



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 48 OF 2013

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

MAMUSH HIRBO FAJA.....ACCUSED

JUDGEMENT

1. The accused person is charged with Murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are that:

“On the 7th day of April, 2013 at Huruma Kiamaiko, within Nairobi County, murdered Tegis Mohammed.”

2. The prosecution called a total of 10 witnesses.

3. The summary of the prosecution case was that the deceased person who was living with her husband at their house in Huruma in Kiamaiko was murdered inside her home and her lifeless body left lying in a pool of blood.

4. PW1 Amina testified that her friend Tegis, the deceased in this case called her during the day and told her she needed to talk to her. PW1 said that there was urgency in the deceased voice. At 9pm the same day, PW1 stood at the door to the deceased house at Kiamaiko on the 2nd floor when she heard the deceased’s voice which she knew very well. She stated that even though the deceased was speaking in low tones with another person inside the house, she could tell that the two were arguing. PW1 explained that she continued to knock on the door but no one opened for her. She then decided to leave.

5. PW1 said that as she left she remembered that the deceased had told her that she was having problems with her husband and that is when she decided to go back to the 2nd floor and to deceased’s house to check on her.

6. PW1 testified that she met the deceased’s husband at the door. He was locking the door with a padlock which was fitted in such a way that a person could open while both inside and outside the house. PW1 testified that she even spoke to him in the Borana language but he did not respond to her. PW1 explained that she saw the accused had blood on him as he walked away because his shoes left bloody footprints.

7. PW1 decided to check through the window which was partly opened. Using the torch light from her phone, she saw the deceased lying down in the sitting room on her stomach. PW1 said she also saw blood foaming from the deceased. She screamed and this attracted the neighbours to the scene. PW1 told the court that she had known the deceased for 5 years and that the deceased was her best friend.

8. PW2 Dansoye Ado Duba was the deceased's sister in law as PW2 was married to her brother. She was at her house in Kariobangi on 7th April 2013 at 4 pm when the deceased came to visit her. She had come to watch a programme on TV and to charge her husband's phone as there was no electricity at their place. PW2 explained that the deceased stayed in her house until 9 pm when she escorted her to her house that was 200 meters across the road from hers. PW2 was carrying the deceased's child of 2 years on her back as she escorted her to her house. They found the accused person when they reached the deceased's house and exchanged greetings. PW2 explained that she went back with the deceased's child to her place as the child was living with her. At about 10 pm, PW2 heard noises and later learnt that the deceased had been murdered.

9. PW3 Habiba Mohamed was the deceased's mother. She testified that she spoke with the deceased on 7th April 2013 when she passed by her house. The deceased told her that she was going to charge her husband's phone at her brother's place. PW2 said that the deceased later returned with PW2 at around 10 pm and bid her good night. She explained that the deceased later came with her sister in law PW2, PW3's last son and the deceased's young child. PW3 explained that she later saw PW2 return with her children. Shortly thereafter she heard noises and following them she went up to her daughter's house.

10. When the Police arrived and broke into the house, PW3 saw her daughter lying in a pool of blood. Next to her body were shoes and trousers and other items namely ATM Card, Wallet and ID card and a knife all blood stained. Even though the police picked all these items from the scene according to PW3, they were not produced in court except the murder weapon, the dagger. PW4 the father of the deceased, who also went to the scene the same night of the incident corroborates PW3's evidence. He too saw a trouser an ATM Card, ID Card and wallet which items he observed were all full of blood. Photograph number 6 bears proof of the presence of the dagger like knife which was found lying on the floor together with other items.

11. PW5 Amina Mohammed lives in the neighborhood where this incident took place. After learning of the incident, PW5 called the OCS Huruma Police Station who came to the scene immediately with other officers.

12. PW6 Kare Abdulrahi Adan lived in a Kiamaiko where he had rented a house near the accused and deceased. He said that he knew the deceased person. He however said that he did not know the husband. PW5 testified that he heard noises at around 9 pm and went out to check on the deceased. The other neighbours also came out after the screams started. PW6 said that the door to deceased house was however locked and they all returned back to their houses as the screams had died down. Half an hour later, PW6 went out to go to the toilet and he said that he saw blood at the door of the deceased's house. He saw more blood when he checked the stairs and also saw footprints with blood. PW6 woke up his neighbours to alert them of what he had seen and when they came they pulled the curtain on the deceased's house and saw the deceased body lying on the floor.

13. PW 7 PC Anthony Mutua testified that he was in the office on 13th April 2013 at 6.25am, when the accused came to the police report office and said he had killed his wife in Huruma. PW7 said that they arrested the accused and placed him in custody after which they later confirmed that indeed there was a murder incident in that area. PW7 said that they then called the police from Huruma police station who came and took the accused with them.

14. PW 8 SGT Nicholas Murira was in charge of petty crime at Huruma Police Station. He attended the scene of murder with his colleague PC Shitemi on the 2nd floor in a building on the material day. They found a crowd gathered at the scene. PW8 said that there was no light at all and the front window of that house was open. Using a torch to look inside the house, PW8 saw the lifeless body of the deceased lying in a pool of blood in the sitting room. PW8 broke the door which was locked and on entering he said that

the body had a cut on the throat and stomach. He further searched the scene for the murder weapon and recovered a Somali sword that was stained with blood under a bed in the bedroom. PW7 called Scenes of Crime personnel who photographed the scene and the body before they took it to the mortuary. PW8 kept the murder weapon as an exhibit.

15. PW9 no. 78066 CPL Johana Tanui, who was a Scenes of Crime officer, went to the scene of crime on 7th April 2013 at 22.30 hours where he took 7 photographs of a body lying in a pool of blood with cuts on the neck and the abdomen. PW7 said that there was a sword under the bed in the bedroom with blood stains which he also photographed.

16. PW 10 PC Peter Shitemi the investigating officer visited the scene on 7th April 2014. He had to use a torch at the scene as there was no electricity in the area. He saw the body of the deceased which he noted had injuries on the neck and on the stomach. They also searched the house and found a Somali sword knife which had blood stains. Officers from Scenes of Crime also came and photographed the body. PW10 said that the following day a postmortem examination on the deceased body was conducted by Dr. Richard Midia who prepared a report that was produced in court as P. exhibit 4. In his report, Dr Midia states that the deceased had multiple stab wounds to the neck, the right mandible and forearm and triple stab wounds on the abdomen and hemoperitoneum. The cause of death in the doctor's opinion was multiple stab wounds to the neck and abdomen.

17. The accused person was placed on his defence after the close of the prosecution case. He opted to give an unsworn statement and put forward an alibi as his defense. He said that he was returning from work on 7th April 2013 at 9pm when he saw a large crowd of people outside the flat where he lived. He heard some people in the crowd screaming and others saying "Mamush has killed his wife" The accused said that when he heard that, he retreated and went to Huruma police station where he found the deceased's relatives who accused him of murdering the deceased prompting the police to arrest him. The accused denied murdering the deceased.

18. Mrs. Rashid for the accused and Ms. Ochieng for the State gave submissions. The Defense Counsel in her submissions argued that the prosecution had not adduced sufficient evidence to prove their case. She urged that the identification of the accused person's face and shoes by PW1 through the light from her mobile phone was insufficient as the light was not adequate. The accused person, she urged had gone to the police station to say what he heard at the scene when he was arrested. Counsel also challenged the evidence of PW2 and urged that she tried to change her evidence contrary to her statement to the police. Further she explained that the knife was not dusted for fingerprints and therefore the evidence was inconclusive.

19. The State Counsel Ms. Ochieng in her submissions urged that PW1 and PW2 saw the accused at the scene of offence and that although PW1 confirmed that there was no light in the estate she knew the accused well. PW1 saw the accused by use of the torch light from her mobile phone because she stood at the door of the deceased house when the accused emerged from the house. Learned Prosecution Counsel submitted that the light from the PW1's phone was sufficient light to enable PW1 see everything around her. Counsel urged that PW1 even talked to the accused during that encounter. Ms Ochieng urged that there was therefore identification by recognition given that PW1 already knew the accused before the incident. Ms. Ochieng urged that the evidence of PW1 was corroborated by PW2. Counsel further explained that PW7 was on duty when the accused surrendered himself at the police station and informed him that he had killed his wife. This was five days after the death of the deceased.

20. I have carefully considered the entire evidence adduced by the prosecution and the defence and submissions by both counsel. The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt.

21. The charge is that of murder contrary to **section 203** of the **Penal Code**. That section stipulates as follows:

"203. Any person who of malice aforethought causes the death of another person by an

unlawful act or omission is guilty of murder.”

22. The prosecution must show that it is the accused that attacked the deceased, stabbed her multiple times on neck arm and abdomen; and that the deceased succumbed and died as a result of those injuries. The prosecution must adduce evidence to establish that at the time the accused attacked and injured the deceased, he had formed the necessary malice aforethought or intention to either cause death or grievous harm to the deceased.

23. The key issue raised by Mrs. Rashid in this issue was that of identification. Mrs. Rashid for the accused urged that the identification of the accused person's face and shoes by PW1 through the light from her mobile phone was insufficient as the light was not adequate. Mrs. Rashid submitted that it was not safe to rely on it since it was done in pitch darkness with limited light. For this proposition the defence counsel relied on the case of **WAMUNYU –V- REP [1989] KLR 424**, where it was held that:-

“1. 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 a conviction.

“2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”

24. On the issue of identification raised by Ms. Ochieng that it was that of recognition of the accused by PW1 for reason she knew the accused before the incident. Counsel urged that submitted that the light from the PW1's phone was sufficient light to enable PW1 see everything around her. Counsel urged that PW1 even talked to the accused during that encounter.

25. There are matters which are not in dispute. The evidence before the court is clear that the accused and deceased lived on the 2nd floor of a building and that on that particular night, there was a major blackout and so there was pitch darkness as there was no electricity. There is no dispute that there was no eye witness to the murder. There is no dispute that the murder took place inside the house where the deceased and the accused lived as husband and wife. The accused person does not deny having gone home on the material night but he said that he did not enter because he found a crowd saying that he had murdered his wife, and that they were baying for his blood.

26. We have the evidence of PW2 who told the court that the deceased visited her on the afternoon of the material day and that she escorted her back home at 9pm. PW2 testified that she entered the house of the deceased and found her husband inside. She greeted him and he responded before she went away soon thereafter. The evidence of PW2 places the accused at the scene of murder shortly before the offence occurred.

27. The other evidence we have was that of PW1. In her evidence, she said that she went up to the door of deceased home and even knocked the door but that no one opened, she walked away. She said that she heard people arguing from inside in low tones and that she was able to recognize the deceased voice. PW1 testified that she walked away and even went downstairs before walking back on recalling that the accused and deceased had marital problems according to the deceased. In fact that very day the deceased had called her expressing the desire to talk to her urgently. That was the reason she went there that night to see the deceased.

28. PW1 testified that it is when she returned that she met the accused at the door of their house locking it. She said that she had her phone's torch light on and held it next to the accused as he locked the door, and tried to talk to him in vain. She said that she watched the accused walking away without saying a single word to her and as she watched him, she saw that his shoes were leaving blood prints on the floor as he walked. She also saw blood in his hands.

29. The issue to determine is the quality of the identification by PW1. The Court of Appeal has set out the

principles applicable when dealing with evidence of visual identification in many cases. In the case of **Charles Maitanyi –vs- Republic [1985] 2 KAR 25** that Court held :

“It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.”

30. As it is stated in the above case, in order to test the evidence with greatest care it is at least essential to ascertain the nature of the light that aided the identifying witness to see and identify the suspect, what sort of light it was, its size, and its position relative to the suspect. PW1 testified that she was aided to see the accused by a torch light of her phone which she held in her hand at the time. PW1 described that she was standing next to the accused at the time, which is quite close, and that the accused was in the process of locking the door to his house. PW1 described the light as very bright.

31. Considering the evidence of identification by PW1, I find that the circumstances of identification were difficult for reason there was pitch darkness, the brightness of the light the witness used to see the accused was not very clear. Most importantly the witness saw the side view of the person given the description of where she was standing vis-à-vis the suspect. I took into account that PW1 knew the accused before having seen him twice or thrice before. None the less I find that standing on its own the evidence of PW1 could not sustain a conviction.

32. The Court of Appeal in the case **John Njeru Kithaka & Ano. Vs. Republic Criminal Appeal No. 436 of 2007**, stated thus:

“As we have stated, only two matters of law were raised and are for consideration before us. On identification, the law is now well settled and that is that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the conditions under which such identification is purported to have been made were not favourable and if the identification is by a single witness. Although recognition raises less problems than identification of strangers, nonetheless, even in cases of recognition, there is need to exercise caution before a conviction is entered. It is thus established that evidence of visual identification in criminal case can cause miscarriage of justice if it is not carefully tested. In the case of Kiarie vs. Republic [1984] KLR 739, this court made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even an honest witness to make a mistake. In cases of recognition it was stated in the case of R. vs. Turnbull [1976] 3 ALLER 549 as follows:-

Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

33. Even though the evidence of PW1 was that of recognition, I find that a conviction is not sustainable only on the basis of her evidence. What is required is other independent evidence to corroborate that of PW1, which implicates the accused with this offence.

34. The evidence of PW1, 2, 3 and 6 is corroborative. The reason is PW2 confirms that the accused was inside his house at 9pm when she escorted the deceased home that evening. The distance from PW2 and deceased's home was 200 meters. PW3 confirms the evidence of PW2 that indeed she saw PW2 escorting

her daughter, the deceased home that evening. PW3 also saw PW2 return to her home after escorting the deceased. PW3's home was on the way between PW2 and the deceased and accused's home, and they passed by PW3's home. PW2 said that they found the accused person when they reached the deceased's house and even exchanged greetings. PW2 saw the accused in a relaxed atmosphere. PW2 knew the accused well and the fact they even exchanged pleasantries rules out the chance that PW2 had a fleeting view of the accused.

35. Mrs. Rashid in cross examination and in her submission raised issues with PW3's evidence saying she could not have gone to deceased home that night because she had the deceased child out of another marriage and that the child would not have agreed to return home with her. There was no such evidence to suggest that PW2 was lying about going into accused home that night. I examined her demeanour during her testimony and found her composed, clear and one who gave a good impression that she was telling the truth. I was satisfied that PW2, and indeed PW1, 2, 3 and 6 were honest witnesses whose evidence was worthy of belief.

36. PW2 placed the accused at the scene of incident. Then there was the evidence of PW6 who gave independent account of his own experiences that night. It was PW6's evidence that at around 9pm, he heard noises and screams inside the deceased house where she lived with her husband. PW6 not only woke up and went out to check on the deceased, he also woke up his neighbours. When no one opened the deceased door, and since the noises had subsided, PW6 testified that he and his neighbours went back to sleep. He said that he woke up later to see blood at the deceased door, next to his, and bloody shoe prints from that door to the staircase up to the bottom of the stairs.

37. The evidence of PW6, though not having seen the accused that night corroborates PW1's evidence that indeed there were bloody shoe prints leading from the home of the deceased to the stairs and downstairs. This corroborates PW1's evidence that the murderer made the bloody shoe prints as he left the scene after committing the offence.

38. I did consider the fact PW1 and 6 did not mention seeing each other on that floor that night. From PW1's evidence, after she saw her friend in a pool of blood inside her house, she collapsed and later found herself elsewhere and could not explain how she got there. That explains why PW6 does not mention seeing PW1 and vice versa. The issue of the time was also considered. PW1, 2, 3 and 6 all talk of the events they witnessed having taken place at 9pm, yet they never met each other at the scene. The time they gave was clearly estimation. I find that the time was an approximated time. The fact is they were all clear that what they testified to happened at approximately 9 pm. In the circumstances, I find no contradiction in their evidence in that regard.

39. This leads me to the next issue raised by Mrs. Rashid regarding what the accused told PW7. Counsel in her submissions urged the court to disregard the testimony of PW7 as he was not recording a statement under inquiry from the accused and neither were the Judges Rules followed. PW7 testified that the accused came to the police station and said that he had killed his wife in Huruma. Such a statement is an extra-judicial admission and if it is admitted in evidence, it would be treated as a confession. The issue is whether it is admissible as evidence against the accused person.

40. Generally confessions made by an accused person are not admissible in Kenya unless they are made strictly under the law. Section 25 of the Evidence Act defines a confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

41. Section 25 of the Evidence Act was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

“25A (1) A confession or any admission of a fact tending to the proof of guilt made by

an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

42. The rules envisaged under (2) above are known as **The Evidence (out of Court Confessions) Rules, 2009** hereinafter the **Confessions Rules**. Rule 4 deals with the rights of an accused person and requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

43. Rule 4 (2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and Rule 4 (3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

44. In addition, the **Confessions Rules** requires that the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5).

45. PW7 was the Investigating Officer in this case. He was a Police Constable when he testified in court, which means that even at the time of investigating this case, he was an Officer of the same rank. That being the case, PW7 is not an officer of the rank mentioned under section 25A of the Evidence Act as having the authority to take confessions from suspects. In the circumstances, what PW7 alleges that the accused told him at Pangani Police Station 5 days after the deceased death is not admissible in evidence.

46. The other evidence against the accused is under statute, which is the statutory presumption created under **sections 111(1) and 119 of the Evidence Act. Section 111(1) of the Evidence Act** provides as follows:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

47. **Section 119** provides:

“119. The court may presume the existence of any fact which it thinks likely to have

happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

48. The evidence by PW2 placed the accused at his house where he lived with the deceased. PW6 heard an argument inside that house round about the time PW2 stated that she left the deceased at home with the accused. PW1 must have come later after PW6 and neighbours went to their homes since according to PW6 they left when no one opened the door to deceased home, and secondly after the arguments and screams in the house subsided. PW1 only heard arguments in low tones. By the time she went downstairs and returned back up to the same floor, the deceased had been murdered. I find that from the evidence on record, the accused was the last person to be seen with the deceased the last time she was seen alive.

49. Having been placed at the scene, under **sections 111(1) and 119** of the **Evidence Act**, the accused has to explain either how the deceased met his death, or how he left her. This is a statutory burden which the law expects an accused person to discharge, subject of course to the provisos under **section 111** of the said Act.

50. The accused put forward an alibi as his defence. He denied having been at home that day. He said that at around 9pm when he went to his house he found a huge crowd which was accusing him of murdering his wife and which was baying for his blood.

51. I am aware that an accused person bears no burden of proving that his alibi is true. All he needs do is create a doubt in the prosecution case, and where the prosecution case would be found weak such doubt would result to his benefit. (See **LEONARD ASENATH VS REP (1957) EA 206** which adopted with approval an English decision, **REP VS JOHNSON 46 CR. APP. R. 55[1961] 3ALL E.R. 969** and **UGANDA v. SEBYALA & OTHERS [1969] EA 204**) However there is in addition the presumption created under the two sections under the E. Act that requires some explanation from an accused person as stated above.

52. The accused denied having been home that night at the time of murder. The evidence by the prosecution establishes firmly that he was home that day and that he quarreled with his wife before she was found dead. It was in accused interest to offer a reasonable explanation as envisaged in the law. Such explanation is alluded to by the court of appeal in case in which it had occasion to consider the effect of a finding that the accused told an obvious lie. This was in the case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**, where the court of appeal observed:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where 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.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available”.

53. The accused denied being home that day. That was incredible, false and blatant lies. The accused also explained that after seeing the crowd baying for his blood, he ran to the police station where he intended to report about the crowd but instead he was arrested. The prosecution brought evidence to show that the accused ran away from the scene after this offence and resurfaced five days later at Pangani Police Station. His alibi is in the circumstances a sham. His defence that he went directly to the police on the

same day is yet another lie. I reject the defence accordingly.

54. The circumstantial evidence adduced by the prosecution against the accused meets the threshold for such evidence set by the court of appeal in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 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.”

55. The prosecution has firmly and cogently established the fact the accused was last person to be seen with the deceased before she died, and fact he was left with the deceased in their house moments before the deceased was found dead that night. Those facts taken together with the evidence of PW1 that the person she saw leaving deceased home was the accused just before the deceased body was seen inside the same house he just left all point irresistibly to accused guilt. I find that the prosecution has established that it was the accused who attacked the deceased on the night in question.

56. In regard to whether malice aforethought has been proved, in **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

57. This case is not dis-similar to the above case. The accused set upon the deceased and stabbed her multiple times on the neck, abdomen and arms causing severe injuries that led to her death. I find that section 206 (b) of the Penal Code has been met. The accused actions clearly show that his intention was to cause death or grievous harm to the deceased. The murder weapon was an exhibit. It was a long blade. The choice of weapon used also demonstrates the accused intention to cause death or grievous harm to the deceased.

58. Having carefully considered the evidence adduced by both sides in this case, I find that the prosecution has proved charge of murder against the accused person beyond any reasonable doubt. I accordingly reject the accused defence find him guilty of murder contrary to section 203 of the Penal Code and convict him accordingly under section 322 of the Criminal Procedure Code.

59. I thank Mrs. Rashid and Ms. Ochieng for the gallant effort put in furtherance of their respective cases.

READ, DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD FEBRUARY 2016

LESIIT, J.

JUDGE.