



**State v Onyango alias Amiso (Criminal Case E007 of 2022)  
[2024] KEHC 6840 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6840 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E007 OF 2022  
RE ABURILI, J  
JUNE 4, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**SIMON OTIENO ONYANGO ALIAS AMISO ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person Simon Otiemo Onyango alias Amiso is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 22<sup>nd</sup> February 2022 at 5pm at Nyawan village in Kisumu East sub-county within Kisumu County the accused murdered one Philip Kipkorir Kirong.
2. The accused person pleaded not guilty to the charge against him and the case proceeded to full trial.
3. The prosecution called a total of nine (9) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

4. PW1 No. 90354 PC Grek Busolo the Investigating Officer in this case testified and recalled that the 23<sup>rd</sup> February 2022, he was called upon by the Deputy In-charge, DCI Kondele, Inspector Cheruiyot who informed him of the murder incident within Gita area of Kisumu East Sub-county.
5. PW1 then proceeded with his Senior IP Cheruiyot to Gita Police Station to start investigations into the incident and they met police officers from Gita Police Station who accompanied them to the scene of the alleged murder which was reported to have taken place on 22<sup>nd</sup> February 2022 at 5pm. PW1



testified that after investigations, he realized that the suspect had an alias name, Amiso, and that he was in Gita Police Station.

6. It was his testimony that he summoned witnesses and recorded their statements. PW1 testified that from the investigations, the accused had beaten up the deceased using a jembe in a nearby stream and left him bleeding from the head. He testified that the victim was found by his friend who escorted him to hospital for treatment but that the deceased passed on before reaching the hospital.
7. PW1 testified that the deceased's friend on realizing what had happened, reported the incident to Gita Police Station. He testified that the suspect then presented himself to the police station alleging that he had been assaulted by the deceased. PW1 testified that earlier on, the suspect had been seen holding the victim's wallet and an ID card and had been bragging that he had killed the deceased.
8. It was his testimony that the deceased's body was taken to Jaramogi Oginga Odinga Teaching and Referral Hospital Mortuary (JOOTRH) awaiting postmortem. He testified that after he recorded the statements of all witnesses, a postmortem was conducted on 29<sup>th</sup> February 2022 and the cause of death indicated in the postmortem report.
9. PW1 testified that from witness statements, the suspect was in the house of one Mary Kadasi Nase in the company of his friends and that they were enjoying illicit brew, chang'aa, when the deceased person joined them and while in the house, the accused started quarreling with the deceased and the asking him why he was always interfering with the accused's issues. PW1 testified that he established that a scuffle ensued and the accused started fighting the deceased but that they were separated by the people present after which the deceased was removed from the house but the accused followed him with a jembe. It was his testimony that the deceased escaped but the accused followed him and hit him with the jembe and the deceased fell down unconscious.
10. PW1 testified that he also established that members of the public tried to save the victim by bringing the ambulance but the deceased succumbed before reaching the hospital. He testified that the jembe which was used as a murder weapon was not recovered by the police. It was his testimony that he compiled the file and forwarded it to the ODPP who perused and directed that the accused be charged with murder.
11. PW1 identified the accused person whom they arrested as the one before court and that they recovered no exhibit from the scene. It was his testimony that he had not known the accused before and that he had no bad blood with him.
12. In cross-examination, PW1 reiterated that he was informed by his in-charge of the murder incident on 23<sup>rd</sup> February 2022 in the morning at around 8am, the incident having had taken place the previous day on 22<sup>nd</sup> February 2022. He testified that he got more information from other witnesses. PW1 testified that the accused had gone to the police station saying that he had been assaulted by the deceased. PW1 further testified that the suspect did not hand over to the police the ID and wallet of the deceased neither was the murder weapon handed over to the police.
13. PW2 Mary Kadasi Nase testified that her husband used to brew alcohol. It was her testimony that she knew the deceased who was a family friend and that she also knew the accused from home. It was her testimony that on 22<sup>nd</sup> February 2022 at around 10am, she was in her house when Susan, Jacky and Cherop arrived and started a commotion with Susan beating PW2 yet PW2 was sick. that Susan started abusing the accused who was in PW2's house. PW2 testified that the accused was protecting PW2 from the beatings by Susan and that the accused wanted to beat Susan but PW2 stood up and separated them. PW2 testified that the accused heard her and sat down after which the 3 ladies left. It was her testimony that she then slept after taking some alcohol.



14. PW2 testified that later, she learnt that the deceased Kipkorir was killed by the accused after the deceased's wife went and called him to come and deal with the accused. It was her testimony that she recorded her statement at Gita Police Station. She testified that she had no grudge with the accused whom she identified in court.
15. In cross-examination, PW2 confirmed that on 22<sup>nd</sup> February 2022 at 10am she was at her house sitting together with the accused. She testified that she used to sell chang'aa though the accused had not indicated whether he wanted alcohol. It was her testimony that it was the deceased's wife who came and started a commotion and that the accused was trying to protect her.
16. PW3 Dr. Ombok Lucy testified and produced the post-mortem report on behalf of her colleague Dr. Silas Owiti whose attendance could not be procured without unnecessary delay and expense as he had proceeded for further studies at Moi Teaching and Referral Hospital. She testified that on the 28<sup>th</sup> February 2022, at the JOOTRH mortuary, a postmortem was done on an African Male aged 37-year-old masculine, of good nutrition and of about 175cm in height, on the body of one Phillip Kipkorir. It was her testimony that externally, the deceased had a deep cut wound at the back of the head measuring 7.5cm while internally, there was a depressed skull fracture measuring 7.5cm. She testified that the rest of the systems were essentially normal.
17. PW3 testified that Doctor Owiti formed the opinion that the cause of death was skull fracture as a result of assault and that Death Certificate No. 1494124 was issued. It was her testimony that the doctor signed the Postmortem Report on 28<sup>th</sup> February 2022 and she produced it as PEX1.
18. In cross-examination, PW3 testified that it was not indicated whether the cut was vertical or horizontal and that in her view, the types of weapons used were sharp heavy objects with a lot of load on it or even a blunt object which was heavy. It was her testimony that she doubted if the deceased could have fallen on a sharp object and injured himself. PW3 further testified that the body was naked and the doctor examined the body not clothes.
19. PW4 Evans Francis Ochieng Ouma from Okok Sub-location testified that on the 22<sup>nd</sup> February 2022 at 5pm, he was grazing their goats up the hill when he heard yelling sounds down so he rushed down and in 15 minutes, he saw a lady covering a man. It was his testimony that the man was unconscious. He testified that he called the Chief to call the ambulance to come and help the man then went back to attend to the goats.
20. PW5 Caleb Otieno Nyambok testified that on the 22<sup>nd</sup> February 2022 at 9.30am he was in his home when Phillip, the deceased, went and asked for drinking water so he gave him some after which the deceased asked him to accompany him to his house to drink. PW5 testified that they went, found the deceased's wife who gave them food to eat after which they started taking alcohol. It was his testimony that the deceased then started to smoke after which he entered his house and slept.
21. It was his testimony that the deceased's wife left shortly and when she came back, she asked for the deceased and PW5 told her that he had gone to sleep. PW5 testified that the deceased's wife went to wake him up but he was not responsive.
22. PW5 testified that they had gone to Kadash with the deceased's sister, wife and Jacky, Osoro who lived with them when Jacky started screaming saying Amiso wanted to beat her because of a jerrican which Phillip had given her in the farm. He testified that at Kadash, Amiso slapped Jacky and Phillip's wife so they decided to return home as he remained at Kadash. PW5 testified that after 15 minutes the deceased arrived and went to Amiso asking him why he had assaulted his-the deceased's wife. It was his testimony



- that the deceased had a kitchen knife which fell down as he was struggling with Amiso, which knife was picked up by a girl who is a neighbour.
23. PW5 testified that they tried to calm the deceased and Amiso and the two calmed down after which the deceased started going home. It was his testimony that Amiso followed the deceased from behind then and returned after a while saying he had beaten up that fool, and that they could go and witness. He further testified that they then heard the deceased's wife screaming and on proceeding to the scene, they found the deceased Phillip bleeding heavily besides water. He testified that the deceased was cut on the head. He further testified that a certain boy came and called the Chief telling him to call an ambulance then left. It was his testimony that the ambulance came but Phillip had died already so the police were called to the scene. PW5 testified that he knew Amiso who was the accused herein.
  24. In cross-examination, PW5 reiterated that he was taking alcohol with the deceased and that the accused was not with them. He testified that a girl named Emily was the one who picked the knife but did not give it back to the deceased. He testified that at the scene where they found the deceased's body, they got a jembe which was blood stained. He stated that the jembe belonged to the owner of Kadash and that he did not see anyone with it not even the accused.
  25. PW6 Nelson Kirweye Kidiavai testified that on the 22<sup>nd</sup> February 2022 at 3pm he was at the deceased's home as they had been ploughing together in the morning but that the deceased had taken alcohol and was drunk. He testified that he continued ploughing with another person and was given Kshs.100. It was his testimony that the deceased went to sleep and when he woke up, he asked for the money for ploughing to which PW6 informed him that he had given the deceased's wife Kshs. 50.
  26. PW6 testified that later on, the deceased's friend came and asked the deceased to go and drink with so the deceased asked PW6 to accompany him. He testified that they went to 'Kadasi' where there was alcohol and on arrival found the doors locked from inside. It was his testimony that they did not know that there was a man inside the bedroom who came from the bedroom covering himself with Maasai kikoi and ordered them to go away while throwing a wooden chair and holding them to which the deceased informed him that they had only gone to drink.
  27. It was his testimony that the accused entered Mama Deno's bedroom and came out with a jembe and that him, PW6 followed the route to Justice Ombija's home then he heard the deceased say that 'Amiso ananiau' so he ran to the deceased's house and told the deceased's wife and sister that the deceased was crying saying the accused was killing him. PW6 testified that they went and found the deceased seriously injured and carried him towards the road. He testified that the ambulance came after the deceased had died. He identified the accused in court stating that he had known him for about 3 months.
  28. In cross-examination, PW6 testified that the deceased was drunk. He stated that he parted ways with the deceased at Kadash's house and that the accused was following the deceased from behind. It was his testimony that he did not follow them otherwise he would also be dead. He testified that he had never heard of any disagreement between the accused and the deceased and further that he did not get to see the jembe and that he did not know if it was traced.
  29. PW7 No. 78992 Corporal Tanui Charles testified that on the 22<sup>nd</sup> February 2022 while at Geta Police Station at around at 1800 hours, the Area Assistant Chief Mr. Aloyce went to the station and informed them that a person had been murdered at Nyawan village. He testified that together with PC Martin Odhiambo they rushed to the scene and found a dead body lying beside the road. It was his testimony that they learnt that the suspect had gone to Geta Police station to report a complaint against the deceased. He further testified that he briefed PC Odhiambo to arrest the suspect and later, officers from Kondele Police Station went and removed the body of the deceased to Russia Mortuary for autopsy after which DCI officers proceeded to the scene the following day and took over investigations. In



- cross-examination, PW7 testified that he visited the scene but did not recover any jembe. He testified that he was not the arresting officer but that he merely secured the scene.
30. PW8 Henry Otieno Juma testified that he knew both the accused and the deceased. It was his testimony that on the 22<sup>nd</sup> February 2022 in the evening at around 5pm, he took the deceased's cousin to eat at a nearby hotel. It was a girl. He testified that as he was returning the deceased's cousin, he was shocked when the accused shouted at him asking him whether he was weighing his brains and threatened to kill him the same way that he, the accused, had killed the deceased and thrown his body in a ditch.
  31. It was his testimony that the accused had the deceased's purse and ID card in his hand and that he also had a jembe which is used and was shorthanded. He testified that he screamed and as he ran, he saw blood and the deceased's body. It was his testimony that people came and removed the deceased's body but that he was still alive and died shortly thereafter. He further testified that the deceased's body was removed by Sagam Police who took it to Russia mortuary.
  32. PW8 reiterated his testimony in cross-examination and further stated that in his statement to the police he did not say that he saw a jembe but rather that he told them what the accused had told him.
  33. PW9 Susan John Sasi the deceased's wife testified that on the 29<sup>th</sup> February 2022 at 5pm, she went to Russia Hospital where she identified the deceased's body to the doctor who conducted an autopsy on the body.

### **The Defence Case**

34. Placed on his defence, the accused person gave a sworn testimony that on the on 22<sup>nd</sup> February 2022 he woke up early, took a panga, went and cut grass then went to bath. It was his testimony that he then proceeded to the alcohol den at Adiero's wife's home. He testified that as he sat, 3 people came in while drunk. He further testified that the deceased's wife started fighting with the Adiero's wife and that he tried to separate them. The accused testified that the deceased's wife wanted free alcohol yet she owed Adiero's wife a past debt thus the latter refused to give her alcohol, thus leading to the conflict.
35. It was the accused's testimony that the deceased then came with 3 other people and asked for alcohol which they were given and they consumed. He testified that Emily Aroko came and stood at the door shouting that the deceased wanted to stab the accused with a knife so the accused got up shocked. He testified that people stood and held him while one was at the door. It was his testimony that he tried to escape but could not so he went to the back door and escaped and went home. The accused further testified that Emily took the knife after it fell from the deceased. It was his testimony that at midnight, the police went and arrested him. He denied knowing anything about a jembe. He stated that he left Phillip, the deceased, alive.
36. In cross-examination, the accused testified that he did not see the knife but that it was Emily who shouted at him saying that the deceased had a knife which he was to stab the accused with. He admitted that he had no issue with PW6 and PW8. He denied saying the words stated by PW8 that he would kill PW8 the way he had killed the deceased. He further reiterated that he did not know what killed the deceased but that the deceased was drunk.



## Analysis and Determination

37. I have carefully considered the evidence adduced in this case by the prosecution witnesses and the defence proffered by the accused person. The accused faces a charge of murder contrary to section 203 of the Penal Code. The Section defines murder as follows:

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

38. To sustain a charge of murder, the prosecution must adduce evidence to prove all the elements of the offence of murder beyond reasonable doubt. It must prove that the accused caused the death of the deceased by an unlawful act and with malice aforethought.

39. The deceased's death is not in doubt. The testimonies of, PW5, PW6, PW7 and PW8 all who saw the deceased's body at the scene. PW9, the deceased's wife testified that she identified the deceased's body to the doctor who carried out the postmortem. PW3, Dr. Ombok testified that the postmortem examination by Dr. Owiti Silas revealed that the deceased's cause of death was depressed skull fracture due to assault.

40. The next question is whether the death of Philip Kipkorir Kirong was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The postmortem report revealed that the deceased sustained a depressed skull along the sagittal suture of the occipital bone measuring 7.5cm. This injury in my view, if caused by an individual, then in my view amounted to an unlawful act as no-one has the right to deprive another of their life. In the circumstances, I am persuaded beyond reasonable doubt that the deceased person, Philip Kipkorir Kirong died out of an unlawful act.

41. The other question is whether it was the accused who unlawfully caused the deceased persons death. None of the prosecution witnesses actually witnessed the deceased's death. In essence, the prosecution case was based on circumstantial evidence.

42. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”



43. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr. App. No 32 of 1990*, this court set out the conditions as follows:

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

- (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

44. In this case, PW5 testified that he was with the deceased on the material date and after their confrontation with the accused, the accused followed the deceased from behind and later on returned saying that he had “beaten up that fool and they could go witness”. PW5 then proceeded to the scene where he found the deceased bleeding with a cut on his head and that the deceased eventually died.

45. PW6 testified that he accompanied the deceased and PW5 to the drinking den where after the accused confronted them, he ran away and later heard the deceased shout “Amiso ananiua.” It was his testimony that when he finally reached the scene, he found the deceased seriously injured and noted that the deceased later died.

46. PW8 on his part testified that he was taking the deceased’s cousin to eat when the accused confronted him asking whether PW8 was weighing the accused person’s brains then the accused threatened to kill PW8 saying the way he, the accused, had killed the deceased and thrown his body in a ditch.

47. The accused in his defence admitted to being with the deceased at a drinking den but denied killing the deceased. He testified that although there was a confrontation between him and the deceased, he, the accused went to his home after escaping through the back door of the house where they were taking alcohol and that the deceased was drunk.

48. I have considered the evidence adduced by both the prosecution witnesses who were in the company of both the accused and the deceased at the alcohol den and the defence put forth by the accused. The evidence irresistibly point to the accused person as the killer of the deceased.

49. I find the defence by the accused person which I have considered, to be nothing but mere denial and that the prosecution’s case was watertight against the accused. I find no reason to doubt the testimony presented by the prosecution witnesses, which testimonies corroborated each other.

50. Further to the above, it is worth remembering the testimony of PW6 who testified that he heard the deceased shouting “Amiso ananiua” meaning, “Amiso is killing me” and when the scene was reached, the deceased was found badly injured and he died almost immediately thereafter. This testimony remained unchallenged in cross-examination.



51. As to whether the statement made to PW6 amounted to a dying declaration, Section 33 (a) of the *Evidence Act* (Cap 80) provides that:

33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—

(a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question..."

52. The principles governing dying declarations were considered by the Court of Appeal in the case of *Philip Nzaka Watu v Republic* [2016] eKLR. The court held that:

"Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in *CHOGE V. REPUBLIC* (supra):

"The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

53. The above principles were reiterated in the case of *Charles Njonjo Gituro v Republic* [2019] eKLR; and in the case of *Moses Wanjala Ngaira v Republic* [2019] eKLR where it held inter alia:

"19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on



the nature and the manner of receiving and considering evidence of dying declaration. We take it from *Choge v Republic* [1985] KLR 1, citing the predecessor of this Court in *Pius Jasanga s/o Akumu R* (1954) 21 EACA 331:

“In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (*Republic v Muyovya bin Msuma* (1939) 6 EACA 128. See also *Republic v Premanda* (1925) 52 Cal 987.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

#### QUOTE

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (*Ramazani bin Mirandu* (1934) 1 EACA 107; *R v Okulu s/o Eloku* (1938) 5 EACA 39; *R v Muyovya bin Msuma* (supra). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (*R v Eligu s/o Odel and another* (1943) 10 EACA 9; *Re Guruswani* [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in *R v Eligu s/o Odel and Epongu s/o Ewunyu* (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (*R v Said Abdulla* (1945) 12 EACA 67; *R v Mgundulwa s/o Jalo* (1946) 13 EACA 169, 171).”



See also R v Eligu s/o Odel (1943) 10 EACA 90, Okethi Okalo v Republic [1965] EA 555, Aluta v Republic [1985] KLR 543, and Kihara v Republic [1986] KLR 473.

20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel's contention that the deceased's statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence."
54. In this case, the statement by the deceased that was heard by PW6 related to the events that eventually led to his death and I am therefore satisfied that it amounted to a dying declaration. I found PW6 to be a credible and trustworthy witness as she had no reason to lie against the accused.
55. It is also not lost on this court that the accused was the last person seen heading towards the direction where the deceased had gone and shortly thereafter, PW6 heard the accused shout "Amiso ananiau." The doctrine of last seen alive is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before his death was responsible for his death and the accused is expected to provide any explanation as to what happened. Nonetheless, this does not shift the burden of proving the guilt of the accused person by the prosecution beyond reasonable doubt. However, having been placed at the scene of the incident as the person who was last seen with the deceased before he died, the accused has a duty to give an explanation of what he was doing at the scene and how the deceased victim met his death.
56. Under Sections 111(1) and 119 of the *Evidence Act*:

" 111.

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

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

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

- "119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human



conduct and public and private business, in their relation to the facts of the particular case.”

57. In *Republic v E K K* [2018] eKLR the Court held thus and I agree, concerning the last seen with the deceased doctrine:

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of *Moses Jua V. The State* (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

58. In *Stephen Haruna v The Attorney-General of The Federation* (2010) 1iLAW/CA/A/86/C/2009 cited severally by Kenyan Courts, the Nigerian Court of Appeal held that:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

59. In *Ramreddy Rajeshkhanna Reddy & Another v State of Andhra Pradesh*, JT 2006 (4) SC 16 the Indian Supreme Court held that:

“Even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

60. In the present case, and from the evidence adduced by the prosecution witnesses especially PW5 and PW6. According to PW5, the accused followed the deceased who had left after the scuffle and according to PW5, after a while, the accused then returned and said that “I have beaten that fool you can go and witness” and at that moment is when PW5 and others heard the deceased’s wife screaming and when they went to the scene, they found the deceased bleeding heavily with a cut on the head. PW6 on the other hand was clear that after the deceased left and the accused followed him, the witness heard the deceased’s voice crying saying Amiso was killing him and so they went where the deceased was lying and found him injured. he died shortly thereafter.

61. The incident took place in broad daylight and in the proximity of witnesses who were at the drinking den with both the accused and the deceased. PW5 and PW6 were clear that it was the accused who followed the deceased from behind after the deceased left the house of PW2 where they had been drinking alcohol and after a scuffle had ensued. The witnesses were clear and firm that the incident took place in at the time when it was the accused who was the immediate last person ‘to be seen’ with the deceased.



62. The accused person was under no duty to adduce and challenge the prosecution's evidence but having been the last seen person to be seen with the deceased in a span of a few minutes prior to the deceased being found seriously injured and crying saying the accused was killing him, the accused failed to offer any explanation as to how the deceased met his death. His defence, as I have stated above, was, in my view, not credible and amounted to a mere denial.
63. In the circumstances, I am satisfied that the prosecution has proved that it was the accused who committed the unlawful act which caused the deceased's death.
64. Finally, as to whether the accused had malice aforethought when he unlawfully killed the deceased, malice aforethought is an essential ingredient for the offence of murder. The circumstances which constitutes malice aforethought are described under Section 206 of the Penal Code 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;
- (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 has committed or attempted to commit a felony.”

65. Under Section 206 (a-e) of the Penal Code, malice aforethought can be either direct or indirect depending on the peculiarity and facts of each case during the trial. The courts in interpreting the provisions of section 206 have stated as such in various authorities.
66. In the locus classicus case of Republic v Tubere S/O Ochen [1945] 12 EACA 63, the court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
67. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased's attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased which were as follows: a depressed skull along the sagittal suture of the occipital bone measuring 7.5cm.
68. An attack on one's head is an attack on the life of a person. The attacker had the ultimate intention of eliminating the deceased although the motive is unclear. Nonetheless, motive is immaterial in proving one's criminal responsibility. That is clear from Section 9(3) of the Penal Code which provides that:

“Unless otherwise expressly declared the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility.”



69. In the case of Joseph Wambirwa Mwanthi v Republic, Criminal Appeal No 63 of 2005 (CA Nyeri), the Court of Appeal stated that “Generally speaking, motive is not essential to prove a crime.”
70. However, the same court stated in Lubambula v R [2003] KLR 683 that:
- “Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”
71. In David Kipkemboi Ngetich v Republic, Nakuru Cr. Appeal No. 276 of 2006 (CA) the Court of Appeal stated that the relevance of motive is “is to contextualize the circumstances in which the offence charged was committed.”
72. In this case, as motive for the unlawful killing of the deceased was not clear from the evidence adduced, this court will not speculate on the same. Only the accused knows why he attacked and unlawfully killed the deceased. Although the murder weapon was not recovered, non-recovery of a murder weapon is not fatal to the prosecution’s case, noting that the accused had the opportunity to dispose of the weapon after the attack on the deceased as they were just the two of them when the accused hacked the deceased to death.
73. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused person beyond reasonable doubt.

Accordingly, I find the accused person Simon Otieno Onyango alias Amiso guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict him accordingly. Sentence shall be after records and mitigation.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 4<sup>TH</sup> DAY OF JUNE, 2024**

**R.E. ABURILI**

**JUDGE**

