



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.4 OF 2006

REPUBLIC PROSECUTOR

VERSUS

PETER OKOTH ORIANGO ACCUSED

JUDGMENT

1. This is an old matter that dates back to 2006 in which the accused herein Peter Okoth Oriango was 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 9th day of November 2005 at Awendo market within Migori District in Nyanza Province, he murdered Olang'o Nyamisi. The trial then began before Bauni J (now deceased) with the aid of three assessors. After Bauni J's demise, Musinga J took over the matter on June 5th 2008 but without the assistance of the 3 assessors.
2. On 12th May 2009 Muchelule J took over the matter still with no assessors and on 29th July 2010, the accused was placed on his defence, but Makhandia J (as he then was) in a ruling dated 4th May 2011 issued directions that the subsequent trial of the accused without the aid of assessors rendered the entire trial a nullity. He accordingly ordered the accused to be tried afresh without the aid of assessors.
3. Accordingly, on 4th October 2011 plea was taken afresh. The accused denied the charges against him.
4. The matter then proceeded before Muriithi J on 8th May 2013 with an opening statement from Mr. Shabola the Prosecution Counsel. Briefly the facts are that on the 9th November 2005, the accused confronted the deceased who was in the company of other people and demanded to know why one Moses Ogunyio was having an affair with his girl friend. Thereafter, a struggle ensued and in the process the accused stabbed the deceased on the chest several times.
5. As a result of the aforesaid attack on the deceased, the deceased fell on the ground and accused continued stabbing him several times on the chest until he became unconscious. Using the same knife the accused attacked other people who had come to try and stop the fight. He also stabbed another person before escaping from the scene. Later, the accused was arrested and found with a knife in his jacket. He was subsequently charged with the present offence.
6. Mr. Shabola in concluding his opening statement, stated the prosecution intended to call 7 witnesses who would give their testimony and confirm that the accused with intent to cause the death of Olang'o Nyamisi did in fact cause his death; that the accused came armed with a knife and was out to inflict injuries and that the accused stabbed the deceased several times on the chest inflicting fatal injury.
7. PW1 was Moses Okonyo Ooro, a technician working at Sony Sugar Factory at Awendo. He recalled that on 9th November 2005 he was on duty when his colleague Morris Muga approached him and requested him to join him at the Awendo Town center as he (Morris Muga) had visitors from Kendu Bay. After having left his work station at 5.00 p.m., he joined Morris Muga -PW5-

- at Alambo bar at Awendo and found them in a group of 5. They included the deceased, Morris Muga and Crispin Wangila. Together with two ladies who were unknown to PW1, they took some drinks (beer) until 11 p.m.
8. At that time, the accused who was unknown to PW1 came to their table. Accused then approached PW1 and insisted that he buys him beer. After much persistence by the accused, PW1 gave the accused Kshs.50/= from his shirt pocket so that he (accused) could stop pestering him. When the bar closed at 11.30 p.m., they proceeded to another bar which was a night club known as Jogamu.
 9. On arrival at Jogamu, there was alive band and they went there in a group of 6 people including himself. A while later when they wanted to leave, the accused approached them again this time complaining that they were taking away his girlfriend. PW1 told the accused that if the lady was his he should just take her. By that time, the lady was heading towards the opposite direction from them as they were going towards the taxi bay.
 10. On reaching the taxi terminus, the accused again went to where PW1 and his colleagues were. The accused was carrying a knife with which he attempted to stab PW1, but he quickly knelt down and the knife only caught the elbow part of his jacket. PW1 then ran away for a distance of about 200-300 meters. When he stopped he heard people crying and saying that the accused had killed someone. Though PW1 wanted to go back to the scene, he was afraid to do so because he and his colleagues had been suspected of belonging to the Banana Referendum Group which was out to cause chaos in Awendo. This time was during the campaign period for the 2005 Referendum.
 11. Later, PW1 decided to go and report the matter at Awendo police station. On arrival at the station, PW1 found some of his colleagues that is Morris Muga, Crispin Wangila, Romans Nyajwa and a lady called Kwamboka already at the station. He also confirmed that he did not see accused stabbing the deceased.
 12. In the final part of his evidence in chief, PW1 testified that the person who tried to stab him with a knife was the accused whom he did not know before. He also testified that he did not understand why the accused wanted to stab him, but one thing he was sure of: that he clearly identified the accused with the help of street light. PW1 also testified that at about 10.00 a.m on 10th November 2005 when the accused was taken to Awendo police station, he (PW1) could still identify him as he (accused) was wearing the very same clothes he had been dressed in during the attack, the only difference being that the accused's clothes were now blood stained. PW1 also stated that the accused was taken to Awendo police station together with a blood stained knife. PW1 alleged that the knife was the same knife the accused had attempted to stab him with and that it was the same knife the accused had used to stab the deceased several times in the chest the previous night. It is to be noted that PW1 testified again as PW4, apparently quite inadvertently since the witness had testified before Muriithi J with the assistance of a different prosecution counsel.
 13. PW2 was Wanjira Opondo Chrispine. He corroborated PW1's testimony to the effect that PW1, the deceased and himself together with others went to Alambo bar on the evening of 8th November 2005 for drinks. They later moved from there to Jogama Night Club for more drinks. While they were at Jogama night club, the accused approached him and asked him why he (PW2) had refused to buy beer for him (accused) when it was a well known fact that he (PW2) was brother of the Managing Director of Sony Sugar. When PW2 told accused that he had no money to buy him (accused) a beer, the accused left him.
 14. At about 2.00 a.m as the group of friends was leaving Jogama Night Club, the accused again went to the group and asked the deceased why he (deceased) was taking his (accused's) girlfriend. As the arguments over the lady continued, the accused removed a dagger from his coat jacket and tried to stab Moses Ogonya Ooro (PW1/4). Realizing that they could come to harm, PW2 and his colleagues decided to take a taxi home, and as negotiations for the tax were ongoing, the accused again approached the group. The accused was wild. He (accused) was accompanied by 2 other people. The group of friends began to run for their lives, but as they ran, the deceased who tried to ward off the accused's threats by kicking him, fell down. While the deceased was on the ground, the accused stabbed him several times on the chest, neck and throat.
 15. On seeing what had happened to the deceased, PW2 and others took stones and started pelting the accused. The accused then ran away. Later, the matter was reported to Awendo Police station. The police came to the scene and removed the body of the deceased to the mortuary.
 16. At around 10.00 a.m on 9th November 2005, the accused was arrested by CID Officer Mr.

- Lubanga and taken to the police station. He was subsequently charged with the present offence. Mr. Lubanga was not called to testify.
17. Upon being questioned by the court for clarification, PW2 testified that while he was at Alambo Bar, the accused went to him and asked him for money for a beer, but when PW2 said he had no money, the accused asked PW2 to ask his colleagues for money. PW2 was given Kshs.50/= by Morris Nyanjwa Muga which amount he gave to the accused who in turn proceeded to buy himself a can of **“Furaha”** beer.
 18. PW2 also stated that while he was at Alambo Bar, he spoke to the accused for about 6 minutes under electric lighting and that he again talked to the accused while they were at Jogama Night Club for about 5 minutes.
 19. During cross examination, PW2 testified that his written statement to the police does not mention that he bought some beer for the accused, nor does it say that he met the accused at Jogama Pub. He also testified that before the accused stabbed the deceased, he (accused) uttered obscene words to the group. He confirmed that the accused was pelted with stones after he (accused) stabbed the deceased. He reiterated his averments in examination in chief that the area (taxi bay) where the stabbing took place was well lit and he was therefore able to clearly identify the accused.
 20. Romanus Odino Nyadura testified as PW3. It was his testimony that while he and PW1, PW2 and PW5 were enjoying a drink at Awendo Town on the evening of 8th November 2005 and the early hours of 9th November 2005, at Jogama pub, the accused emerged from a disused telephone booth and told Moses Ogunyoro Ooro, PW1, in Kiswahili; **“Leo huendi na bibi yangu: translated “today you are not taking my wife with you.”** That the accused engaged PW1 in a long argument about his (accused's) **“wife”**, as a result of which a fight erupted between the accused and PW1. The accused attempted to stab PW1 and everyone else who tried to rescue PW1 and others. The people scampered for safety.
 21. At that moment, PW3, the deceased and a lady who was with the deceased ran towards the taxi bay hoping to get onto a taxi and escape to their home before they were stabbed. As people ran, the deceased fell down and was immediately attacked by the accused who stabbed him on his chest several times. PW3 ran to Sony Dispensary to look for an ambulance, but found none. The matter was reported to Awendo police station. The police later came to the scene and took the deceased's body to the mortuary for preservation and for subsequent post mortem examination.
 22. During cross examination, PW3 stated that he first met the accused at Jogama Bar as he (accused) emerged from a disused telephone booth. He also testified that there was light at the taxi bay, which light was coming from an adjacent bar and other adjoining shops.
 23. PW5 was Morris Nyanjwa Muga who confirmed that before the attack took place, he and his colleagues had been drinking at Alambo and later at Jogama bar in Awendo town. That as they were leaving Jogama Bar, the accused whom he had earlier seen at Alambo Bar went to them, claiming that a lady by the name Kwamboka, who was in the company of the gentlemen was his (accused's) girl friend. The accused was informed that none of the men was interested in Kwamboka and that if he wanted, he should take her with him. PW5 went away and was only woken up at 4.00 a.m and informed that the deceased had been killed and that he was required at Awendo Police station to record statements.
 24. In response to questions put to him during cross examination, PW5 stated that the accused approached them while they were at Alambo Bar and asked for beer, and again the accused appeared to the group as the group was leaving Jogama Bar.
 25. Number 76786 Police Constable Douglas Ongicho of CID Migori and formerly attached to Awendo police station testified as PW6. He recollected that on 9th November 2005 at about 3.00 a.m, he was woken up from sleep and summoned to the report office by Police Constable Kirui. At the report office, he found the OCS, C.I Kiarie, the O.C Crime Inspector Lubanga as well as other officers together with members of the public. Upon receipt of the murder report, PC Ongicho and other police officers proceeded to the scene from where they recovered the body of the deceased and took it to the mortuary. The accused was also thereafter arrested and taken to the police station. The accused was later taken to the hospital for mental assessment.
 26. The witness also testified that the post mortem on the body of the deceased was done on 10th November 2005. From the post mortem report which was produced as **P. Exhibit 1**, the deceased's body had the following injuries:-

- *Stab wound on left mid-chest vertical about 4 cm long;*
- *Stab (cut) wound on left mandibular region measuring approximately 5 cm long traverse;*
- *Stab wound right upper chest vertical about 4 cm long;*
- *Severe respiratory right sided haemothorax;*
- *Penetrating wound in the left atrium about 30 cm long;*
- *Chronic hepatitis with cohesion;*
- *Cut wound on the left mandible.*

1. Dr. Idagiza who performed the post mortem examination on the body of the deceased was not called to testify, but his opinion was that the cause of death was cardiovascular collapse due to penetrating injury of the left atrium.
2. PW6 also testified that he took certain blood samples and clothing to the Government Chemist for analysis. The blood samples were of the accused, and the deceased marked as items Q and W respectively. Among the other items taken were a Somali sword in a leather sheath (item X), a grey/yellow/blue checked jacket of the accused (Item Y), a greenish soiled coat of the deceased (Item Z1) and a black/greenish striped long sleeved shirt of the deceased (Item Z2). According to the Government Chemist report produced by PW6 after heated arguments, blood samples marked Q and W were of blood groups B and O respectively. The somali sword (Item X) and the grey/yellow/blue checked jacket of the suspect were both slightly stained with human blood group O. The result of the analysis was that the blood stains found on items Y, X and Z1 and Z2 all matched in group the blood sample of the deceased and that these blood stains could have come from the deceased after injury. The Government Analyst Report dated 9th May 2006 was produced as **P. Exhibit 3**, while the Exhibit Memo Form dated 20th November 2005 was produced as **P. Exhibit 2**. The medical examination report on the mental status of the accused was produced as **P. Exhibit 4**. The same is dated 9th November 2005. The somali sword produced during previous proceedings could not be availed as an exhibit.
3. During cross examination, PW6 explained to the court that he could not say where the doctor who conducted the post mortem report or the Government Analyst who carried out the analysis were, and that that was the reason why he had to produce all the exhibits in this case. PW6 also told the court that Inspector Lubanga who arrested the accused personally told him (PW6) that during the arrest the somali sword was found on the accused. PW6 also testified that the post mortem report comprises two parts namely: Part I which is normally filled by the police (which part he said he filled) and Part II which is normally filled by the doctor who carries out the post mortem examination.
4. In unsworn statement of defence, accused stated that on 7th September 2005, his youngest child was sick and he left at about 10.00 a.m. for the shops to buy some medicine for the child. Before he got to the shop, the motor vehicle he was travelling in stopped and he was arrested at a road block which was near Sony police station. Being one of the 3 excess passengers, he was taken to the police cells.
5. At the police cells, he alleged that some people were released on cash bail but he did not have enough money for the cash bail. On that night, he alleged that he was assaulted by one police officer going by the name Ongicho. At about 11.00 p.m., he was taken to Migori police station, was kept at Migori police cells for 120 days and only brought to court on 25th January 2006.
6. He prayed for this court in its judgment to consider whether his having been kept in custody for 120 days was constitutional. He denied the charges of murder facing him.
7. After considering all the evidence on record, this court needs to answer two questions:-
 - *Does the fact that the accused who was arrested on 9th November 2005 and only arraigned in court on 25th January 2006 mean that his trial should be declared a nullity since the prosecution failed to arraign him in court within the stipulated time?*
 - *Have the charges of murder against the accused been proved?*
1. In answering the first question, according to the charge sheet, the accused person was arrested on 9th November 2005. However, according to the record of proceedings, he first appeared in court for purposes of plea on 25th January 2006. That means a total of 77 days lapsed before the

accused was arraigned before the High Court for the purpose of plea.

2. **Section 72 (3) of the repealed Constitution** provided:-

“A person who is arrested or detained -

a)

b) upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before court within twenty four hours of his arrest or from the commencement of his detention; or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging the provisions of the subsection have been complied with.”

3. I have already highlighted the chequered history of this trial, how it initially proceeded before Bauni J. then Muchelule J, Makhandia J (as he was then), Muriithi J and finally Sitati J. It is to be noted that as the trial proceeded before all these judges, the accused who was represented by counsel at all times never raised this issue and only raised it during defence hearing, that is after the prosecution had already closed its case. In my view, the issue of constitutional violation was an afterthought.
4. Emukule J was faced with a similar predicament in **Republic -vs- David Geoffrey Gitonga – criminal case No.79 of 2008 -Meru** (unreported). In that case, the accused was tried for the offence of murder and after the conclusion of the trial and after the accused had made his defence, his counsel submitted that the trial was a nullity since the accused was detained for 140 days before he was charged in violation of **Section 72 (3) (b) of the repealed Constitution**.
5. Emukule J declined to acquit the accused saying that a breach of **Section 72 (3) (b)** does not render a trial a nullity but entitles an accused to compensation as stipulated in **Section 72 (6)**. He thus reasoned:-

“I am aware that contrary opinions have been expressed by others in this court. I do not share these views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy law, order and indeed nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect of defined offences and by duly competent courts or tribunals.”

6. In **Julius Kamau Mbugua -vs- Republic [2010] e KLR** the Court of Appeal sitting in Nairobi, Githinji, Waki and Visram JJA observed:-

“The decision of Osiemo J in J.K. -vs- Republic – Eldoret High Court Criminal Appeal No.83 of 2007 deserves mention. In that case, the appellant in the course of hearing an appeal against both the conviction and sentence for defilement, raised a preliminary objection (issue in essence) that, the trial and conviction were a nullity since he was unlawfully detained in police custody for more than 24 hours in violation of section 72 (3).”

The superior court after making a finding that the rights of the appellant had not been violated, added:-

“The appellant having failed to assert his right from the time he appeared in court and throughout the proceedings, he must now be treated as having waived the alleged violation of the Constitutional right and I reject this ground and further no prejudice to the appellant had been established.”

I entirely agree with the above restatement of the law.

7. Secondly, a declaration that the accused's right has been violated does not automatically entitle such accused to an acquittal. As often said justice must be seen to be done by the watchful eye of the public. The court must constantly balance the claim of the accused against the possibility unproven and unprovable in many cases that delay has been procured or encouraged by someone acting in the interest of accused.
8. In the instant case, as I have already stated above, the accused was all along represented by counsel, and it was only after the prosecution closed its case that the accused in his unsworn statement of defence alleged that his rights had been violated after he was arrested and before he was brought to court. I agree with the reasoning of Emukule J and decline to render the trial of the accused a nullity. The prosecution in this case was not given a chance to rebut accused's allegations as to why he was kept in remand for 77 days. Considering the fact that all along the accused was represented by counsel, he cannot raise this issue after the prosecution had already closed his case. He should have done so at the commencement of the hearing before Bauni J.
9. Now I turn to the more contentious part of this case, namely whether or not the charges of murder against the accused person were proved beyond reasonable doubt. In my considered view, the prosecution has discharged its burden of proof.
10. Firstly, the evidence of PW1-PW5 clearly shows that the accused was identified by all the witnesses as the person who insisted that PW1 buys him beer and then he (accused) was also the same person who had a confrontation with the witnesses when they were leaving the night club known as Jogama Inn on why they were going away with his lady.
11. According to the evidence of PW1, who also gave evidence as PW4, the accused approached them when they were leaving the bar and demanded to know why they were leaving with his lady. PW1 in turn answered him and told him that they were not interested in the lady. PW1 then stated:-

“When we reached the taxi terminus, the man carrying a knife attempted to stab me and I knelt down and the knife only caught the elbow part of my jacket. I ran away.”

PW2 in his evidence in chief stated:-

“As the arguments continued, the accused removed a dagger from his coat jacket and tried to stab Moses Ogonya Ooro, a colleague of mine.

Since we were many we overcame the accused but eventually he ran away. At that point we decided to take a taxi home but at the taxi bay, the taxi driver told us he could not go to Sony since it was late. The accused came again accompanied by two other people. He was still dressed in the same clothes but he was very wild. There was a security light where we were so I saw the accused very wild.

We got scared of the accused who was by now very wild. We had to run for our lives but after a short distance, I came back to the taxi man. On returning, I found the deceased Olango Nyamisi standing by the taxi. Olango Nyamisi was one of the colleagues with me that night. He was in the company of a lady who was his fiancée. Then the accused came carrying a dagger in his right hand. Mr. Nyamisi tried to kick the accused as he was not sure why the accused was running back to us. In the process of kicking the accused Mr. Nyamisi fell down.

While Mr. Nyamisi was on the ground, the accused reached for him and stabbed him in the chest, neck and throat. At the time Mr. Nyamisi was lying on his back.

We tried to stone the accused and that is when the accused ran away.”

12. PW3 Romanus Odiro Nyadura had this to say on the attack by the accused against deceased:-

“..... Then the man pulled a dagger from the jacket and aimed it at everyone. We scattered in

different directions and the man was fighting everyone who wanted to rescue us. Me and the deceased and a lady who was with the deceased ran towards the taxi. The man followed us. The deceased being drunk and old could not run or dodge. We were at the taxi bay which was 10-15 metres away from Jogama.

Then the deceased fell down. The man who had emerged from the telephone booth stabbed the deceased while the deceased was on the ground. He stabbed him several times. Then everybody ran for their lives.

The deceased was stabbed on the chest and neck. The deceased was on the ground with his face facing up.”

13.PW4 during evidence in chief stated:-

“As we were leaving the same strange man who had asked me for a beer appeared at the door of the bar. The man was still wearing the same clothes and I was able to see him with the help of security lights.

.... Then at that point the man became violent forcing us to run towards the taxi so we could go away. As we talked to the taxi drivers, the man came running towards me carrying a knife in the hand and tried to stab me but I ducked and ran for my life.”

14.PW5's evidence only confirmed that the accused had began a confrontation with PW1 over a lady known as Kwamboka but since he (PW5) left soon after he did not witness the attack on the deceased.

The whole of the above evidence clearly shows that the accused was at the scene of crime; that he made every effort to annoy the deceased, that he ferociously attacked the deceased after the deceased fell down and that PW1, PW3 and PW5 clearly identified the accused as the person who attacked the deceased and stabbed him many times in the chest.

15.PW6 was the investigating officer who produced the postmortem report as **P. Exhibit 1** together with the government analyst report comparing the blood on the knife with that of the deceased. As indicated in the proceedings, before PW6 adduced evidence, defence counsel objected to the production of the above reports by PW6 on the ground that he was not qualified/expert to adduce such evidence.

16.Karanja J was faced with a similar situation in State -vs- Godfrey Masika Juma [2007] e KLR where he observed:-

“..... These 2 reports were produced in court under **Section 77 of the Evidence Act** by the State Counsel through the investigating officer, one IP Francis Gutuma. The defence counsel objected to their production on the basis that the witnesses is not capable of giving the meaning of the report to this court. I could see the danger in allowing this witness to produce the reports given the nature and importance of the evidence they contained. Therefore suggested to the State counsel that it would be proper if the maker of the documents or a person with expertise in that area came to produce them as exhibits. For reasons I could not comprehend, he insisted that it was his right to produce the documents under **Section 77 of the Evidence Act** as the law allowed him to do so I accordingly allow4ed him to produce the said reports. The law is nonetheless clear on this issue **Section 77 of the Evidence Act** is only an enabling section which authorizes the reception of evidence of the reports of the Government Analyst ballistics expert report etc and dispensing with the formal proof of the signature on such a report it does not however preclude the prosecution or the defence from proving the nature of the evidence such a document entails. That is why in my considered view the prosecution has to be very careful and cautious when invoking that provision. A document with evidence of a technical of specialist nature should not be produced by a person who lacks knowledge of the issues contained in such a report. A police officer who cannot stand or who is not trained in medical matters cannot therefore answer any questions on the substantive matters raised in a report should never be called to produce such a document. A police

officer should not therefore be called to produce a medical report, post mortem report, government analyst report etc unless there is no objection to such a production by the defence. Where the defence clearly indicate that they would like to cross examine or have some issues clarified in the report, then if the maker of the document cannot be found, then an expert in that field should be called to testify on the report. Then and only then, would such a report have any evidential value.”

17. The 2 reports produced by PW6 were not explained nor the contents thereof explained to this court. For purposes of this case, they remain mere chits of papers signed by the Government Analyst. They did not add any value whatsoever to the prosecution's case.

18. Applying the above reasoning by Karanja J, does that then mean that the accused goes scotch free? I think not. I say so because in as much as the documents produced by PW6 are of no real evidential value, there is still enough evidence on which to make a finding of guilt against the accused on the charge he faces based on circumstantial evidence. In the case of **Sawe -vs- Republic [2003] KLR 364** the Court of Appeal held as follows:-

- i. *In order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of guilty.*
- ii. *Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*
- iii. *The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*
- iv. *Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.*

1. Further, in the case of **Teper -vs- Republic [1952] A.C. 480 at page 489** it was held:-

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

2. In the instant case, we have the evidence of PW1-PW5 confirming the fact that the deceased was perfectly healthy and happy enjoying his beer with his colleagues before a confrontation ensued between him and the accused as they were leaving Jogama Inn. According to the evidence of PW1, the accused approached him alleging that PW1 and his colleagues wanted to leave with his (accused's) girlfriend. Once PW1 revealed to the accused that he had no interest in the alleged girlfriend, the accused drew a dagger and aimed it at him with clear intentions of stabbing him. Luckily, he managed to dodge the dagger and to run for dear life.

3. The deceased in this case was not so lucky. According to the evidence of PW2 and PW3, when the accused confronted them and drew a dagger, they all happened to run for their lives. However, the accused managed to catch up with the deceased when the deceased fell down. The deceased had in the process of running away, attempted to kick the accused but unfortunately, he fell down on his back with his face facing up. The accused took advantage of the deceased falling down and he proceeded to stab him continuously on the chest and throat. According to the evidence of PW2, on witnessing the accused stabbing the deceased, they threw stones at the accused who eventually stopped stabbing the deceased and ran away.

4. PW2 and PW3's evidence is corroborated by PW6, the investigating officer who confirmed that indeed once the accused was arrested, he had to be taken to hospital as he had some injuries on his face.

5. After the vicious attack by the accused on the deceased, the body of the deceased was taken to the mortuary by police officers.

6. Section 203 of the Penal Code reads:-

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

7. On the issue of malice aforethought, I am guided by the case of **Daniel Muthee -vs- Republic – CA No.218 of 2005 (UR)**, where 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.”

8. From the un rebutted evidence given by PW2 and PW3 on how the deceased was attacked by the accused by stabbing him repeatedly in the chest and the neck as the deceased lay helpless on the ground, the accused must have known that the act of repeated stabbing of the deceased on the chest and neck which are vital parts of a person's body would cause death or grievous harm to the deceased. Through these actions, malice aforethought was established in line with the provisions of **Section 206 (b) of the Penal Code.**
9. Further, from the evidence on record, I am satisfied that the chain of circumstances linking the accused to the commission of the offence remained unbroken throughout the trial.
10. In the circumstances therefore, I find the accused herein, Peter Okoth Oriango, guilty of the murder of Olango Nyamisi contrary to **Section 203** as read with **Section 204** of the **Penal Code** and convict him accordingly under **Section 322 (1)** of the **Criminal Procedure Code.**

Delivered, dated and signed at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Majale for State

Mr. Samwel Onyango for O.M. Otieno for Accused

Mr. Bibu - Court Assistant

Sentence

The court notes that the accused herein has been in custody since 2006. The court also notes the mitigating circumstances put forth on behalf of the accused. While noting the above, it is not lost to the court that the accused herein attacked the deceased in a most ferocious manner; and in the circumstances, this court has no alternative but to mete out to the accused the sentence that is provided under the law. The accused is therefore sentenced to suffer death as by law provided. R/A within 14 days from today.

R.N. SITATI

JUDGE.

29/10/2014