is dead:

Under this ingredient there is no dispute about the death of the deceased. This court has the evidence of the pathologist PW6 Dr. Stephen Mutiso. In his testimony and as per the postmortem report he conducted postmortem and examined the body of Kaipon Toronkei. The examination done by PW6 Dr. Mutiso opined the cause of death to be hemorrhage from stab wound to the chest.

25. In addition PW7 ASP Gitau of scenes of crime processed and developed the photographs which documented the scene indicating that the deceased had sustained fatal injuries. The other witnesses of significance are the family members like PW1 – Christine Wakesho, who testified as the wife of the deceased, PW2 Kaipon Joel and PW3 Peter Kaipon both testified as sons of the deceased. These witnesses were categoric that the deceased died on 12/9/2016 at their home in Nomaiyanat village. The accused, who is also the son to the deceased alluded to the death of his father save that he had nothing to do with it. I am therefore satisfied that the fact of death and the cause has been proved beyond reasonable doubt.

26 (2) The second ingredient is that of unlawful death of the deceased through acts of omission or commission:

A person is guilty of murder if he kills another person unlawfully. The law prescribes that the unlawful act was not done in self-defence or defence of another or property or at the time of the killing it was not accidentally. In all these circumstances in any event of the facts factored establish reasonable use of force each of this defence will provide an absolute defence to the offender. In the same code elements of each offence to be proved in order to find the offender blameworthy is stated.

27. I see the general principles enshrined in the code as legality and culpability. The legality principle provides that an act or omission may only be considered as a crime when provided for by law. While on the other hand culpability is the idea that there can be no penalty without guilt.

28. The crime of murder cannot be said to have been committed unless the prosecution establishes that the acts of omission or commission which caused the death were unlawful. That as a result, death of a human being resulted killing of another human being is criminal unless other circumstances exist to justify the death. In *actus reus* evidence must be led by the prosecution that the accused who is alleged to have committed the offence was an active participant and not a mere by stander in commission of the offence.

29. The test to me is whether when the death occurred, the wound inflicted by the accused did contribute to the event. If it did, although other independent causes might have contributed. The causal relation between the unlawful acts of the accused and the death of the deceased has been made out. This was a case where the deceased was alive and peacefully resting in his house on or about 2200 hrs on 12/9/2016. His attention according to PW1 was drawn by the knock at his house by the wife of the accused. As the head of the family the deceased went out of the house to intervene between his son, and the wife. What PW1 heard in a short while was a voice of the deceased ***"Mtaita nimewekwa kisu"*** *(Taita I have been stabbed).* The accused person stayed within proximity of the scene.

30. Throughout the testimony of PW2, PW3 and PW5 it is indicated that the deceased was found to have suffered bodily harm. It was also their testimony that the accused was armed with a sword which they managed to dispossess from his control and physical custody. The same sword was positively identified before this court admitted in evidence as exhibit 5. The postmortem form exhibit 6 confirmed the injuries sustained by the deceased.

31. The accused in his defence stated to have been at the scene but denied that he caused the death. However from his evidence he alluded that there was a kind of fight between him and the deceased when he went to pursue his wife who happened to be in the deceased house. According to the accused the deceased had a club which he was using to beat him but managed to overpower him and took it away. That in the course the deceased fell down and only to learn later of his death.

32. From the analysis of the evidence it is clear from PW1 that the deceased was not armed with a club. There is also cogent evidence from PW2, PW3 and PW5 that the accused was armed with a sword on that fateful night. According to PW2, PW3 and PW5 they dispossessed the accused of the said sword which was blood stained. In addition PW4 visited the home and witnessed the recovery of the knife/sword from the left side of his waist. The injuries suffered by the deceased are consistent with the use of the sword herein being described as the murder weapon.

33. In view of the evidence I am satisfied that the detailed testimony of PW1, PW2, PW3, PW4 and PW5 stands over as truthful, credible and reliable evidence on the sequence of events on the material day. The accused testimony that he did not know how the deceased died nor was he armed with the recovered murder weapon has nowhere to hang. The prosecution evidence rebutted his version and left nothing for this court to go by way of defence in answer to the cause of death.

34. The inference I draw from these set of circumstances is that the deceased death was unlawful. It does not fall on any of the exceptions illustrated in the case of ***Republic v Guzambizi S/O Wesonga [1948] EACA 65.*** There is no evidence from the accused that he was in any on imminent danger from the deceased to warrant retaliatory attacks of that magnitude.

35. The sole question is whether the unlawful and voluntarily act by the accused was of such a kind that death or grievious harm was the natural result? In answer to this an analysis of the evidence of PW1, PW2, PW3, PW4 and PW5 the level of circumstantial evidence is indicative of the fact that a lethal weapon was used and did target the sensitive/vulnerable part of the body. I am satisfied that deceased death was unlawful and therefore the prosecution has discharged the burden of proof beyond reasonable doubt.

36. (2) The third ingredient is that of malice aforethought:

Malice aforethought is a technical term which includes distinct circumstances from which an inference of

state of mind as provided for under section 206 of the Penal Code can be drawn:

> **a.** ***The intention to cause the death of; or***
>
> **b.** ***The intent to do grievious harm to any person whether that person is the person actually killed or not;***
>
> **c.** ***Knowledge that the act or omission causing death will probably cause the death of or grievious harm to some person, whether that person is the person actually killed or not although such knowledge is accompanied by indifference whether death or grievious bodily harm is caused or not, or by a wish that it may not be caused.***
>
> **d.** ***An intent to commit a felony.***
>
> **e.** ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

37. From this definition malice aforethought can be inferred from the conduct of the accused alleged to have committed the offence. For example if evidence shows that A took a sword pointed it at the B and actually occasions harm which results in the death of B it will be reasonable to infer that the accused intended to kill B.

38. The test in determining the threshold for malice aforethought has been discussed in a plethora of cases. In the Uganda case of ***Nanyonjo Harriet & Another v Uganda Cr. Appeal No. 24 of 2002*** the Supreme Court of Uganda held:

> **"In cases of homicide, the intention and/or knowledge of the accused person at the time of committing the offence, is rarely provided by direct evidence. More often than not the court finds it necessary to deduce intention or knowledge from the circumstances surrounding the killing, including the mode of killing, the weapon used and the part of the body assaulted and injured."**

39. The Court of Appeal in the case of ***James Masomo Mbatha v Republic [2015] eKLR*** observed as follows:

> **"In the present case, the sheer force of the wounds on the deceased is indicative of malice aforethought. Phyllis had a cut in the head region, which extended to the skull bones and exposed her brain. In addition she suffered a deep cut on her right hand, with a fracture of the right hand. She also had cuts on her legs and suffered burns. Evelyn Ndeti Nyamai had deep cuts on the right elbow and several cuts on the skull…..surely in inflicting these wounds on the deceased; the appellant intended to cause them fatal harm."**

40. Malice from the above cases means an intention to cause pain or injury to another which ends up in death. In our jurisdiction and the reading of case law malice aforethought as it relates to murder is therefore a conscious intent to cause death or grievious bodily harm to another. Since malice aforethought is a requisite for prove of murder it is the element which separates the offence from that of manslaughter.

41. From time to time superior courts struggle to find a clear path to define intention in criminal law. That is why under our Penal Code section 206 the manifestation of malice or intention can be deduced from the category of circumstances provided for in the section. The prosecution has the task to call evidence to show the presence of intention to cause death or to cause grievious harm. The problem arises more specifically when faced with indirect intent.

42. In the case of ***Republic v Nedrick [1986] 3 ALL ER 1*** where the court stated as follows:

> **"Where the charge of murder and in the rate cases where the simple direction is not enough**

the jury should be directed that they are not entitled to infer the necessary intention unless they fell sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's action and that the defendant appreciated that such was the case."

43. In addition in ***Mohoney v Republic [1985] 1 ALL ER 1025*** **Lord Bridge** held thus:

"The issue for the jury was a short and sample one if they were sure that, at the moment of putting the trigger, which discharged the live cartridge the appellant realized the gun was pointing straight at his step father's head, they were bound to convict him of murder. If, on the other hand they thought it might be true that in the appellant's drunken condition and in the context of his ridiculous challenge, it never entered the appellant's head when he pulled the trigger that the gun was pointing at his step father, he should be acquitted of murder and convicted of manslaughter."

44. I must say once again that principally the English Criminal Law is materially similar with ours, including the issue on intention to commit an offence. Although I am not bound by English decisions or those of the House of Lords but the legal dicta in the cases cited is an accurate statement of the law in Kenya.

45. I take the view drawing inference from the above principles that the intent of murder or to cause grievious harm on the part of the accused must be proved beyond reasonable doubt. This would include the aspect that his mind was fixed to attain a desired objective of death or grievious harm.

46. In the present case I have grappled with the following questions:

a. *Was death or very serious injury a natural consequence of the accused voluntary act?*

b. Did the accused foresee that as a consequence of his unlawful act the natural and probable outcome of his act was death?

47. In the present case I have the testimony of PW1 who confirmed the circumstances that made the deceased to get out of his house in order to restrain his son Melita Kaipon from beating his wife. The wife had arrived earlier in their home and only later to be followed by the husband Melita Kaipon (accused). There was no physical confrontation between the deceased and his son Melita Kaipon, save for the directions that they part ways by giving sanctuary to the wife of Melita Kaipon (accused) in this case. It is on record that the deceased having warned the son Melita Kaipon he proceeded to the gate in order to close it upon the accused exiting the compound. That is when hell broke loose as PW1 heard a voice from the deceased that he has been stabbed.

48. The question I ask is whether there was risk, danger and or threat on the part of the accused that paused the danger to arm himself with a knife against the deceased? The prosecution evidence by PW1 on the events of the fateful day negative that there was any serious danger to warrant excessive use of force.

49. I will start with the case of ***Republic v Joseph Chege Njora [2007] eKLR*** where the court held:

"A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused that on a balance of probabilities that he was in immediate danger or peril arising from a sudden and serious attack by his victim. It must also be shown that reasonable force was used to avert or forestall the attack."

50. The next authority is ***Republic v David Kinya [2014] eKLR*** the court held that:

"No doubt this element of self-defence may, and in, most cases will in practice, merge into the

element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right to self-defence of person or property or as acts done under the stress of provocation.

The e*ssence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter."*

51. In the present case PW1 did not see a struggle between the accused and the deceased. PW1 also was present when the deceased mediated the conflict between accused and his wife. From PW1 testimony the deceased was not armed and it was the accused who had the sword which he used to stab the deceased. When PW1 raised an alarm PW2, PW3 and PW5 responded immediately to the scene. According to PW2, PW3 and PW5 they found accused armed with the blood stained knife standing a few meters away from the body of the deceased. It is not disputed that as at the time PW1, PW2, PW3 and PW5 arrived at the scene the deceased had already passed on. In the testimony of PW5 he touched the deceased he had no pulse.

52. In applying the above principles to the facts of this case, I am of the view that the accused was not in any imminent danger of attack from the deceased. It was not therefore necessary for him to use force against the deceased. The testimony of PW1 shows that the attack on the deceased was unprovoked therefore likely to bring the case under section 206 (a) (b) of the Penal Code. There was also the issue of possession/or armed with the sword which the prosecution tendered in court as the exhibit and murder weapon.

53. According to PW1, PW2 and PW3 the house of the accused is a few metres away from the deceased. The evidence of PW1 indicates that the accused and the wife had an altercation which forced her to run for safety into their home. That is when the accused followed her immediately to dissuade her for getting the attention she was looking from them. According to PW1 the only action taken by the deceased was to separate them by ordering the accused to go to his house and the wife to spend in their house. There was therefore an assumption from the deceased and PW1 has heeded the order and left for his house. However this was rebutted upon PW1 hearing a distress call from the deceased who had gone to lock the gate to the effect "***Mtaita nimewekwa kisu***".

54. I find from the evidence of PW1 this happened in a span of minutes between the directions given by the deceased for the accused to go back to his house. It is not disputed that the deceased was killed as a result of the fatal injuries inflicted by the accused.

55. The onus is on the prosecution to satisfy the court beyond reasonable doubt that the accused in killing the deceased had malice aforethought. Thus, the fact that malice is expressly made an essential element of the murder. The prosecution must therefore prove the existence of such an intention.

56. Does the element of intention in the offence manifest itself by virtue only of the accused being armed with a sword and simultaneously attacking the deceased? The Court of Appeal considered the issue in the case of ***Nzuki v Republic [1993] KLR 171*** where the rule on malice aforethought was laid down:

"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 rest of which is always subjective to the actual accused:

i. *The intention to cause death.*

ii.The intention to cause grievious harm.

iii. *Where the accused knows that there is a serious risk that death or grievious bodily harm will ensure 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 the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievious 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 v DPP [1975] AC 55)."

57. The legal principle in this case in my view is that the number of wounds or injuries inflicted is not a decisive factor to infer malice aforethought. In the persuasive authority by the Supreme Court of India in ***Palicherla Nagaraju v State of Andhra Pradesh [2006] 11 SCC 444*** the court laid down the minimum characteristics relevant on intention to cause death where it observed *inter alia:-*

"The intention to cause death can be gathered generally from a combination of a few or several of the following among other circumstances:

i. The nature of the weapon used.

ii. ***Whether the weapon was carried by the accused or was picked up from the spot.***

iii. Whether the blow is aimed at a vital part of the body.

iv. ***The amount of force employed in causing injury.***

v. ***Whether the act was in the course of sudden quarrel or sudden fight or free for all fight.***

vi. ***Whether the incident occurs by chance or whether there was any pre-meditation.***

vii. ***Whether there was any prior enmity or whether the deceased was a stranger.***

viii. ***Whether there was any grave and sudden provocation, and if so, the cause for such provocation.***

ix. ***Whether it was in the heat of passion.***

x. ***Whether the person inflicting the injury was taken undue advantage or has acted in a cruel and unusual manner.***

xi. ***Whether the accused dealt a single blow or several blows. The above list of circumstances is, of course not exhaustive and there may be several other circumstances with reference to individual cases which may throw light in the question of intention."***

58. Coming to this case assuming there was no exchange of heated arguments and subsequent fight between the accused and the deceased, my finding is that there was employment and use of excessive force, on the part of the accused which was uncalled for as deduced from the evidence. There is no mention from PW1, PW2 and PW3 that on arrival at the scene a weapon in the description of a club which accused alluded to be in possession of the deceased was spotted. It is also on record from the prosecution witnesses more specifically PW3 and PW5 that they are the ones who were angered with the accused wrongful conduct and did inflict some physical injuries. That therefore rebutts the accused assertion that he had a fight with his father – the deceased. Whether there were any exchanges of a nature that will provoke the accused loose self control and respond with such a force remains a matter of speculation. The act of the accused being armed with the sword and inflicting the fatal injuries is not in dispute.

59. Secondly, the fact that it was the accused who used the sword to inflict the fatal injuries is not in dispute. What to me is lacking from the totality of the evidence is proof of intention in order to manifest malice aforethought on the part of the accused. It is necessary to prove beyond reasonable doubt that there

was an intention to cause death or grievious bodily harm sufficient enough for the deceased to succumb to injuries. That to me is not detectative from the facts and evidence tendered by the prosecution.

60. On the basis in the dicta in the case of ***Nzuki v Republic (Supra) and Nebart v Republic [1994] eKLR*** and the facts of this case the intention to cause death has not been proved as required by law beyond reasonable doubt. That therefore rules out the inference on malice aforethought.

61. As stated in the case of ***Miller v Minister of Pensions [1947] 3 ALL ER 373*** **Lord Denning** held inter alia:

> **"That proof of beyond reasonable doubt is not proof beyond iota of doubt."**

62. In my judgement the failure to prove malice aforethought mandates me not to make a positive finding of the charge of murder contrary to section 203 of the Penal Code. What the prosecution has bolstered through the evidence of PW1 – PW8 is a case of unlawful act of manslaughter.

63. The prosecution case however is wholly based on circumstantial evidence on both the commission of the offence and putting the accused at the scene.

64. The law on circumstantial evidence is well settled as illustrated in the case of ***Musili Tulo v Republic [2014] eKLR*** where a case depends exclusively on circumstantial evidence the court held that it must satisfy the following criteria:

> **i.** ***The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.***
>
> **ii.** ***Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.***
>
> **iii.** ***The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

65. The incriminating evidence can be found in the testimony of PW1 who saw the accused in their house. PW1 further stated that the accused walked ahead of the deceased before the attack occurred. There is further irresistible evidence from PW1 when the deceased was heard calling and uttering the following words ***"mtaita nimewekwa kisu"*** (reference to PW1 who comes from Taita that he has been stabbed).

66. There is logical and reasonable inference from the evidence of PW1, PW2, PW3 and PW5 were among the first people to arrive at the scene. They confirmed the accused at the scene who was found to be in possession of the blood stained sword produced as exhibit 5. The accused was the last person to walk away with the deceased when he was alone after he and the deceased left the house. In a few minutes the deceased was pronounced dead which was determined to be from the fatal injuries as per the autopsy report by PW6. The defence by the accused he denied ever stabbing the deceased.

67. On my evaluation of the evidence and the accused defence I am guided by the principles in the case of ***Rafaeri Munya alias Rafaeri Kibuka v Republic [1953] 20 EACA 226*** where the court held:

> **"The force of suspicious circumstances is augmented whenever the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect."**

68. In his evidence the accused gave a different version of what happened. He claimed that he was beaten by the deceased but failed to provide proof on how that was occasioned. This was a deliberate lie which

did not answer to the case for the prosecution according to me proved beyond reasonable doubt.

69. In the circumstances of this case it's impossible to come to any other conclusion in this case to weaken or destroy the inference that the accused was responsible for the death of the deceased. The wrongful act by the accused was unlawful and dangerous and the same acts inadvertently caused the death of the deceased.

70. Having considered the facts I am satisfied that the accused is guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code. in consonance with section 179 of the CPC I hereby substitute the charge of murder contrary to section 203 to that of manslaughter and do convict the accused accordingly.

Dated, delivered and signed in open court at Kajiado this 23rd day of August, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Chege for accused present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli Court Assistant

Accused present