



material day at 8 p.m., they were at home when they were attacked and according to PW1, he was in the kitchen while PW2 was taking food to the main house but ran back to the kitchen to say that there were strangers in the house. PW1 saw two men and he described them as follows;

i) One, with black clothes and a cap who he identified as the 1<sup>st</sup> accused. He stated that the person had a panga and an iron bar.

ii) a short man with a panga who he could not identify.

6. PW2 said that she saw only one person, a tall man, whom she identified as the 1<sup>st</sup> accused who was allegedly dressed in black clothes from top to bottom. He had an iron bar.

7. According to PW1, the 1<sup>st</sup> accused slapped him while the second man cut him with a panga and on the available lighting, when in the kitchen, he said that there was a lamp when the 1<sup>st</sup> accused entered it but went off shortly thereafter but not before he could identify him. That because the lamp went off, he was unable to identify the second person.

8. PW2 on her part said that when she was first confronted by the tall man, she identified him using moonlight and also because the man grabbed her and was therefore close to her.

9. Both witnesses testified that after the robbers left, they found that Anjeline had been injured and was not talking. She was assisted by neighbours and was taken to Mukumu Hospital and died while undergoing treatment.

10. **PW10, Sgt. Daniel Baraza**, together with other police officers went to the scene at 10 p.m. on the material night and during investigation, he was informed that a witchdoctor had been approached by the accused persons to cleanse them and so he had them arrested and later charged them with the present offence.

11. **PW11, Dr. Edwin Anjira**, performed a post mortem on the deceased's body and concluded that she had died of severe bleeding following the severance of her spine.

12. PW6, Peter Lumulo Shatiala is the one who identified the deceased's body prior to post-mortem.

13. When the accused persons were put on their respective defenses, the 1<sup>st</sup> accused stated that he had no knowledge of the deceased nor the manner of her death. He stated that he was arrested because of a fight he had with PW3 and that they previously had another fight (on 9.4.2005) when PW3 injured him and he was taken to Mukumu Hospital for treatment. He gave evidence that he participated at an identification parade but the witnesses who claimed to have identified him were wholly unknown to him.

14. The 2<sup>nd</sup> accused on his part also denied knowledge of the murder and stated that when he was arrested, one PC Amboko threatened him by shooting a bullet close to his ear and later beat him until he became unconscious.

15. The 3<sup>rd</sup> accused also denied knowledge of the murder and stated that he was arrested on 9.9.2006 and later charged with the present offence.

16. I should begin my analysis and evaluation of the case by stating the following; that very often, investigations and prosecution of cases is conducted so casually that one wonders whether there is any sense in our criminal justice system. In the present case, the initial evidence I reproduced is wholly inadmissible. A theory has been advanced that the 1<sup>st</sup> accused confessed to the murder and even confessed the motive for it; robbery. Neither the motive is relevant nor is the "confession" to PW3 and PW4 admissible and all the evidence in that regard is irrelevant. I have perused the Evidence (out of court confession) Rules 2009 and that finding is consistent with these Rules.

17. Turning to the only evidence on record, it is alleged that PW1 and PW2 were able to identify the 1<sup>st</sup> accused at the scene. I will leave that evidence for a minute, but where is the evidence connecting the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons to the offence of murder? I have dismissed the evidence of PW4 as inadmissible and yet in his evidence, PW10 stated that he arrested the accused persons because the witchdoctor who they had approached to cleanse them for the murder had named them. In his own evidence, the witchdoctor only named the 1<sup>st</sup> accused as the one who approached him and so even if his evidence was admissible, he never actually named the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. No other witness gave any evidence that would in any way connect the two to the charge.

18. Returning to the evidence against the 1<sup>st</sup> accused person, the only question is whether PW1 and PW2 were able to identify him on the material night. I have elsewhere reproduced the evidence in that regard and I am satisfied that it was consistent and each of the two was able to identify the 1<sup>st</sup> accused using light from the lamp in the kitchen and moonlight at separate instances. PW2 was quite close to the 1<sup>st</sup> accused so was PW1 who was slapped before the lamp went off and that is why PW1 could not identify the second assailant. I have found no reason to fault that evidence and I am satisfied that they were able to identify the accused person on the material night in favourable circumstances.

19. On his defence that he was arrested because he had a fight with PW3, I find that evidence as not strong enough to challenge the evidence of identification at the scene and will dismiss it as such. The defence is in no way an answer to the charge.

20. Having so held, it follows that when a person sets out and goes into another's home, attacks that person, causes fatal injuries and is properly identified as having been at the scene, it follows that malice aforethought has been established and murder proved beyond reasonable doubt.

21. In the event, I have said that the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons are not guilty of the offence of murder and are accordingly acquitted while the 1<sup>st</sup> accused is convicted as charged.

22. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons may be released unless, they are otherwise lawfully held.

23. Orders accordingly.

***Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of March, 2011***

**ISAAC LENAOLA  
J U D G E**