



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 19 of 2008

REPUBLIC.....PROSECUTOR

Versus

BONIFACE GATHEGE WACHEKE.....ACCUSED

J U D G M E N T

Boniface Gathege Wacheke, hereinafter referred to as “*the accused*” has been tried on an information dated and filed in this court on 19th March, 2008 charging him with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the information are that on 29th February, 2008 at Miro village, Gacharageini Sub-location in Murang’a North District within Central Province, he murdered **Julius Nyamai Mwangela**, hereinafter referred to as “*the deceased*”.

The accused entered a plea of not guilty to the information and his trial ensued before me. During the trial a total of ten (10) witnesses testified. A summary of their evidence is as follows:-

PW1 **Jane Njeri Daniel**, is the wife of the deceased. On 29th February, 2008 at about 1 p.m she was at home. Whilst in the house, the accused who was a neighbour in the plot dropped by and stopped at the door. He was armed with a panga. Using the panga he hit the door and told her to come out so that he could slash her. Reason being that he suspected that she and her deceased husband had bewitched his child. He went on to tell her that on that day at about 5 a.m he had been called by his wife with whom they had separated and told that it was her who had bewitched their child and his two brothers who were mad. He therefore ordered her to come out of the house with her children so that he could slash them. He went on to state that he had already informed the Chief regarding his mission. That he would kill her, her daughter and then the deceased. He went on to order the witness to inform the deceased that he had given them two seconds to have his son recover from his madness or be killed. He then left.

Together with her child she went to the Assistant Chief to confirm what the accused had told her but never found the Assistant Chief. She decided to go and see the Chief instead. On the way she met the deceased who told her that he had been with the accused in the Administration Police Offices (A.P.) and had been asked to come for her. They went back but never found the accused. They boarded a motor vehicle on the way home. The accused too entered the same motor vehicle. She alighted at Miro shopping centre and went home leaving the accused and deceased thereat. At about 8.30 pm two women, **Mercy Wairimu** (PW3) and **Milka Wangare** came to her house. They were screaming and asked her for a torch to assist them to confirm something that they had seen outside the compound. They fetched a lamp from a neighbour, **Margaret Wanja** and proceeded to the scene where they came across the body of the deceased, cut on the forehead. He was dead. They screamed and people came. They proceeded to the accused’s house but he was nowhere to be seen. They looked for him in the bushes to no avail. Only his bag was found. Police were called and were shown the house of the accused. They entered the house and recovered a panga. The body of the deceased was later removed to Kiriaini District Hospital Mortuary. On 5th March, 2008,

she identified the body to Dr. **Julius Kimani** (PW7) for purposes of post mortem.

Cross-examined by **Mr. Nderi** learned counsel for the accused she responded that she had known the accused for about 2 years. Her relationship with him was cordial. However her relationship with his wife was strained as they had a criminal case pending in Kangema Court. In that case the deceased and her daughter were the accused and his wife, the complainant. It was claimed that two had assaulted the accused's wife. The accused had first confronted her with the threats at about 1.30 p.m. The exchange went on for about 30 minutes. Thereafter she went to report the incident to the Assistant Chief at about 2 p.m. On missing the Assistant Chief she proceeded to the Chief's camp and met the deceased at the gate coming out. She had earlier met him at 2 p.m at a bar and briefed him on what had transpired between her and the deceased earlier. From the Chief's camp they went to Mioro shopping centre where she left the accused in the company of the deceased. At about 8.30 p.m she saw the accused enter the plot and then leave. The body of the deceased was discovered at about 9 p.m. The accused had threatened her and the deceased earlier in the day prior to the discovery of the deceased body.

PW2, **Simon Chege Njuguna** stated in his evidence that he was the Assistant Chief for Gacharageini. On 29th February, 2008 whilst on normal patrols at about 10p.m he received information that the deceased had been killed. He contacted the police at Nyakianga police station and they proceeded to the scene. They found the deceased on the ground with a deep cut on the forehead. They collected the body and took it to Kiriaini District Hospital mortuary. Cross-examined he stated that he had not indicated in his police statement that the deceased had been killed by the accused.

PW3 was **Mercy Wairimu Maina**. She testified that the deceased was from her neighbourhood. At 8p.m she went to the deceased's house. On the way she met the accused and deceased. They appeared drunk and were pushing each other and quarrelling. On her way back in the company of a neighbour they saw something where she had last seen the accused and the deceased. They went to the deceased's house to get a torch to find out what was it that they were seeing. They managed to get a lamp and saw that it was the body of the deceased. They unsuccessfully tried to pull him up. On turning his body, they realized that he was dead and had an injury on the head. The accused was not at the scene though. She had been able to identify the deceased and accused earlier as there was moonlight and she had known the two for a very long time.

Cross-examined, she stated that she never said that at about 8 p.m she had met the deceased and accused talking to some people at a volleyball pitch. The deceased and accused appeared drunk though. They were pushing and pulling each other.

PW4 **Dr. Owino** a consultant psychiatrist. He examined the accused regarding his mental status at the time. He formed the opinion that he was physically and mentally normal and fit to plead. He prepared and signed the P3 form which he tendered in evidence.

PW5 **Francis Mung'a Mwangi** runs a bar at Mioro shopping centre. On 29th February, 2008, the deceased and accused came to the bar and ordered alcohol. They drunk as they talked. When done, the accused told him that they were going to eat and then come back for more drinks. They left at about 7.50p.m. At about 9p.m he heard screams. He proceeded to the scene. He found the deceased lying on the ground facing up. He was dead. They went looking for the accused but could not be found.

Cross-examined, he stated that he did not know whether they had drunk elsewhere. The two were not quarrelling. However, they were talking in low tones.

PW6 was **James Ikura Tumbo**. On his way from a funeral meeting of his nephew, he passed via Mioro shopping centre. That was on 29th February, 2008. He came across a group of people. Nearby he saw the body of the deceased. He alerted the Assistant Chief who later came to the scene.

Dr. Julius Kimani was PW7. He is a consultant Surgeon. On 5th March, 2008 at Kiriaini district Hospital mortuary, he conducted a post mortem on the body of the deceased that was identified to him by **P.C. Robert Naibei** (PW9) **Joseph Kirura Mwangela** and **Jane**

Njeri Daniel (PW1). His examination revealed that the deceased had a cut on the forehead about 3 cm long and deep to the skull. There was a depressed skull fracture at the back of the head accompanied by Massive intracranial subdural haematoma. In his opinion, the cause of death was intra cranial haemorrhage from the head injury. He prepared and signed the post mortem report that he tendered in evidence.

PW8, **Patrick Mwangela Julius** was the son of the deceased. He knew the accused as a neighbour. On 29th February, 2008 at about 1 p.m he was with the deceased at Mioro tea buying centre. His mother (PW1) was also present. Later she left for home leaving him and the deceased behind. Soon thereafter his brother, **Peter Mutuku** came and informed them that the accused had threatened to cut PW1 together with her children with a panga. They left for home. On the way they met the accused who went on to blame the deceased for bewitching his child who had died. They proceeded on and met PW1 who repeated to them what the accused had told her. At about 5 pm, the deceased and PW1 went to Gacharageini police patrol base and reported the incident. The accused too was also in attendance. PW1 came back at about 7 pm and told him that she had left the deceased at Mioro shopping centre. At about 8 pm he heard women screaming and asking for a torch. He took a lamp and proceeded to the scene with the women. He came across the body of the deceased. He had been cut on the head by a panga. Later they contacted the police who came and collected the body.

Under cross-examination, he stated that he had been staying in Nairobi. He did not initially know that the deceased had been charged in Kangema Court. However he had since been made aware. He had been charged on the complaint by the accused's wife that his sister had fought with her.

PW9 **P.C. Robert Naibei** testified that he was attached to Nyakianga police station. On 29th February, 2008 at about 11pm whilst on patrol duties at Gatunguru tea factory, they were stopped by an oncoming motor vehicle and informed that a person had been killed. They went back to the police station and later proceeded to the scene arriving thereat at about midnight. They found the body of the deceased at the back of the shops on a footpath. It had a big cut on the head. They were showed the house of the accused by the area Assistant Chief and PW1. They searched the house and recovered nothing. Thereafter they collected the body and took it to Kiriaini District Hospital mortuary. He later identified the body to PW7 for purposes of post mortem.

Cross-examined, he stated that the body was on a footpath in a public place. He did not know where the deceased came from. However they were told that he was staying in a plot 10 -20 metres away from the shopping centre.

The last witness called by the prosecution was the investigating officer, **I.P. Jospheh Mutua**. On 29th February, 2008 at about 11.50p.m he received a report from PW2 that a person by the name of the deceased had been killed. In the company of PW9 and others they proceeded to the scene. At the scene they came across the body of the deceased with a deep cut on the forehead. They were given a name of the suspect. They managed to get a bag containing personal effects of the suspect on a path leading to the plot where the deceased and suspect resided. Apparently the suspect had dropped it as he tried to escape from the wrath of the villagers. In the bag there were photographs of the suspect as well as personal effects. They proceeded to the house of the accused, conducted a search therein and recovered a sharp panga. PW1 told them that during the day the suspect had been seen sharpening the panga and had threatened to cut the family of the deceased into pieces. They then removed the body to Kiriaini District Hospital mortuary. The suspect was the accused. They conducted further investigations and established that the accused had a case pending before court with the deceased. Apparently the deceased and her daughter had assaulted the accused's wife. The deceased had managed to get bond for himself and the daughter. Further they discovered that the accused had claimed that the deceased had bewitched his child. He had then threatened to finish the family of the deceased. On 6th March, 2008, he received information from O.C.S, Molo, that the accused had surrendered himself at the station on the strength of an allegation that he had killed someone at Mioro. On 14th march 2008 he proceeded to Molo and picked up the accused. Later he charged him with the offence.

Cross-examined, he responded that in his police statement he had stated that he received a report from PW2 that the accused had killed the deceased. Apart from this information he had also carried out further investigations and knew that the accused had last been seen drinking with the deceased. The bag was retrieved from the house. He had been given the accused's name before they went to the scene. That marked the prosecution case.

Mr. Nderi submitted at length on no case to answer. **Mr. Orinda** also responded at length. Upon reviewing and considering the evidence tendered and respective oral submissions on no case to answer, I formed the opinion that the prosecution had established a prima facie case to warrant the accused being placed on his defence. I so ordered.

In his defence, the accused elected to give a sworn statement but called no witnesses. He testified that he was a matatu tout. He knew the deceased as a friend and also because they resided in the same plot at Mioro shopping centre. On 29th February, 2008 he woke up at about 8 a.m and went to work on a farm that he had leased. He remained thereat until 3 pm. Thereafter he went to the shopping centre to buy food. From the farm he had seen PW1 and talked to her. Indeed he even borrowed her tool file to sharpen his panga. As he sharpened the panga he was talking to her. When done he returned to her the tool file and took the panga to his house. Thereafter he proceeded to the shopping centre. He met the deceased in the company of other people. The accused and deceased later proceeded to Honey cup bar owned by PW5. They had one drink each and left promising to come back later to continue with drinks. The accused maintained that there was no hostility between him and the deceased. Infact they were friends. However PW3 his former girlfriend had disagreed with his wife. She was a friend of PW1. The deceased's daughter, **Wangare** and his wife had fought. His wife had complained and as a result the deceased and his daughter were arrested over the incident and charged before Kangama Law Courts. However the two were released on bond. He had impressed on his wife albeit unsuccessfully to terminate the case. He conceded that he had left the bar with the deceased at about 7.30 p.m. However on the way, they came across 4 people. He recognized one of them as **Irungu**, who used to work with the deceased. **Irungu** called the deceased and started asking him why he had taken their money. The accused asked the deceased to come along with him but the deceased told him to proceed on as he would come later. He thereafter went home and prepared supper. Soon thereafter 2 people walked into his house. He did not know them. At the same time, he heard a woman screaming at the gate saying that it was him who had killed the deceased. The 2 men started to assault him. However he managed to escape and ran into Aberdare forest from where he proceeded to Molo. He denied killing the deceased. As far as he was concerned he had left the deceased alive in the company of **Irungu** and his colleagues.

His answers in cross-examination were that his relationship with the deceased was cordial. He denied having advanced the deceased or his wife any money or and vice versa. He came from Molo although he was born in Murang'a. They were staying in the same plot with the deceased. He denied having claimed that the deceased and his family had bewitched his child. He denied further having confronted PW1 and threatened to kill her on 29th February, 2008 over the issue or any other member of her family. He maintained that he worked on the farm until 3 pm. He never came back to the plot at noon as claimed by PW1. He had been friends with PW3 before he married his current wife. It was his wife who lodged a complaint at Kangema that she had been assaulted by the deceased and his daughter. When **Irungu** and his colleagues demanded their money from the deceased, he did not intervene. He denied having left with the deceased. 2 people came to his house after 20 minutes. He escaped to Aberdare forest as he was being chased by the villagers. Later he proceeded to his grandmother's house at Molo. He never reported the incident to any police station. To date he does not know that the deceased passed on. Finally he denied having lost any child. With that he closed his case.

Mr. Nderi informed the court that he would solely rely on the defence advanced by the accused as well as the submissions he had made earlier on no case to answer. On the part of **Mr. Makura**, he opted to rely on the evidence on record.

In his submissions on no case to answer, **Mr. Nderi** had stated that there was no evidence linking the accused to the death of the

deceased. Though the prosecution had led evidence which suggested that there was a grudge between the accused and the deceased family and that the accused had caused the death of the deceased using a panga, the evidence of PW7 and the accompanying post mortem report gave a different picture. According to the post mortem, the deceased died as a result of intercranial haemorrhage due to a fracture of the occipital bone. Thus the evidence led and cause of death had no nexus. If the prosecution was to rely on circumstantial evidence, the inculpatory facts were not consistent with the guilt of the accused. Finally he submitted that the prosecution evidence was full of contradictions and inconsistencies.

In response, **Mr. Orinda**, learned senior principal state counsel then holding brief for **Mr. Makura**, submitted that the accused had concretely been linked to the death of the deceased. Motive was perception that the deceased's family had bewitched his child. Evidence tendered though circumstantial irresistibly pointed to the accused's guilt. He had earlier issued threats to PW1. Evidence of PW5 was to the effect that he saw the deceased and accused in his bar on that night. The accused was the last person to be seen with deceased alive. The evidence of PW7 too cannot be faulted.

Having carefully evaluated the evidence tendered by the prosecution as well as the defence, respective oral submissions by learned counsel and the law I think that the issues for determination in this case are clear cut;

- (i) Whether the deceased was killed**
- (ii) Whether the killing if at all amounted to murder or manslaughter**
- (iii) Whether the accused was responsible.**

From the totality of the evidence tendered there is no doubt at all that the deceased was killed. He did not die from self-inflicted injuries. Neither did he commit suicide. There is the post-mortem report. The cause of death was stated therein by **Dr. Julius Kimani** (PW7) to be as a result of intracranial haemorrhage from head injury. As regards his external observation of the body during the post mortem, he noted a cut on forehead measuring 3CM long deep to skull and haemotoma on the occipital area. The other witnesses who saw the body of the deceased at the scene attested to the fact that he had a deep cut on the forehead. There is no way that this injury could have been inflicted by the deceased on himself. It must have been inflicted by another person (s). Accordingly, the deceased was killed.

Every killing however does not necessarily amount to murder. Murder is all about intentional and deliberate killing of another person. However there are cases where the killing is accidental in which event such killing cannot amount to murder but perhaps manslaughter. For the charge of murder to be proved the prosecution must show by cogent and credible evidence that the deceased was killed and was so killed with malice aforethought. In this case I have already held that the accused was killed. Was he however killed with malice aforethought? In any event what is malice aforethought? On my part I can do no more than refer to the definition of malice aforethought under section 206 of the penal code which provides:-

“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.**
- (c) An intent to commit a felony;**
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony.....”**

In the circumstances of this case there is no doubt at all that malice aforethought has been established. The person who hacked the

deceased and caused the cut on the deceased forehead had the intention to cause the death of the deceased or if not, at least grievous harm. The cut was so deep as to reach the skull. Malice aforethought may of course be inferred and or proved by the nature and seriousness of the injuries sustained by the deceased in the process. From the evidence on record it is quite clear that the deceased sustained fatal injuries. The deep cut on the forehead led to intracranial haemotoma on the occipital area. On the basis of the foregoing, malice aforethought is established. I am therefore satisfied that the killing of the deceased was murder as opposed to manslaughter.

Was the accused responsible for the death of the deceased? On this score, the prosecution have relied heavily on circumstantial evidence as well as the accused's motive predicated upon his alleged irrational perception that deceased's family had perpetrated witchcraft on his family and further the fact that the deceased and his daughter **Wangare** had assaulted his wife resulting in his wife lodging a complaint that led to the arrest and prosecution of the duo at Kangema Law courts.

Dealing first with the issue of circumstantial evidence it is apparent from the evidence on record that there was no eye witness to the killing of the deceased. Consequently and as properly appreciated by learned counsel for the accused as well as learned senior state counsel this case has to be decided on the basis of circumstantial evidence. It is settled law that where the prosecution's case depends solely on circumstantial evidence, then, the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should point to the guilt of the accused and thirdly, when the said circumstances are pieced together or taken cumulatively they should form a chain so complete that there is no escape from the conclusion that within the realm of human probability the crime was committed by the accused and no one else. In a nutshell the inference of guilt should only be drawn where the facts said to incriminate the accused are incapable of any other rational explanation except the guilt of the accused and are wholly inconsistent with his innocence. See generally **Republic v/s Taylor, weaver and Donovan (1928) 21 Cr. App. R 20, Republic v/s Kipkering Arap Koske & Another 16 EACA 135, Mwangi v/s Republic (1983) KLR 522 and Omar Chimera v/s Republic, Criminal appeal number 56 of 1998** (UR).

In my view the evidence on record does irresistibly point to the culpability of the accused. PW1 knew the accused very well. They were next door neighbours. In the early part of the material day, the accused had confronted her with a panga and threatened to wipe out her entire family allegedly because her family had bewitched his child and his 2 brothers who were mad. According to PW1 much as the accused had been married, they had since separated. This fact too was conceded to by the accused. Secondly, when confronting PW1 as aforesaid, the accused was armed with a panga. Much as the accused denies this fact, in his on defence he acknowledged that when he came from the farm he had a panga. Indeed he even asked PW1 to lend him a tool file to sharpen the same. It is not therefore mere coincidental that PW1 would talk of the failing marriage between the accused and his wife and also the accused confronting her with a panga. Yet the accused in his testimony and cross-examination of witnesses admits to his wife having abandoned him and also being in possession of a panga on the material day. How would she have come by that information unless she was told by the accused. This could only have been during the confrontation referred to by PW1. There is no reason why PW1 would have manufactured or concocted such evidence. According to the accused he had no grudge with PW1, if anything, the grudge was between his wife and some members of her family. Indeed it was his evidence that he had attempted to prevail upon his wife to no avail to withdraw the charges against the deceased and his daughter. Further, he even borrowed a tool sharpener from her. She could not have given him if there was an element of enmity or hostility between her and the accused. That being the case, there would have been no reason for PW1 to frame the accused with the case considering that this is a serious case of murder. The accused in his defence stated that though PW1 had claimed that the confrontation was at 1p.m, as far as he was concerned, he was at the time working on his farm and that it was not until 3 p.m that he came home. As I have already stated, PW1 had no reason to lie to court against accused. My take therefore is that the accused confronted PW1 at about 1 p.m or thereabouts as stated by PW1. The accused has admitted that as he sharpened the panga, he engaged PW1 in a discussion. Much as the accused claimed that the

discussion was all about farms, my inkling is that the discussion he was alluding to was nothing about farms but the confrontation aforesaid. Much later on the same day, the deceased was found dead with a sharp cut on the head.

Mr. Nderi submitted that the evidence led and cause of death had no nexus. That the evidence of PW7 and the accompanying post mortem report are to the effect that the deceased died as a result of intracranial haemorrhage due to a fracture of the occipital bone meaning that it had nothing to do with the cut on the forehead. **Mr. Nderi's** submission cannot possibly be correct. According to the post mortem, PW7 observed in so far as the external appearance of the deceased was concerned, a cut on the forehead 3cm long deep to skull as well as a Haematoma on the occipital area. He concluded that the cause of death was intracranial Haemorrhage from head injury. What was the head injury? A deep cut on the forehead reaching the skull. The prosecution took the view that the cut on the deceased forehead was caused by a panga. That possibility was not eliminated. Mark you, earlier the accused had threatened to decapitate the deceased's family with a panga. Is it therefore mere coincidence that the deceased was found dead with a deep cut on the forehead.

The 2nd piece of circumstantial evidence is to be found in the evidence of PW5, the owner of honey cup bar. He was in the bar when the accused and the deceased entered the bar. They ordered drinks. After having a drink each they left together promising to come back for further drinks after they had eaten. This was at about 7.50 p.m. At about 9 p.m he had screams. The evidence of PW5 therefore is that he last saw the deceased alive with the accused when they left his bar together. The accused does not dispute that fact. Indeed he confirms in his defence that he left the bar with the deceased. On the way however, he came across a group of people numbering about 4. One of them was **Irungu**, who allegedly used to work with the deceased. He confronted the deceased over some money. At that stage, the accused left behind the deceased with that group of people and proceeded to his house. In nutshell therefore he is saying that if the deceased was murdered, then it was not by him but by that group led by **Mr. Irungu**. I doubt this story by the accused. If indeed he had brought to the attention of the police this information, I am certain the police would not have ignored it. They would have acted on it by way of investigation. It is clear that he never gave such information. Had he done so, I am certain that PW9 and 10 would have made reference to it in their testimony. Indeed he never even raised it during their cross-examination. Remember they were investigating officers herein. To my mind therefore this story is just a figment of the accused's imagination.

The other witness who last saw the accused with the deceased was PW3, **Mercy Wairimu Maina**. He saw them at about 8 pm. On the way pulling and pushing each other. She was in the company of a neighbour. To her they appeared drunk. She never saw other people at the scene. She left them there. On her way back after 10 minutes she found the deceased dead at the very scene she had seen him with the accused last. She knew the accused and deceased very well as they came from her area. On that occasion there was moonlight which enabled her to see the deceased as well as the accused. In his defence, the accused seem to suggest that the accused testified against him falsely because she was bitter after he had abandoned her as a lover in favour his current wife. Ordinarily one would have expected that the accused would raise such an important issue in cross-examination of the witness. The accused did nothing of the kind. That being the case, the only conclusion I can draw is that this is a make belief story. PW3 having seen the accused and deceased pulling and pushing each other and shortly thereafter the deceased is found dead, surely who could have caused the death. It must be the accused. After all, the witness saw no other people at the scene. The only other people apparently were at a volley ball pitch. It is not clear whether the volley pitch was at the same place where PW3 saw the accused and deceased. If as PW3 states that the duo were pulling and pushing each other is it possible then that in fact they were fighting? I cannot rule out that possibility, much as PW3 attributes the same to drunkenness. In any event the accused has not advanced the defence of drunkenness and or intoxication. However, PW5 stated in his evidence that when they left his bar they did not appear drunk.

The other element of circumstantial evidence in my view is the disappearance of the accused from the neighbourhood. The accused admits that much. He stated in his defence that after being confronted in his house by two people whom he did not know, they proceeded to

beat him as a woman screamed at the gate claiming that he had killed the deceased. He managed to escape however and ran to aberdare forest and thence to Molo. It is noteworthy that none of the witnesses who testified talked of chasing the accused or even assaulting him. All of them talked of going to his house and finding it deserted. Indeed the door was not even locked. PW5, PW9 and PW10 said as much. It is also instructive that upon search of the house or path they came across a bag containing accused's personal effects. Why had the accused parked his personal effects in a bag? Was it in readiness to flee or was he escaping? The accused did not at all challenge the evidence of the bag and the contents therein. Did the accused drop the bag as he tried to escape from the scene. That possibility cannot be ruled. The fact of the recovery of the bag was not challenged at all by the accused. Was the accused therefore attempting to escape in the knowledge that he had committed a serious offence. My evaluation of the evidence leads me to that conclusion. It is also instructive that the accused having disappeared from the neighbourhood, made no report at all to any police station. If he had been assaulted by 2 people aforesaid as he claimed leading to his escape, one would have expected that he would report the incident at the nearest police station more so considering he was being accused of having committed a heinous offence of murder. One would expect that he will make such a report in abid to try and exonerate himself. He did not do so. Instead he escaped allegedly to Aberdare forest and thence to Molo. It was not until 6th march, 2008 according to PW10 that he received information from OCS Molo police station that the accused had surrendered himself at the station on the strength of allegation that he had killed somebody at Miro. This evidence was not seriously challenged by the defence once again. Indeed the accused was silent as regards the circumstances of his arrest. In my view the accused conduct after the incident is a pointer to his guilt. As was held in the case of **Malowa V Republic (1980) KLR 110** when an accused person disappears after an offence has been committed, the fact of his disappearance can lead the court to an inference that the accused disappeared to escape being arrested for committing the offence. I would hold the same of the accused in the circumstances of this case. He knew that he was being accused of killing the deceased going by the screams of the lady at the gate. Instead of going to nearest police station to try and set the record straight he disappeared to Molo, very far away from the scene of crime.

In the house of the accused, a panga was recovered. That panga was tendered in evidence. However one could not tell whether it was the same panga that had been used in the murder of the deceased as it had not been subjected to any analysis by Government analyst. No reason was advanced for this omission on the part of the prosecution. May be it was informed by the fact that there were no blood stains on the same. However that omission does not advance the accused's defence any further. It is possible that, that was not the panga he had used.

Is it possible that the accused had no motive to kill the deceased as they were friends? It is trite law that failure to prove motive does not, perse hand an accused a lifeline as by dint of the provisions of section 9 of the penal code, motive is not one of the elements necessary to prove a criminal offence. In any event if one is looking for motive then it is found in the accused's perception that the deceased family had bewitched his child, and secondly, the deceased and his daughter had assaulted his wife and though they had been charged in Kangema Law Courts for the offence, they had been realised on bond. I do not think that their release on bond as aforesaid went down well with the accused and or his family. This ties in very well with the fact that earlier in the day the accused had threatened PW1 and her family with dire consequences including death.

It is submitted that there are contradictions and inconsistencies in the prosecution evidence. In any trial witnesses invariably, differ on certain matters of detail. The court has to consider whether the variance in the evidence is fundamental or minor. If fundamental, then the court has to give the benefit of doubt arising therefrom to the accused. If, however, the variance relates to unessential aspects or that it does not effect the credibility of the witnesses concerned and does not got to the root of the prosecution case, then the court is at liberty to act on the evidence and base a conviction on it. In the circumstances of this case I find the alleged contradictions and or inconsistencies not material and do not cast any doubts to the strong prosecution case.

In conclusion, I would hold, after consideration of the entire evidence on record and submissions by counsel that the circumstantial

evidence not only irresistibly point to the accused as the person who killed the deceased, but also excludes any co-existing circumstances which would weaken or destroy such inference. On the evidence again, there is the requisite malice aforethought. The totality of the foregoing is that I find the accused guilty as charged and accordingly convict him. I discount the issue of the accused and deceased being drunk.

I will not invite respective counsel to address me on the issue of sentence in terms of *section 323* of the Criminal Procedure Code.

Dated and delivered at Nyeri this 5th day of February, 2010.

M.S.A. MAKHANDIA
JUDGE