



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 4 OF 2020[MURDER]

STATE.....PROSECUTION

VERSUS

FREDRICK AKULA ONYANGO.....ACCUSED

JUDGMENT

Introduction

1. The accused person FREDRICK AKULA ONYANGO is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the Information brought against the accused are that on or about the 9.12.2019 at around 11.00am at Siderema Village, Kagilo Sublocation, Central Gem Location in Gem Subcounty within Siaya County he murdered Margaret Auma Wagga.
2. The accused pleaded not guilty to the Information brought against him and the prosecution called a total of nine witnesses to establish a prima facie case against the accused person who was placed on his defence. The evidence adduced by the nine prosecution witnesses is summarized as below:
3. PW1 Dr. Mbeki testified that she carried out post mortem on the body of the deceased Margaret Auma Waga on the 13.12.2019 at 5 p.m. It was her testimony that the body of the deceased was identified to her by Veronicah Anyango and Lydia Oketch. PW1 observed that the deceased was a well-nourished African female with good physique and of height 5:4 feet. She further observed that the deceased's body was externally well embalmed. The body had a 4 centimeter cut wound, 1 centimeter above the umbilicus and nafumentum (mass of body) coming out, a 4 cm wound below the left scapula (backside below the shoulder bone), a 3 cm cut wound on the lateral aspect of left rib cage, protruding momentum from the said wound, a deep 5 cm cut wound on the left lateral side of the neck with visible cut to the vein and visible clotted blood all over the body.
4. Internally, PW1 found that the respiratory and cardiovascular systems were intact. She noted that in the digestive system, there was minimum blood within the peritoneum cavity mixed with peritoneal fluid.
5. As a result of the postmortem examination, PW1 found the cause of death to be severe bleeding/haemorrhage due to the cut wound to the neck where the jugular vein that carries a lot of blood to the brain was located. PW1 produced the postmortem report for the deceased Margaret Auma Wagga dated 13.12.2019 as PEX1.
6. PW2 Fredrick Samo Warinda, the Senior Assistant Chief for Wagai West Sub-Location Gem Sub-county testified that on the 19.12.2019 at about 11 p.m. whilst in his house, he received a call from one of his village elders who informed him that he had seen a boy alleged to have committed murder in the neighboring Sub-Location moving around Nyagondo Market.
7. PW2 testified that he told the village elder to follow the boy who had then entered his grandmother's place after which PW2 called CPL Mwaniki at Wagai Police Post who reinforced him with other Police Officers as they proceeded to the suspect's grandmother's house where they found the accused, his grandmother and three of his uncles. PW2 testified that he knew all present except the accused but that CPL Mwaniki who was also handling a defilement case against the accused knew the accused very well.
8. PW2 testified that after identifying the accused, whom he pointed at in the dock, the accused was arrested and escorted to Wagai Police Post. He further testified that he then recorded his statement at the Wagai Post the same night.
9. In cross-examination, PW2 stated that the accused was arrested on 19.12.2019 at about 11.30 p.m. He further stated that he had information of a murder committed in a neighbouring sub-location and that the person who knew the accused saw the accused and called PW2. He stated that the murder was said to have taken place on the same date and morning of 19th December 2019.
10. Mr. Okachi the prosecution counsel, later on in the day sought and was granted permission to recall PW2 who testified that he had made

an error during his testimony and stated that he received the call on 9.12.2019 at about 11 p.m. and not on the 19.12. 2019.

11. PW3, Margaret Auma Wagga, the deceased's mother testified that the deceased was her 6th child. She produced the deceased's birth certificate showing that the deceased was born on 29.12.2004. It was her testimony that in September 2019, the deceased was defiled and the incident was reported at Wagai Police Station. She stated that the deceased went to school on 13.9.2019 but never reported back so PW3 reported her as missing. She stated that her other daughter Agnes who is in Form 3 informed her to go and look for the deceased at the home of Onyango Akula, the accused where she found the deceased.

12. PW3 testified that she then went to report her findings at the Wagai Police Station where she was able to get some police officers who accompanied her to the accused's home but on their to the accused person's home, the accused called her on phone and informed her that "*I have seen you are coming to arrest me with Police men.*" It was her testimony that the Police who accompanied PW3 took her mobile phone and listened in after which the accused switched off the phone. She further testified that when they arrived at the accused's home, they found when the accused, his parents and her daughter had all escaped from the home. She stated that both the accused and the deceased were later arrested on the following day and escorted to the Police Station.

13. PW3 further testified that on the 9.12.2019 at or about 8.30 a.m, while in the shamba with the deceased and her sister Agnes, they were visited by PW3's granddaughter Maximilla Akoth who borrowed a trouser and shoes from the deceased after which the deceased left with the said Maximilla. She further testified that she stayed at the shamba until 10 a.m. when she left for home. That at around 11 a.m. as they were preparing to go to the market, she saw people screaming and mourning towards her home. It was her testimony that one Prisca Auma Miduda then asked her what time the deceased had left home and broke the sad news that the deceased had been murdered. She further testified that she went to the scene where she saw the deceased lying on her back with cuts on the thigh and hand. PW3 testified that the deceased's teeth were out and she was lying in a pool of blood with her left vein on the neck cut.

14. PW3 testified that when the deceased was taken to the mortuary, she saw another cut at the umbilical cord of the deceased and further noticed that her intestines were protruding. It was her testimony that she identified the deceased's body to the doctor for postmortem. She further testified that the deceased was killed near River Yala and that one Odhiambo Okele saw the accused run away from the scene and followed him up to his home where the accused removed his clothes which were blood stained and ran away.

15. It was her testimony that another boy whom she could only identify physically also told her that he saw the accused forcefully give the deceased a letter. PW3 stated that she saw the letter which was dated 9.12.2019 and read it but it was taken by the Police. She further stated that at the scene she found people reading the letter and saying that the accused was the one who wrote it saying that after killing the deceased he would kill PW3 as well. She identified the letter in question and the birth certificate for the deceased saying that the latter had some alterations made by the deceased when she was a child and in class three.

16. In cross-examination, PW3 stated that she knew the name of Odhiambo Okele who said that he saw the accused kill the deceased and later escape.

17. PW4 No. 635375 CPL Joseph Mwaniki testified that he was attached to Wagai Police Post under Akala Police Station and that he previously investigated a defilement case involving the accused and the deceased reported to the Police on 20.9.2019 vide OB No. 6. He stated that the case was reported to Wagai Police Station and the accused was arraigned vide Bondo PM Cr. Case No. 635/2019, a case which was not yet concluded as the victim, the deceased, had not yet testified before she was killed.

18. Corporal Joseph Mwaniki testified that on 9.12.2019 at around 11 p.m. he received a telephone call from the area Assistant Chief Wagai West Sub-Location who informed him that a suspect in connection with the murder of Margaret Auma had been located in his area of jurisdiction. I personally knew the accused before because of the defilement case and that on 9.12.2019 a report had been made at Yala Police Station concerning the death of the deceased and Yala Police Station had reported to Wagai Police Station to assist and locate the accused person.

19. PW4 testified that he called P.C. Dennis Munyao and P.C. Frankline Muchiri who together rushed to the office of the area Assistant Chief Mr. Samo where they found him and he showed them the location where the accused had been seen. He further testified that they went and found the accused, his grandmother and three uncles seated in the house, conversing in Dholuo language with a lantern on. PW4 stated that they knocked the house and it was opened where he saw the accused sitting near the door. It was his testimony that he only recognized the accused person in that house since he had known him via the defilement case and that he called him by his names, to which the accused responded and then PW4 arrested him and took him to Wagai Police Post.

20. PW4 testified that he called the investigating officer at Yala Police Station and notified him of the arrest. He then proceeded to identify the accused person in court. It was his further testimony that the defilement case before Bondo Court was due for mention on 14.7.2020 and had been set for first hearing 11.10.2019, then mention 29.1.2019 and hearing on 3.2.2020 however the complainant in the Sexual Offences Case No. 635/2019 who was said to be aged 15 years had died before she could be heard in the said defilement case. He identified in Court the Charge Sheet in Bondo SO Case No. 635 of 2019.

21. PW4 testified that when he arrested the accused, the trouser that the accused was wearing had blood stains so he looked for another trouser, gave the accused to wear and took possession of the blood stained trouser as an exhibit and handed the accused and the blood stained trouser to the DCI Yala.

22. PW4 testified that later, on 12.12.2019, DCI Yala and the accused went to Wagai Police Station requesting for escort to search for a knife which the accused used to stab the deceased. He stated that they went to the accused person's home and the accused showed them where he had stuck the knife in the stem of the Banana plantation. He identified the small knife which was recovered in the banana plantation. In cross-examination, PW4 stated that the accused person led them in the company of DCI Yala to where he had stuck the knife.

23. PW5 Polycarp Lutta Kweyu a Government Analyst at Kisumu Government Chemist since 2012 sought and was granted permission by the court to produce a report which was prepared by Mr. Richard Kimutai Langat, his supervisor who was on the material date of testifying engaged at Kisii High Court giving evidence.

24. PW5 testified that the report was prepared on 23/4/2020 by his supervisor Mr. Richard Kimutai a Government Analyst at Kisumu. He stated that they received the samples on 13/1/2020 with a request to establish the origin and presence of blood stains:

- a) ***Blood sample from Margaret Auma Waga (deceased) marked 'A'***
- b) ***Blood stained trouser for Fredrick Akula Onyango (accused) marked 'B'***
- c) ***A knife in an envelope marked 'C'***

25. It was Mr. Kweyu's testimony that after analyzing the samples as required, the results were as follows:

- a) ***Red stains on the brown trouser was found to be of human origin.***
- b) ***The knife was slightly stained with human blood.***
- c) ***DNA profile generated by bloodstains on the brown trouser and the knife/sword matched the DNA profile of Margaret Auma Wagga the deceased.***

26. PW5 produced the Government Analyst report as PExhibit 2(a) and the Exhibit Memo received as PExhibit 2(b).

27. PW6 No. 73365 Corporal Martin Kitai a Forensic Documents Examiner who worked at the DCI laboratory, Nairobi and trained as a documents examiner at various laboratories locally and internationally testified that he had in his possession exhibit memo and exhibits received on 20/1/2020 from DCI Gem at their Forensic laboratories, Nairobi.

28. He testified that the Exhibit Memo was referenced 5/7/2020 and was brought by No. 71662 Corporal Floisam Mbelenge from DCI Gem. He testified that the Exhibit markings were as follows:

- a) ***'A' the questioned document B1-B4 specimen handwritings of Fredrick Akula Onyango.***
- b) ***'C' known handwritings of Fredrick Akula Onyango***
- c) ***'D' known handwritings of Margaret Auma Wagga.***

29. PW6 testified that his task was to answer two questions:

- Ascertain whether the questioned handwritings on Exhibit 'A' compared to the specimen handwritings on Exhibits marked B1-B4 and the known handwritings on Exhibit 'C' were made by the same author.

30. He testified that upon examination and comparison, the questioned handwritings in Blue on Exhibit 'A' compared to specimen handwritings on B1 - B4 and the known handwritings on Exhibit 'C' were in his opinion, made by the same author.

(2) To compare the questioned handwritings on Exhibit 'A' when compared with the known handwritings on Exhibit 'D' if they were made by the same author.

31. According to PW6, he examined and compared the questioned handwritings in Blue on Exhibit 'A' with the known handwritings on Exhibit 'D' and formed the opinion that the handwritings were made by different authors.

32. PW6 identified the exhibits presented for analysis as follows:

- a) ***Exhibit 'D' is a book for Sireembe for Wagga Margaret Auma.***
- b) ***Exhibit 'A' is a letter written in Kiswahili 7-12-2019.***
- c) ***Exhibits B1-B4 are specimen handwritings for Fredrick Akula Onyango and they all bear the names of the said Fredrick Akula Onyango.***

33. It was the testimony of PW6 that before arriving at the opinion, he followed the stipulated procedure as per his report and that he signed the report on 21/1/2020 and gave it a trace Lab Ref. No. CID/Org/8/3/1/57/2020. He further stated that later the Exhibit memo, Exhibits and forensic Memo were collected by DCI, Gem. PW6 produced the Forensic Expert Report dated 21/1/2020 as PEx3(a) and Exhibit Memo as PEx3(b).

34. In cross-examination PW6 stated that he got Exhibits C & D from the Investigating Officer, CPL Mbelenge. He further stated that under

individual characteristics, each person has unique handwritings but under class characteristics, one can exhibit different handwritings i.e. schooling in a particular school that requires you to write in a particular way.

35. PW6 further stated that Exhibit 'C' was known handwriting of Fredrick Onyango Akula, the accused and that he had examined the written portions of Exhibit 'C' as marked by the teacher in red biro excluding what he, PW6 had folded. He further stated that he had put his stamp impression where he examined.

36. PW7 Richard Odhiambo Okerre from Kagilo sub-location, Owilo village testified that he knew the deceased as a village mate despite their homes being far apart. It was his testimony that on 9/12/2019 he woke up in the morning and went to the farm of one Ms. Nyaudhine when at around 9 am, an unknown lady walked past him in the farm. He further testified that at around 10 am while still on the farm he heard screams though he did not know who was screaming.

37. It was his testimony that he went to find out where the screams were coming from and as there was a small river on his way he crossed the river and saw somebody hiding in the bushes whom he passed and proceeded to the opposite direction where he saw another person lying down and turning around, rolling on the ground. It was his testimony that he noticed the person on the ground was a lady though he could not ascertain her age but noted that she was young. He further stated that he got shocked and screamed and stood and watched the lady till when people arrived at the scene. PW7 testified that he never looked at the person hiding in the bushes and that they retrieved a letter from the chest of the lady rolling on the ground. He further stated that he later recorded his statement at Wagai Police Post.

38. In cross-examination PW7 stated that he recorded a statement at Wagai Police Post. He stated that he went to the scene with the lady he helped with work at the farm. He further stated that the letter from the chest of the deceased was retrieved by one Eunice Auko, the 'Mji Kumi' village elder. In re-examination by Mr. Okachi for the state, PW7 reiterated that it was Eunice Auko who took the letter from the deceased

39. When questioned by the court as to whether he knew the accused person, PW7 he stated that he did not know him. He further stated that though he did not know the name of the deceased lady, she was from his village.

40. PW8, Eunice Auko Odhiambo testified that on 9/12/2019 she was in her farm at about 11 a.m. when a small boy aged 8 years called 'baby' informed her that PW8 was being called as a person had been found dead near River Odiyo. She stated that she followed the boy and found people talking and gathered. It was her testimony that at the scene, she saw a girl lying on the ground and bleeding. She stated that the girl was Margaret and she knew her as 'Maggy'.

41. It was her testimony that he saw a piece of paper with writings on her chest which she took and gave to the Assistant Chief who had arrived. She further stated that the police from Yala arrived and collected the deceased's body and that she later recorded her statement at Wagai Police Station. She further stated that the piece of paper was folded so she could not remember or recall it if she saw it in court. In cross-examination, PW8 stated that at the scene, she found many people. She reiterated that she was the one who took the piece of paper which was on the deceased's body and it was folded so she could not recognize it.

42. PW9 No. 232549 Inspector Eli John Njuguna Warui testified that he was previously the Deputy DCIO, Gem Sub county and that on the 9.12.2019 he was at his house when the OCS called him to the office at about 11a.m. where he was informed of a murder incident at Kagilo. He testified that he mobilized officers and they went to the scene and found the body of a girl lying near a seasonal stream stabbed on her neck with a knife with the veins visible.

43. PW9 testified that he interrogated people present and they told him that the girl had been seen with the accused who was her relative. He further testified that they took away the deceased's body and were given a note MFI 12 which was found on the body of the deceased by PW8 who handed it over to Assistant Chief who surrendered it to PW9. It was his testimony that they were investigating the case with CPL Berenge who had since gone on transfer.

44. PW9 testified that the accused was arrested and found with a trouser which was blood stained and that in the company of CPL. Berenge, DCIO CIP Tarus, CPL. Mwaniki and the accused, they visited the accused's home for recovery of a murder weapon which the accused had informed them that he threw the knife in the bushes but after PW9 spoke to the accused person, he revealed that he had stuck it on a tree near his home. It was his testimony that they searched for the knife but never traced it only for the accused's brother, Ben Omondi Onyango a Form Four student to inform him that the knife was in the banana plantation where he had moved it.

45. PW9 further testified that Post mortem on the deceased's body was carried out by Dr. Mbeki and that the deceased's blood sample was taken while her body was preserved at Yala Level 4 mortuary. He further testified that the deceased's blood, the knife (sword) and the accused's brown blood stained trouser were escorted by CPL Berenge to the Government Chemist and later they received the Government Analyst's Report which was produced as PExhibit No. 2 (a) while the exhibit memo was produced as PExhibit No. 2(b). PW9 produced the brown trouser MFI 4 as PExhibit No 4. He further produced the recovered knife (sword) as PExhibit No. 5.

46. PW9 further testified that in the course of their investigations, he sent CPL Berenge to go and find out more about the handwritten note and whose handwriting it was. It was his testimony that CPL Berenge recovered two exercise books, one belonging to the deceased that was surrendered by her parents and another exercise book for the accused surrendered by his mother. He further stated that they then took the sample handwriting specimens of the accused, four sets thereof – MFI 6, 7, 8 and 9 and together with the handwritten note, the two exercise books one for the accused and another for the deceased and specimen handwritings of the accused were submitted for forensic examination in Nairobi to determine who wrote the note. He produced the handwritten note as PExhibit No.6, the specimen handwritings of Fredrick Akula Onyango MFI 6,7,8 and 9 as PExhibits 7,8,9 and 10 respectively. PW9 further produced the exercise book of known handwriting of the accused as PExhibit No. 11 whereas the deceased's exercise book was produced as PExhibit 12.

47. It was his testimony that during their investigations they found that the deceased and accused were blood relatives and that the accused defiled the deceased and was charged before Bondo PM's Court in SOA 635/2019. He produced the charge sheet as PExhibit 13 as well as

the deceased's Birth Certificate as PExhibit 14 and that of the accused as PExhibit 15.

48. PW9 further testified that he had been unable to trace the accused's brother Ben Onyango Omondi despite various efforts including obtaining a warrant of arrest from this court. He therefore sought to have the written statement of Ben Onyango Omondi produced in evidence to prove how the witness at large had aided the police recover the knife admitted in evidence. The statement of Ben Onyango Omondi was admitted as PExhibit 16 as there was no opposition from the accused's counsel. PW9 further identified the accused before court as the person he had arrested and investigated over the deceased's murder.

49. In cross-examination, PW9 stated that they did not recover any items at the scene where the deceased lay. He further stated that CPL Berenge was his co-investigator and did not record any statement.

Defence Case

50. Placed on his defence, the accused gave sworn testimony. He stated that he hailed from Gem, Minyuu area and was aged 23 years old. He stated that he was a casual worker before his arrest. He stated that he knew the deceased as they were in primary school together at Olengo Primary School where they were both in class 7.

51. He testified that on the 9/12/2019 he was at his home having woken up at 5a.m. to cut trees for charcoal burning. He stated that at 10.00a.m. he heard people screaming whilst approaching their home area and calling out his name. It was his testimony that he thought that they were protesting over the defilement case he had in court so he ran away towards the river and proceeded to his grandmother's home at Nyagondo center but did not find his grandmother as she had gone for a funeral.

52. The accused stated that he stayed at the centre and went to his grandmother's house where his grandmother returned at 6p.m. and told him to prepare dinner then they ate. It was his testimony that the police arrived between 9.30 – 10 p.m. and called him out by name stating that they were looking for him. He further stated that he boarded the police vehicle up to DO's Office and Yala Police Station where he was placed in cells at about 1p.m. and brought to court in the morning.

53. The accused further stated that after court, he was escorted to hospital for examination. It was his testimony that he did not know anything about the knife and that when the police took him to his home, he was told that the knife was recovered in their banana plantation which was cut down.

54. It was his testimony that the brown trouser was not his and that he had seen it first in court. He further stated that he never wrote any letter or note which he only saw it in court. He admitted that the book – PExhibit 11, was his and all the writings and notes in the exercise book were similarly his. The accused further denied writing exhibit Nos 7,8,9 &10 while in police custody. It was his testimony that he was the accused in Bondo S.O. 635/2019 whereas the deceased was the complainant in the same case. He stated that when he went to court at Bondo for the third time, he was told that the complainant had died so the case would be withdrawn from court.

55. In cross-examination, the accused stated that he was alone when he was cutting trees to burn charcoal. He reiterated that he schooled with the deceased but never had any love affair with her. He further stated that the deceased used to visit a classmate who lived near his home and that he only used to greet her. He further stated that his home and the deceased's were close and that he never disagreed with her.

56. The accused further stated that Ben Onyango Omondi was his elder brother and that they had never disagreed. He stated that they had a good relationship and that his brother was not at home on the material date but that they shared a home. The accused admitted that the exercise book, Exhibit 11, was his exercise book and the notes therein were his. He denied ever writing exhibits Nos 7,8,9 & 10. He stated that the handwriting in the exercise book and the note were different. The accused declined to comment on the forensic expert's report produced in court by the prosecution witness.

Analysis & Determination

57. I have considered the evidence adduced by the 9 prosecution witnesses and the defence proffered by the accused person. The issue for determination is whether the prosecution has proved all the elements of the offence of murder and therefore whether the evidence adduced establishes the guilt of the accused person beyond reasonable doubt. The accused faces the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

58. The offence of murder is defined under section 203 of the Penal Code as follows:

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

59. Malice aforethought is defined in section 206 of the Penal Code. This definition of murder gives rise to four (4) crucial ingredients of the offence of murder, all of which the prosecution must prove beyond a reasonable doubt in order to prove the charge and sustain a conviction. These elements are:

- a) ***The fact of the death of the deceased.***
- b) ***The cause of such death.***
- c) ***Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly***

d) **Proof that said unlawful act or omission was committed with malice aforethought.**

Fact of Death

60. On the fact of the death of the deceased, there is no doubt. PW3, PW8 & PW9 all saw the deceased's body at the scene of crime, lying in a pool of blood with multiple cut wounds. PW3, the deceased's mother testified that at the scene, she saw the deceased lying on her back with cuts on the thigh and hand, that her teeth were out and she was lying in a pool of blood with her left vein on the neck cut. PW8 testified that having received information of a murder, she went to the scene where she saw a girl, whom she knew as Maggy lying on the ground and bleeding. The investigating officer PW9 testified that when he arrived at the scene with his colleagues, they found the body of a girl lying near a seasonal stream stabbed on her neck with a knife with the veins visible.

61. PW7 who was first to reach the scene testified that while still working on the farm he heard screams though he did not know who was screaming and when he arrived at the place where the screams were coming from, he saw a young lady lying down and turning around, rolling on the ground. PW1 Dr. Mbeki conducted a postmortem examination on the body of the deceased as identified by her mother PW2. She produced the postmortem report showing the cause of death thereof. Postmortems are never conducted on live persons. Accordingly, the fact of death of the deceased Margaret Auma Wagga was proved beyond any reasonable doubt.

Cause of Death

62. PW1 Dr. Mbeki who carried out the post-mortem on the deceased's body testified that upon examination of the deceased's body, she found the following:

- a) *That there was a 4 cm cut wound 1 c.m. above the umbilicus and navel (mass of body) coming out, a 4 cm*
- b) *That there was a wound below the left scapula (backside below the shoulder bone),*
- c) *A 3 cm. cut wound on the lateral aspect of left, rib cage, protruding momentum from the said wound, a deep 5 cm cut*
- d) *A wound on the left lateral side of the neck with visible cut to the vein and visible clotted blood all over the body.*

63. PW1 testified that the respiratory and cardiovascular system were intact, that in the digestive system there was minimum blood within the peritoneum cavity mixed with peritoneal fluid.

64. As a result of the examination, PW1 found the cause of death to be severe bleeding/haemorrhage due to the cut wound to the neck where the jugular vein which carries a lot of blood to the brain was located. Accordingly, I find and hold that the cause of the deceased's death was established beyond reasonable doubt.

On whether the death of the deceased was caused by an unlawful act or omission on the part of the accused person

65. Having sufficiently proved the fact as well as the cause of the death of the deceased, the prosecution is under a duty to prove that the accused person before the court are criminally culpable for the act or omission leading to the death of the deceased. It is worth noting that the prosecution's case against the Accused person primarily rests on circumstantial evidence as there was no eye witness to the incident.

66. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, the Court of Appeal had this to say 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.” See also Musili Tulo v Republic Cr. App. No. 30 of 2013.

67. The Court of Appeal also laid down 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 Accused 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 Accused; (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.

(see also Sawe v Republic (2003) eKLR and GMI v R Cr. App. No. 38 of 2011).

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715). In Dhalay Singh v Republic, Cr. App. No. 10 of 1997, this court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”

68. Before I determine whether the accused person was positively identified by the circumstantial evidence adduced to be the person who killed the deceased, it is important to establish whether the killing of the deceased was caused by an unlawful act or omission. From the injuries found on the deceased's body, which rule out any suicide, I have no doubt that the deceased's killing was caused by an unlawful act. The knife which was suspected to have been used to inflict the injuries on her was recovered from the accused person's home with the guidance of the accused and his brother Ben Onyango Omondi whose statement was produced in evidence as an exhibit. Ben Onyango clearly explained in his statement to the police how he helped the police recover the knife from their homestead and the accused stated in his evidence that he lived in the same home with Ben Omondi his elder brother. In addition, the said recovered knife was blood stained and forensic examination on the same revealed that it had human blood whose DNA matched that of the deceased Margaret Auma Wagga. No justification for the killing of the deceased was placed before this court. Accordingly, I am satisfied that the killing of the deceased was unlawful.

69. On who unlawfully killed the deceased Margaret Auma Wagga, there being no eye witness but only circumstantial evidence adduced by the prosecution witnesses, leading to her death, in **Neema Mwandoro Nduzuya v R [2008] eKLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”

70. In its earlier decision in **Mwangi and Another v Republic (2004) 2 KLR 32**, the Court of Appeal stated that:

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge.”

71. Having examined the circumstantial evidence adduced in this case, I now lay out the four strands that link the unlawful killing of the deceased to the accused herein Fredrick Onyango Akula. First, PW4 CPL Mwaniki who arrested the accused on the material day testified that during the arrest, the accused was wearing a brown trouser which had blood stains. It was his testimony that he recovered the trouser which was escorted to the Government Chemist for analysis, together with the blood of the deceased Margaret Auma Wagga. PW5 the Government Analyst who produced PExhibit 2, the analysis report testified that upon analysis, the blood extracted from the brown trouser was found to be of human origin and matched the DNA profile of Margaret Auma Wagga the deceased.

72. The second strand is the knife that was allegedly used to stab the deceased. PW4 further testified that on 12.12.2019, the DCI Yala, accompanied by the accused, went to Wagai requesting for escort to search for a knife which the accused used to stab the deceased and that they proceeded to the accused person's home where the accused showed them where he had stuck the knife between the stems of the Banana plantation. Ben Omondi, the accused person's elder brother aided the police by showing them where the knife had been kept by the accused.

73. PW9 the investigating officer corroborated PW4's testimony and stated that in the company of CPL Berenge, DCIO CIP Tarus, CPL. Mwaniki and the accused, they visited the accused's home for recovery of a murder weapon which the accused had informed them that he threw in the bushes but later revealed to have stuck it on a tree near his home. PW9 testified that they searched for the knife but never traced it only for the accused's brother, Ben Omondi Onyango, to inform him that the knife was in the banana plantation where he had moved it. It was PW9's testimony that the accused's brother recorded a statement to the effect that he helped the police recover the knife, which statement was admitted in evidence because Ben Omondi Onyango had since disappeared and could not be traced despite numerous summons and the existence of an arrest warrant issued by this court. This court admitted the statement of Ben Onyango Omondi as PExhibit 16 on account that the witness could not be found and there was no opposition from the accused or his counsel. The evidence of PW5 was that the blood extracted from the aforementioned knife recovered from the home of the accused and his brother Ben Omondi, as directed by the accused Person's brother was found to be of human origin and matched the DNA profile of Margaret Auma Wagga, the deceased.

74. The third strand linking the accused to the deceased's unlawful killing is the handwriting of the letter recovered from the deceased's chest at the scene. PW6 the forensic examiner at the DCI laboratory in Nairobi testified that the handwritings on the letter written in Kiswahili matched the specimen handwritings of the accused contained in specimens that were marked B1-B4. The aforementioned letter written in Kiswahili, was the letter recovered by PW8 on the deceased's chest at the scene of crime. The conclusion by the forensic handwriting expert was that the accused person was the author of the said letter.

75. The final strand linking the accused to the unlawful killing of the deceased was the fact that there was a pending sexual offence case

against the accused in which the deceased was the complainant. That case was yet to be heard and finalized at Bondo Principal Magistrate's Court. A charge sheet was produced in respect of Bondo SO Case No. 635 of 2019 where the accused therein is the accused herein whereas the complainant is the deceased. The deceased was a crucial witness in that case. This was the testimony of PW4, the investigating officer in the defilement case by the deceased complainant against the accused vide Bondo PM SO Case No. 635/2019. The Birth Certificate produced in evidence showed that the deceased was a minor.

76. Juxtaposed against the evidence above, the accused's defence was that he did not know anything about the deceased's death and that when he was arrested he thought he was arrested for protests about the defilement case he had in Bondo PM SO Case No. 635/2019. The accused further denied knowing the knife alleged to be the murder weapon. He also denied owning the brown trouser produced as an exhibit which he stated he was seeing for the first time in court. The accused further stated that he never wrote any letter or note and that he saw it in court for the first time. It was his testimony that he was the accused in Bondo S.O. Case No. 635/2019 where the deceased was the complainant and that when he went to court at Bondo for the third time, he was told that the complainant had died so the case would be withdrawn from court. In cross-examination however, the accused refused to comment on the expert evidence adduced in court by the forensic examiner and the government analyst. He also admitted being the owner and author of the contents of the book which was produced as exhibits that were compared to the letter that was found on the deceased's chest.

77. The conduct of the accused as well as the circumstantial evidence against him is cogent in establishing that it was the accused and no other person who unlawfully killed the deceased. The accused's defence consists of mere denials. There is no reason why the prosecution or any of its witnesses would frame the accused for committing such a heinous offence. Further, there is no explanation why deceased's blood was to be found on the brown trouser clothing which the accused was found wearing and the knife which was recovered from his home with the aid of his own brother Ben Onyango Omondi. The forensic evidence adduced by both the Government Analyst and the handwriting expert was not controverted by any other evidence. Section 111 of the Evidence Act provides that:

“(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 prosecution, 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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence. (2) Nothing in this section shall— (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

78. In the circumstances I am satisfied that the prosecution has proved beyond reasonable doubt that it was the accused herein Fredrick Onyango Akula and no other person who unlawfully killed the deceased Margaret Auma Wagga.

Proof of Malice aforethought

79. The last element of murder that the prosecution must prove beyond reasonable doubt is malice aforethought or the 'mens rea' for murder. The prosecution must not only prove the fact and cause of death and that the death was caused by an unlawful act or omission on the part of the accused. They must also prove beyond reasonable doubt that the accused had malice aforethought when he unlawfully killed the deceased. Mens rea is defined by the **Wex Legal Dictionary** as follows:

“The state of mind indicating culpability which is required by statute as an element of a crime.”

80. The mens rea for murder is described as 'malice aforethought'. Section 206 of the Penal code defines 'malice aforethought' as follows:

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

- 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;***
- 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.***
- An intent to commit a felony.***
- An intention.....”***

81. On whether the accused had malice aforethought when he unlawfully killed the deceased, the prosecution must establish facts that are consistent with existence of malice aforethought on the part of the accused. The East African Court of Appeal in the case of **Republic v Tumbe S/O Ochen [1945] 12 EACA635** in determining whether malice aforethought had been established, considered the following elements:

(1) The nature of the weapon used;

(2) The manner in which it was used;

(3) The part of the body targeted;

(4) The nature of the injuries inflicted either a single stab/wound or multiple injuries;and

(5) The conduct of the accused before, during and after the incident.

82. The postmortem report of the deceased as produced by PW1 reveals multiple injuries on the following parts of the deceased's body-neck, shoulder and stomach. The injuries on the neck that showed the jugular vein was cut and severed led to the bleeding/haemorrhage that caused the deceased's death. The nature, severity and multiplicity of the injuries found on the deceased's body as described in the post mortem report leave no doubt that the accused person used a sharp object and was determined to end the life of the deceased or to cause her grievous bodily harm. Any human being aiming at the neck and stomach of another human being and cutting through those parts of a human body no doubt knows that the consequential injuries would be fatal. The weapon used to inflict the fatal injuries was a small sharp knife which was produced as an exhibit. This is covered under section 206 (a) of the Penal Code.

83. Motive is of course 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.”

84. In **Joseph Wambirwa Mwanthi –Vs- 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.”***

85. However, the same court said in **Lubambula Vs R [2003] KLR 683** stated 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.” In David Kipkemboi Ngetich Vs Republic, Nakuru Cr. Appeal No. 276 of 2006 (CA) the Court of Appeal said its relevance “is to contextualize the circumstances in which the offence charged was committed.”

86. Motive therefore becomes important in proving the accused's malice aforethought where the evidence adduced against an accused person is circumstantial. In the instant case, it is apparent that the deceased was the victim and key witness in **Bondo Principal Magistrate's Court, Sexual Offence Case No. 635 of 2019** where the accused was charged with the offence of defiling her and from the evidence adduced in this case, it is clear in my mind that the accused lured the deceased to her death in order to silence her from testifying in the defilement case against the accused person. He indeed achieved his goal by stabbing her to death. The killing of the deceased was not justified at all. It was unlawful. The motive is evident that the accused wanted the deceased eliminated because she was a key witness in the defilement case against him.

87. On the whole, I am satisfied that the prosecution has adduced sufficient watertight evidence against the accused person and proved that the unlawful killing of the deceased was with malice aforethought. Accordingly, I find the accused person **Fredrick Onyango Akula GUILTY** of the offence of murder of the deceased **Margaret Auma Wagga**. I convict him for the offence of murder as charged, under section 203 of the Penal Code.

88. Sentence shall be after records and mitigations.

89. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 1ST DAY OF NOVEMBER, 2021

R.E. ABURILI

JUDGE