



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 58 of 2009

REPUBLIC PROSECUTOR

-VERSUS-

LUKE JUMBA AVINA.....ACCUSED

JUDGMENT

The accused **LUKE JUMBA AVINA** is charged with **Murder** contrary to section **203** as read with section **204** of the **Penal Code**. It is alleged that on the 20th day of June, 2009, at Dandora Phase V ex-Muoroto in Nairobi East District within Nairobi Area, the accused unlawfully murdered **WELLINGTON AURA OSORE**.

The charge facing the accused is ‘**Murder** contrary to Section **203 of Penal Code.**’ That section provides 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.”

The prosecution has the burden of proof in this case. It has to prove the charge against the accused beyond any reasonable doubt. The prosecution has to prove that the accused, with malice aforethought and due to an unlawful act or omission, caused the death of the deceased.

The prosecution case is that **CONSOLATA ADHIAMBO PW3** was married to the accused person for a period of 21 years and that the two had six children. **CONSOLATA** stated that the two of them separated in 2007. That on the material day, 20th June, 2009 at 6 p.m. she was at her kiosk supervising one, **WELLINGTON AURA OSORE**, who is the deceased in this case, as he painted the kiosk. The kiosk belonged to her and another one, **GILBERT BARAZA AMKO PW4** in the case. **CONSOLATA** stated that as the work was going on, she noted that the accused person came and stood opposite the kiosk. **CONSOLATA** stated that the accused had been threatening to kill her and that whenever he found her in any company, whether of a man or a woman, he became hostile. She said that after she saw the accused across the street, she decided to ask the watchman to find out from the deceased what he wanted.

The watchman, **DAVID LOKOIYE IKUTAN, PW1**, confirmed that **CONSOLATA** sent him to the accused person who was across **CONSOLATA'S** kiosk. **DAVID** confirmed that he approached the accused person whom he recognised as a person he had seen two or three times before around the market place. **DAVID** says that as he approached the accused person, the accused decided to leave the area. **DAVID** testified that he clearly saw the accused through lighting coming from a street light against which the accused was leaning, just before he decided to walk away.

It was **CONSOLATA'S** evidence that after the deceased completed painting her place, they started walking home together. It is not contested that **CONSOLATA** and the deceased lived in the same house with the children of the marriage between the accused and **CONSOLATA**. **CONSOLATA** testified that it was on their way home that they met the accused person. She stated that on their way home she noticed the accused person at the *matatu* terminus. **CONSOLATA** said that they continued walking with the deceased towards a junction ahead of them. **CONSOLATA** testified that after reaching that junction, the accused person emerged ahead of them and started throwing stones at them and saying: "*I must kill someone today.*" He also said "*You don't sire children but you have taken my wife and children.*" **CONSOLATA** said that after the accused made that statement, she saw him throw a jab and hit the deceased on his abdomen near the umbilical cord; that on being hit the

deceased fell down flat face forward to the ground. **CONSOLATA** said that she did not realise that the deceased had been stabbed until people came in answer to her screams, and after she had also called some neighbours for help. When the people came to help, she said that she turned the deceased over in order for him to be carried to the vehicle and that it was then that she noted that the deceased had been stabbed and that the intestines were protruding from the umbilical area. By the time they reached Kenyatta National Hospital the deceased was pronounced dead.

PW5 RODRICK OGWANO was a ten year old boy who was the son of the accused and **CONSOLATA**. His testimony was that at 6 p.m. on 20th June, 2009 he and his brother **BRIAN** went to visit their father the accused person in his house. They did not find him at home but that he came shortly later in the company of their elder brother called **INVESTER**. **RODRICK** testified that their father gave him and **BRIAN** food which they ate. **RODRICK** stated that their father asked them to cook more food. **RODRICK** stated that **INVESTER** went away leaving him and **BRIAN** and the father. **RODRICK** stated that in their conversation, his father asked him and **BRIAN** where their mother slept in the house. And that when they told him that she slept on a chair, he accused them of lying to him. **RODRICK** testified that he saw his father go to the side of the bed and take a metal bar. He described the metal bar as being about 1

foot long and having the thickness of 2 biro pens put together (about 1cm).

RODRICK stated that he saw the father put the metal bar inside his jacket. He identified the jacket the accused person was wearing during the proceedings as the same one he had on the day in question. He said that his father left the house leaving them preparing food and that he did not inform them where he was going. **RODRICK** said that by the time the father came back, they had already eaten and gone to sleep and therefore he was not able to tell what time it was.

The accused in his defence did not deny having met **CONSOLATA** who was in the company of the deceased on the material date. The accused contends that upon meeting the two as he was about to pass them **CONSOLATA**, who used to be his wife pushed him; that on inquiring from her why she did that, and that before she could answer, the deceased hit him with a stone. The accused testified that he realised that the two of them wanted to beat him and that one of them had a stone. On realising so the accused said that he punched the deceased in the stomach and then escaped from the scene. The accused contended that he does not know what happened after punching the deceased because he ran away leaving the two of them behind.

MR. SWAKA represented the accused person in this case while **MR. KABAKA** and later **MRS. TUTA** represented the State. After the close of the prosecution case **MR. SWAKA** made submissions which I have considered in this judgement. **MR. KABAKA**, Learned counsel for State opted to make no submissions at the close of the prosecution case. However, **MRS. TUTA** gave submissions at the close of the defence case. The learned State counsel submitted that the State was relying on the evidence on record. Counsel urged the Court to find that the prosecution had proved its case against the accused beyond any reasonable doubt. **MRS. TUTA** urged the Court to find that the accused person deliberately inflicted an injury on the deceased which caused his death. **MRS. TUTA** submitted that the act of the accused amounted to the offence for which he was charged and that therefore he should be convicted for it.

MR. SWAKA for the accused submitted that **CONSOLATA PW3** was not candid about the events leading to the death of the deceased. Counsel urged the Court to find that hers was a case of a personal grudge against her former husband, who is the accused person in this case. Counsel submitted that **CONSOLATA** was using their separation as a pretext that the accused person had committed the murder. **MR. SWAKA** learned counsel for the accused submitted that **CONSOLATA** must have been tampering and concealing

evidence for the reason that she turned over the deceased at the scene before he was lifted into a vehicle and taken to the hospital. Counsel submitted that the reason why **CONSOLATA** did not see the weapon used to injure the deceased, was because it was dark. **MR. SWAKA** urged the Court to find that there was a possibility that anyone other than the accused person committed this act. Counsel also urged that by turning over the deceased at the scene **CONSOLATA** destroyed evidence.

I will deal with the issue of **CONSOLATA** at a later stage but I must comment on counsel's submissions that **CONSOLATA** was tampering with and concealing evidence when she turned over the deceased. I find this suggestion by counsel farfetched and misleading. **CONSOLATA**'s evidence is very clear that the deceased fell down flat on his face after the accused person punched him on the stomach, and that the reason for turning him over was merely intended to make it easier for him to be carried to the vehicle. I find **CONSOLATA**'s explanation reasonable. Nothing turns on this point.

MR. SWAKA urged that the prosecution case was anchored on the evidence of PW3 that is, **CONSOLATA** and also on circumstantial evidence. Counsel submitted that the evidence did not meet the requirement of law as far as circumstantial evidence is concerned. In regard to the evidence of **PW1**,

DAVID, MR. SWAKA submitted that he did not see the accused person as it was dark and also for the reason that by the time **DAVID** reached the accused, he had disappeared. Counsel urged that in evidence **DAVID** did not point out which person he had seen. **DAVID** identified the accused person in Court as the one he saw on the material day and also two or three other times before that day. Nothing turns on this point.

MR. SWAKA submitted that **PW2 CHRISTINE MBAISI** testified that when **CONSOLATA** went to see her, all she stated was “*kisu*” which means a knife. **MR. SWAKA** submitted that **CONSOLATA** alleged that the accused person had been harassing her before this incident. Counsel however submitted that no evidence was produced in support of that allegation.

I wish to comment on the submissions by **MR. SWAKA** that no evidence was adduced to support **CONSOLATA**’s allegation that the accused person had been harassing her prior to the incident in question. **MR. SWAKA**, while cross examining **PC WAMELA** who was PW9 in the case, posed the question whether any reports of threats had been made to the station touching on the accused and **CONSOLATA**. **PC WAMELA** answered that several reports of threats by the accused person against **CONSOLATA** had been made at the

Dandora Police Post. The officer said that for instance O.B. No. 14 of 13th of May, 2007 was a case in point. **PC WAMELA** testified that in that O.B. entry, **CONSOLATA** had reported that the accused person had issued a number of threats against her. **PC WAMELA** further went on to state that the accused person was even arrested and booked at the Police Station vide O.B. No.14 of 14th of May, 2007. **PC WAMELA** said that it was only after the accused person pleaded for forgiveness from his wife, **CONSOLATA**, in the presence of the investigating officer of that report, one **PC BENJAMIN CHEPKONGA**, that the wife agreed to pardon him leading to his release on 16th May, 2007.

There was a witness in the instant case by the name **PC BENJAMIN CHEPKONGA**, who testified as PW6. This witness was not questioned about any reports or threats issued by the accused against **CONSOLATA** at the time he gave his testimony. The role of **PC CHEPKONGA** in the instant case was to escort the Scene of Crime Officers to the City Mortuary to photograph the body of the deceased, and also to escort the family members of the deceased to identify the body to the doctor before post mortem.

MR. SWAKA urged that because **RODRICK, PW5**, had taken long to

make a statement with the police, it was likely that **CONSOLATA** told him what to say because PW5 was a son of the accused and **CONSOLATA**. I do not think the accusation by counsel has any basis. I examined the demeanour of this witness and recorded the following observation at the end of his testimony.

“RODRICK was a very composed witness. He gave straight answers without hesitation. He was brilliant, bold and had a good demeanour.”

It is my view after careful examination of this witness as to demeanour and body language that he was telling the truth. **RODRICK** told **MR. SWAKA** in cross-examination that he loved both his mother and father. He also said that no one had told him what to say in Court. I see no reason to disbelieve him. **RODRICK** proved his love by the fact he spent time both with his father in his house and his mother in her house. Nonetheless I did treat his evidence with caution being that of a child, and also sought for corroboration of his evidence from the rest of the case.

In regard to **PW6 PC CHEPKONGA**, who escorted the witnesses to identify the body of the deceased for the post mortem, **MR. SWAKA** submitted that this witness testified that he saw blood on the face of the

deceased. It was counsel's submission that a blow on the deceased person's stomach with a fist could not have produced blood on his face. **MR. SWAKA** submitted that the evidence of **PC CHEPKONGA PW6** was inconsistent with that of **CONSOLATA**, in regard to the blood found on the face of the deceased.

The issue of the blood found on the face of the deceased when the injury he suffered in this case was in the abdomen, was put to **DR. PETER NDEGWA** who was **PW10** in this case. **DR. NDEGWA** testified that at the City Mortuary bodies are placed in cabinets or chambers and that it was possible for them to be stained with blood and other substances coming from other bodies in other cabinets. From this evidence it was possible that the blood found on the face of the deceased came from other bodies other than the body of the deceased. Nothing therefore turns on this point.

MR. SWAKA relied on the case of **SAWE –V- REP [2003] KLR 354** for the proposition that the circumstantial evidence in this case did not meet the requirement set in the cited case. **MR. SWAKA** submitted that suspicion that the accused person is the one who committed the offence was not sufficient ground for conviction. In the **SAWE** case, supra, the Court of Appeal held as follows:

- “1. In order to justify 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 hypotheses than that of his guilt.*
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*
- 3. The burden of proving facts which justify the drawing of this 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.*
- 4....*
- 5....*
- 6...*
- 7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”*

With due respect for **MR. SWAKA** the prosecution is not relying wholly on circumstantial evidence but on the direct evidence of **CONSOLATA, DAVID** and **RODRICK**. Since the prosecution is not wholly depending on the circumstantial evidence, I do not think that the cited case of **SAWE v. REP** applies to the circumstances of this case.

MR. SWAKA also relied on the case of **RORIA –V- REP [1967] EA 582** for the proposition that evidence by a single witness was not safe to found a conviction. **MR. SWAKA** submitted that it was unsafe to convict on the evidence of **CONSOLATA** alone. In the cited case the Court of Appeal for Eastern Africa held:

“While it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so.”

I have considered the proposition by **MR. SWAKA**. I am well guided by the cited case of **RORIA**, supra. I agree that the evidence of identification by a single witness should be treated with caution especially where it involves strangers. That was not the case in the instant case.

The prosecution relies heavily on the evidence of **CONSOLATA** which is to the effect that the accused person punched the deceased in the stomach and that after he did so the deceased collapsed, and eventually succumbed and died. I have considered the defence by the accused person and it is very clear to me that he does not dispute that he met with the deceased and **CONSOLATA** on the material day, that is on the evening of 20th June, 2009.

CONSOLATA did not place any time to the meeting which resulted in the injury to the deceased. However, there was evidence of **DAVID** the watchman who said that it was at 8.40 p.m. when **CONSOLATA** requested him to approach the accused person and find out from him what he wanted near

CONSOLATA's kiosk/hotel. Also going by the evidence of **RODRICK**, their father left home after 6 pm but **RODRICK** did not specify the exact time he left home. The time is however not very material since the accused does not deny meeting these two people.

There is evidence of **RODRICK** that before the accused person left his house he carried a metal bar which was about 1 foot long and which he put inside his coat. **RODRICK** testified that after his father left with that metal bar, he did not return home until much later when **RODRICK** and his brother **BRIAN** had fallen asleep. Taking into account all the evidence given by the prosecution witnesses and also by the accused himself, it is correct to say that after the accused left his house leaving behind his two children that is, **RODRICK** and **BRIAN**, at some time after 6 p.m., he never went back to his house until after the incident the subject matter of this case. I find that the accused person left his house and proceeded to the market stall where his former wife **CONSOLATA** had a small kiosk/hotel with the **GILBERT BARASA**.

The accused visit to the kiosk testified to by **CONSOLATA** is corroborated by **DAVID. MR. SWAKA** urged the Court to disregard the

evidence of **DAVID** pointing out that **DAVID** had not seen the accused person and therefore he could not identify who it was that **CONSOLATA** had asked him to confront. I considered the demeanour of **DAVID** and he impressed me to be a truthful witness. His evidence was that the accused person was standing below an electric street light and that he was able to clearly see the accused as he stood a short distance from him. **DAVID**'s testimony was that he approached the accused person in order to question him as mandated by **CONSOLATA**. **DAVID**'s testimony was that he could see the accused person clearly as the street light was very bright. **DAVID** said that it was when the accused person started to run away that he used his torch to flash him and followed him towards the powerlines at the rear of the market.

I considered the fact that the accused was not a stranger to **DAVID** because, according to **DAVID** he had seen him before two or three times, around the same market place. I find that the evidence of **DAVID** that it was the accused person he saw at the material night was truthful. **DAVID** had no reason to implicate the accused person as he was a total stranger to him. I find that the evidence of **DAVID** must have been true. I find that there was evidence of two witnesses, **CONSOLATA** and **DAVID** that the accused person had gone to the place where **CONSOLATA** carries on business just before the attack.

In regard to the actual attack, the accused person did not deny meeting with **CONSOLATA** and the deceased on the material evening. The issue of identity of the person who aggressively attacked the deceased is not very much in question. The accused person admits that there was a confrontation between him and **CONSOLATA**. According to the accused person, **CONSOLATA** first pushed him as he walked past the two of them before **CONSOLATA** and the deceased threw stones at him. It was the accused case that he in return punched the deceased on the abdomen and ran away from the scene without looking back to see what followed thereafter.

CONSOLATA testified that the accused person was the aggressor.

Whereas **CONSOLATA** mentioned about stone throwing, it was her testimony that it was the accused who threw stones at them. The accused defence was that he was attacked by the deceased and **CONSOLATA** and that he suffered an injury on the hand and which injury caused a swelling. The accused's statement that he had a swollen hand caused by an injury on the 20th June, 2009 which is the day in question, was confirmed by **DR. KAMAU**, the Police Surgeon on the 22nd of June, 2009, two days after the incident. There is therefore a possibility that indeed there was stone throwing between the

accused person **CONSOLATA** and the deceased.

The prosecution has to prove that the accused person caused the death of the deceased in order for this case to succeed in its favour. **CONSOLATA** is very clear in her evidence that when the accused person confronted them she only saw his hand hit the deceased on the abdomen but she did not see that hand having any weapon in it. The Doctor's findings at post mortem was that the deceased had suffered a penetrating injury at the umbilical and that the cause of death was abdominal injury due to trauma by a penetrating object. The post mortem form shows that internally there was bowels and stomach perforation.

MR. SWAKA has urged the Court to find that the evidence of **CONSOLATA** was inconsistent with the post mortem findings of the doctor. At the same time **MR. SWAKA** urged that **CONSOLATA** was unable to see any weapon because it was dark and therefore in his evidence that it was the accused who inflicted the injury ought not to be believed.

In cross-examination **CONSOLATA** admitted that where the attack took

place was a little dark and that can explain why she may not have seen what the accused person was holding. Her evidence is however clear that the deceased was hit in the stomach just once and that after he was hit, the deceased immediately collapsed and fell on his face to the ground.

There is evidence from **RODRICK** the son of the accused and **CONSOLATA** to the effect that his father had first of all questioned him and **BRIAN** his brother to find out where their mother slept while at home. From the conversation **RODRICK** had with his father and **BRIAN**, it is clear that the accused person was uncomfortable about the sleeping arrangements in **CONSOLATA**'s house. It is clear that the accused was concerned that the pastor was living in the same house with **CONSOLATA** and his children. The accused's concern about the sleeping arrangement in that house, coming shortly before the confrontation which led to the death of the deceased, is a clear indication that there was a motive for the attack. The words that the accused person spoke as reported by **CONSOLATA** clearly show that the accused was not happy that the deceased had moved in to live with his wife and children. It is therefore clear that the prosecution has established that the accused person had a motive to commit the offence.

The evidence of **RODRICK**, was that the accused person armed himself with a metal bar which according to **RODRICK**, was 1 cm in width. I find that the metal bar is a probable weapon that could have caused the penetrating injury the deceased person suffered. The prosecution has therefore shown from the evidence that the accused person armed himself with a metal bar before leaving the house to confront **CONSOLATA** and the deceased. That evidence establishes that not only did the accused person have a motive to attack the deceased but that he also prepared himself for the attack by arming himself with a weapon which he eventually used to cause a fatal injury to the deceased.

The evidence of **RODRICK** was that of a child. Section 124 of the Evidence Act regarding the evidence of children provides as follows:

“s.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.”

In the Court of Appeal case of **ONSERIO v. REP. [1985] KLR 618**, it was held:

“An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act.”

I have sought for evidence corroborating that of **RODRICK** that indeed the accused person had a thin metal bar in his possession, and that he used it to attack the deceased. I find that corroboration in the evidence of the doctor who performed the post mortem examination on the body of the deceased and concluded the deceased had a penetrating injury. There is also corroboration from the evidence of **CONSOLATA** herself to the effect that after the accused hit the deceased on his abdomen, he immediately collapsed and fell forward and lay face down to the ground. **CONSOLATA** testified that the deceased had a wound on the abdomen and that the intestines were protruding. **CONSOLATA**'s evidence that the deceased intestines were protruding is corroborated by **CHRISTINE MBAISI PW2**, who was among the first people to respond to **CONSOLATA**'s call for help. This evidence of **CONSOLATA**, **CHRISTINE** and the doctor confirms that the deceased was stabbed with a penetrating object. The penetrating injury found on the abdomen of the deceased is consistent with an injury caused by a metal bar which fits the description of the object that the accused carried from the house as given by **RODRICK**.

I find that the evidence of **RODRICK** that the accused person was armed with a metal bar is corroborated in all the surrounding evidence of the case. It can be safely be inferred that since the deceased collapsed immediately after the accused hit him in the stomach and since the deceased did not encounter any other attack after that one and that the injury he suffered is caused by penetrating object that it was the accused armed with a metal bar who caused the deceased the fatal injury.

I find and hold that the prosecution has been able to establish that the accused person armed himself with a metal bar which was about 2 cm wide. The prosecution through the evidence of **DAVID** and **CONSOLATA** has established that the accused stalked **CONSOLATA** and the deceased on the evening in question. It is established that the accused first appeared at the market place where **CONSOLATA** and one **BARASA** ran a kiosk. It was established that the accused person did not return to his house until late in the night. It is also shown that after leaving the market place when **DAVID** approached him, the accused person waylaid **CONSOLATA** and the deceased on their way home soon thereafter.

Having carefully considered the evidence by the prosecution and the defence, I am satisfied that the accused person hit the deceased in the abdomen with a penetrating object therefore causing serious injuries on the deceased. **CONSOLATA**'s evidence that the deceased collapsed and was unable to talk soon after the attack is corroborated by **CHRISTINE MBAISI PW2** who came to the scene soon after the act. **CHRISTINE** accompanied **CONSOLATA** and the deceased at Kenyatta National Hospital and it was her evidence that the deceased did not utter any word throughout the journey except for groaning and moaning due to severe pain. This goes to show that the injury suffered by the deceased was severe.

Having carefully considered the entire evidence I do accept the accused statement that he hit the deceased on the stomach. However I reject his statement that he hit the deceased with his fist. I do find that from the evidence adduced by **RODRICK** and corroborated by the testimony of **CONSOLATA**, **CHRISTINE** and the doctor from the post mortem findings, the accused person must have used a metal bar to hit the deceased on the stomach. I do find that that metal bar caused the deceased to suffer perforation of the bowels and the stomach and the penetrating injury which caused the death of the deceased soon after the attack.

The accused person has not pleaded provocation in his defence in this case. Nonetheless I will consider it because of two points. The first is the fact that **CONSOLATA** used to be the wife of the accused of 21 years and they had 6 children. The fact that after they separated the deceased moved in to live with **CONSOLATA** and the children of the accused person can create a provoking situation. The second point is the fact that the accused person had been hit on the hand and by the time the doctor examined him two days after the incident, he was of the view that the accused had been injured two days earlier. There is a probability that **CONSOLATA** and the deceased hit the accused with a stone. The issue is whether the two incidents can give rise to provocation.

Section **207** of the **Penal Code** provides as follows:

“207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

Provocation can only be pleaded in defence only where the act which causes the death was done in the heat of passion caused by sudden provocation and before there is time for the passion to cool. This defence is not available to

the accused. First of all **CONSOLATA** and the deceased had moved in together for sometime before the attack in question. The provocation, if any, cannot qualify to have been sudden. It was longstanding. Secondly it is also very clear that the accused did not hit the deceased at the heat of passion as there was no provocative act or insult directed at the accused person by the deceased at the time of the attack. Being hit by a stone as the accused person alleged in his defence does not constitute an act of provocation within the meaning of section **207** and also section **208** of the **Penal Code**.

The evidence adduced by the prosecution clearly shows that the accused person armed himself with a metal bar just after 6 o'clock on the evening in question, and that between that time and 9.30 p.m. or so when the incident occurred, the accused person stalked the deceased and **CONSOLATA** from the kiosk where **CONSOLATA** had a business, and waylaid them just before they arrived at their house.

I am satisfied that the prosecution has established that the accused person premeditated his action against the deceased. It is clear that by arming himself with a metal bar before going out to stop the deceased that the accused had formed an intention to cause grievous injury to the deceased. I am also satisfied that he pierced the deceased in the abdomen and that since the injury was

confirmed by the doctor to have been a penetrating injury I do find that the most probable object he used to cause the injury to the deceased was the metal bar which his son **RODRICK** saw him carry away with him before the attack in question. I find that the prosecution has met the requirement of **section 206 (a) and (b) of the Penal Code** which provides as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”**

I find that the prosecution has established that the accused had formed the necessary malice aforethought to commit this offence. I found **CONSOLATA**'s evidence was corroborated as every material particular both by the testimony of the other prosecution witnesses and also in part by the evidence of the accused person in his defence. I believed her evidence as that of a truthful witness.

In conclusion, I find that the prosecution has proved its case against the accused person beyond reasonable doubt. I reject the accused defence to the extent explained in this judgment, find him guilty for the offence charged and convict him accordingly.

Dated at Nairobi this 18th day of February, 2010.

LESIIT, J.
JUDGE

Read signed and delivered in the presence of:

Elisha.....Court clerk

Accused..... present

Mrs. Tutafor the State

Mr. Swaka for the accused

LESIIT, J.
JUDGE