



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 21 OF 2018

REPUBLICPROSECUTION

VERSUS

RAPHAEL MATENGO CHIAJI.....ACCUSED

JUDGMENT

INTRODUCTION

1. Vide Information dated 9th October 2018 and signed by Mr. David M. Okachi Senior Principal Prosecution Counsel, the accused person **RAPHAEL MATENGO CHIAJI** was arraigned for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars are that on the night of 21st day of September, 2018 and morning of 22nd September 2018 at unknown time at Sianga area in Bondo District within Siaya County he murdered **FRANCIS OGOLLA ODUNDO**.

2. On 17/10/2018, the accused person took plea of not guilty after he was certified to be mentally sound and fit to stand trial for murder. He denied committing the offence and the prosecution called ten witnesses in a bid to establish their case against the accused person. On being placed on his defence, the accused person gave sworn testimony and called one witness.

PROSECUTION'S CASE

3. **PW1, Teresa Agidho Ouma a 40 year old a** farmer from Sianga Village testified on oath that she knew the deceased. She recalled that on 22/9/2018 she was at home at about 6.00 am when the accused person Raphael went to her home asking for her husband who was a Village elder of Sianga area. That she told the accused person that her husband had gone on a trip and the accused requested for her husband's telephone number which she provided and he called her husband Stephen Ouma. That she overheard Raphael tell her husband that there was an issue between Raphael and Francis Ogolla Odundo which he wanted her husband to intervene to resolve. That she also heard her husband tell the accused person that he would return that day and Raphael said a Baraza should be held to resolve the issue.

4. PW1 further testified that a few minutes later, she saw some motorcyclists pass by her house carrying 2-3 people and she inquired from a milk man as to what was happening and the milkman told her that somebody (Ogolla) had died. She did not go to the scene because she had "chama" (a meeting) that morning. She stated that she heard of the death of Ogolla at about 6.30 am after Raphael had left. She also stated that she had known Raphael for long because he was her in-law. She identified the accused in court.

5. On being cross examined by Mr. Mirembe counsel for the accused person, PW1 stated that the incident happened on Saturday, 22nd September 2018 when Raphael went to her home asking for her husband, but that he never spoke of what had transpired. She denied hearing any screams.

6. **PW2, Joseph Oginga** a farmer and tailor testified that on 18/9/2018 at 9.00 pm, he was at his house when he heard screams from his brother Francis Ogolla the deceased. That he listened and heard the deceased cry saying "Raph Raph." That PW2 ran to the deceased's homestead and met Ayoma his other brother at the gate, trying to push the gate and that Raphael was emerging from the house of the deceased. PW2 saw Raphael using very bright moonlight. He stated that Raphael tried to hit PW2 with a club but PW2 evaded and Raphael tried to get out through the gate. PW2 pushed the gate and got into the homestead of the deceased Ogolla and found the house door broken into pieces. They entered the house and found Francis lying on the floor with a cut on the left leg. They attended to Francis and gave him first aid. He stated that Francis told them that Raphael had beaten him. They took Francis to Bondo District Hospital but were told there was no doctor so they returned back home with the deceased without any treatment. PW2 then went to Kisumu and advised the deceased to go back to hospital. PW2 returned on 21/9/2018 and found some documents in his house showing that the deceased was to go for an XRay. He further stated that on 21/9/2018 at 9.00 pm, he heard his brother Francis, the deceased, screaming saying **"even if you broke my door and hit me, a club, panga or gun cannot do anything."**

7. Further testimony from PW2 was that on the morning of 22/9/2018 at about 6.00 am when PW2 was going to fetch water on a bicycle, he saw Francis lying on the side of the road. He moved closer and realized that he was dead. PW2 who was with his son called the Assistant

Chief Micheal Osare Amolo who went to the scene with Police from Bondo Police Station and removed the deceased's body to Bondo Mortuary. He later witnessed the postmortem on the body of the deceased.

8. PW2 identified the accused in the dock saying they were cousins and that their homes are about 50 meters apart. He stated that he did not know of any disagreements between the deceased and the accused person.

9. On being cross examined by Mr. Mirembe advocate for the accused, PW2 reiterated his testimony in chief and added that when he rushed to the house of the deceased on 18/9/2018 on hearing screams from the deceased, he found the deceased bleeding from the left leg and that the deceased was attended to at Uyagi Dispensary and that they handed to the investigators the deceased's treatment notes. He stated that the deceased was unmarried. He stated that he could not tell what happened to the deceased and that he was the first person to find the deceased lying dead but that he found no blood. He maintained that he was not aware of any quarrels between the deceased and the accused. He stated that police collected the body from the scene after about 2 hours.

10. **PW3, Stephen Ouma Pesa** a village elder of Sianga village testified that on 22/9/2018, he was in Kakamega at a place called Sawawa when at 6.15 am he received a telephone call from Raphael the accused herein, who told PW3 that he (Raphael) was calling from PW3's house. That the accused told PW3 that he had an issue with Ogolla, the deceased. That the accused further told PW3 that he had quarreled with Ogolla and PW3 told the accused that he was returning home on Sunday. That after 30 minutes, Raphael again called PW3 and told him that Raphael had heard screams and that it seemed the person he had beaten had died. PW3 then called Ongala, his fellow Village elder and send him to Ogolla's home to establish the truth and that PW3 explained to Ongala what Raphael had told him(PW3) on phone that morning to the effect that Raphael had beaten Ogolla who was said to be dead.

11. On being cross examined by Mr. Mirembe advocate for the accused person, PW3 reiterated his testimony in chief and stated that the accused never disclosed to him the issues but said Ogolla used to abuse the accused.

12. **PW4, Micheal Omollo Osare Assistant Chief of Nyangoma Sublocation testified that on 19/9/2018**, he was at his office at Nango Shopping Centre when the deceased Francis Ogolla went and told him that his cousin Raphael Matengo had attacked him and that the deceased showed PW4 bruises on his leg and PW4 told him that that was a police case. He further testified that on 21/9/2018 he met the deceased at Nango market but that they never spoke and that on 22/9/2018 at 6.00 pm, the deceased's brother Joseph Oginga Odundo (PW1) called him saying he had found his brother's body (Ogolla) lying on the road. That Pw4 went to the scene and met William Ongala a village elder who told him that he had heard that Raphael had gone to the home of Stephen Pesa a village elder and briefed the wife and called Stephen, PW2, telling him he had beaten the deceased. PW4 looked for the Accused and found him in his homestead, arrested him and took him to Kopoto Administration Police Camp. Later the police went to the scene and collected the deceased's body to the mortuary and PW4 recorded his statement.

13. On being cross examined by Mr. Mirembe counsel for the accused, PW4 stated that he visited the scene and saw bruises on the deceased's body, leg and head but never saw any blood.

14. **PW5, No. 86640 CPL Douglas Wamalwa** of Scenes of Crime Siaya testified that on 22/9/2018 he took photographs of the scene at Sianga Area, Bondo Sub County in respect of alleged murder of Francis Ogola Odundo. he took and produced three photographs from the scene as follows: -

(1) General view of the body lying along the road as exhibit 1(a)

(2) General close up view of the same body as exhibit 1(b)

(3) General view of the hand with visible injuries as exhibit 1(c)

15. He also produced Gazette Notice No. 217/28/12/2012 and a certificate of electronic evidence as exhibit 1(d).

16. **PW6, Polycarp Lutta Kweyu No. 2012024565** a Government Analyst, from Kisumu Government Chemist testified that he had worked for the Government Chemist for 7 years. He stated that they received an exhibit Memo form in a case against Raphael Matengo Chiaji (accused) and Francis Ogola Odundo, (deceased). He stated that they received the following items on 27th September, 2018 at their laboratories:

(1) Blood sample of Francis Ogola Odundo (deceased) marked 'A'.

(2) A stripped long trouser in a red shopping bag marked "B".

(3) Blood sample from Raphael Matengo Chiaji marked "C".

17. PW6 further testified that the samples and items were submitted by No. 85809 PC Mwendwa of DCI Bondo, requesting for determination of any genetic relationship as per the Memo form Referenced AIII/2018. He stated that upon analyzing the exhibits, he found that the stripped navy blue pair of trousers was slightly stained with human blood. PW6 then generated DNA profiles from the exhibit and blood. He stated that every person has a unique DNA from parents (biological/mother and father and that they can determine origin of fluid or blood given the samples.

18. PW6 further stated that a comparison of DNA profile generated from the Navy Blue stripped pair of trousers matched the DNA profile of the deceased Francis Ogola Odundo. He produced the forensic Report as PEx2 (a) and Exhibit Memo as PEx2 (b). He also identified the stripped Navy Blue trousers (marked MFI 3).

19. On being cross examined by Mr. Mirembe Counsel for the accused, PW6 stated that he was informed that the Navy Blue trouser was recovered from the suspect's house.

20. On being shown the photograph of the deceased and being asked a question he stated that the exhibit trouser was only slightly stained and that it was not a jeans trouser unlike what the deceased was wearing in the photograph.

21. **PW7, No. 90088551 Chief Inspector C.I John Otieno Otunge based** at the County Commissioner's Office in Suba, Magunga, as an Infrastructure Commander recalled that on 22/9/2018 while he was at Nyangoma Administration Police Camp, a resident of Nyangoma, Sianga village called him on phone and informed him that there was a dead body lying along the road from Alala to Nandu, 3 metres from the homestead of Francis Ogolla Odundo.

22. PW7 called his officers including APC Omondi and CPL Felix and together they rushed to the scene where they found Area Asst. Chief. PW7 saw the body of Francis Ogolla Odundo lying down with several wounds. The Area Assistant Chief called PW7 aside and disclosed to him that intelligence information had it that there was a suspect and that there were many people baying for the blood of the suspect. That the Area Assistant Chief Mr. Osare led PW7 to the home of Raphael Matengo Chiaji and they arrested him, took him to AP Camp to rescue him as people (mob) was baying for his blood. That when they went to arrest him, they found him sitting in his house looking frightened and tensed. That they later returned to the accused's house with the OCPD, the DCIO and other officers to look for evidence that could link the accused with the murder of the deceased.

23. PW7 stated that as they thoroughly searched the accused person's house and in his bedroom they found a blue long trouser which was blood stained. They took possession of it and escorted the accused person to Bondo Police Station. PW7 Identified the blue trouser that he recovered from the accused person's house and stated that the said trouser was later taken to the Government Chemist for DNA analysis and testing.

24. On being cross examined by Mr. Mirembe advocate for the accused person, PW7 stated that the trouser (MFI 3) was recovered from the accused's house and that they found it blood stained. He also reiterated that they were led to the accused person's house by the area Assistant Chief. He reiterated that they found the accused tensed and that he told them that the recovered trouser was his.

25. **PW8, William Ongala Odira** from Nyangoma, Central Sakwa, Ombaka Village, a charcoal seller and village elder testified and recalled that on 22/9/2018 at 7.00 am, he was in his homestead when his fellow village elder Stephen Ouma Pesa, PW2 called him and told him that he had been called by Raphael Matengo who told him that the latter had quarreled with the deceased Francis Ogolla and that they fought and the deceased died.

26. That PW8 went to the scene and found the Chief and Assistant Chief and saw the deceased. He told them what he had been told by Stephen Ouma Pesa and they proceeded to the accused person's house where they found Raphael. The police arrested Raphael and escorted him to Bondo Police Station. They then returned to the home of Raphael and did a search and found a blood stained blue trouser (MFI 3 identified). The Police removed the body from the scene to the mortuary. He later recorded his statement with the police. PW8 identified the accused as Raphael Matengo.

27. On being cross examined by Mr. Mirembe advocate for the accused person, PW8 reiterated his evidence in chief of what his co village elder had told him. He stated that he knew the accused very well as they live near each other about 300 meters apart but stated that he did not hear noise from the scene.

28. **PW9, Dr. Phelgona Kabibi**, Medical Officer Bondo Sub-county Hospital testified and produced a postmortem report on the deceased Francis Ogolla Odundo, prepared by Dr. Willis Ochieng who was said to be away on official duties in Migori County. PW9 stated that she had worked with Dr. Willis for two years hence she was familiar with his handwriting and could interpret his writing.

29. She stated that the Postmortem was carried out on 3/10/2018 at Bondo Sub-County Hospital at 11.00 am. On general Observation, the deceased was found to be of a black African Male with no clothing; aged 43 years; of adequate nutrition and physique; height: 180 cm. The body was identified by Joseph Oginga Odundo and Benard Otieno Otom.

30. Postmortem changes involved: The body was well preserved with presence of rigor mortis.

31. On external appearance there were: Multiple bruises on the head, 5 in number, the largest was 10 cm by 3cm; Deep cut wounds on the head, 2 in number; On the left lower limb, there was a fracture of the femur was noted.

32. Internal appearance:

- Respiratory and cardiovascular:

No abnormalities noted.

33. In the digestive system there was:

- Splenic rupture grade 3 spleen was completely out of the ligaments and Haemoperitonium - blood in the abdomen.

34. The head and nervous system were all normal.

35. The cause of death was found to be hypovolemic shock due to haemorrhage. PW9 produced the Postmortem report signed by Dr. Willis Ochieng as PEx.4.

36. In cross examination by Mr. Mirembe Advocate for the accused person, PW9 stated that the body had deep cut wounds as shown on the Postmortem Report. That the doctor found a lot of blood accumulated in the abdomen and that the cause of death was internal haemorrhage. She stated that due to the deep cut wounds noted, there must have been external bleeding.

37. **PW10, No. 85809 PC Shadrack Mwendwa** based at Bondo DCI Sub-County Office, as a Crimes Investigator and the investigating officer in this case recalled that on Saturday 22/9/2018 he received a call from the DCIO who informed him of a murder within Nyangoma Area. He proceeded to the police station and was accompanied by the Area OCPD, DCIO and Chief Inspector Yusuf to Nyangoma Area and on reaching Kopolo Area where there is an AP Camp, Michael Osare Area Assistant Chief accompanied them together with the Area Chief Julius Nyerere and the AP Incharge Chief Inspector Otunge. They proceeded to Sianga village at a scene of murder. On arrival, they found a crowd of people gathered around a body of a man lying beside the road near his house with bruises on his hand, legs, waist and backside of the head.

38. The scene was photographed and they proceeded to the deceased's home where they found that his house door had been broken. On inquiry, he was informed that on 18/9/2018, the deceased had fought with the accused resulting in the damage of the door and that the deceased had made a report vide OB No. 58/18/9/2018 and was referred to the hospital for treatment. In the said OB, the deceased claimed to have been injured by the accused person Raphael Matengo

39. PW10 proceeded to the house of the accused person and upon search he recovered a blue trouser with blood stains on the lower part which he took possession of. At that time, the accused had already been arrested and taken AP Camp at Kopolo. PW10 took the deceased's body to Bondo Sub-County Mortuary and obtained blood sample from the deceased and later he took the accused's blood sample, the trouser and the deceased's blood to Kisumu Government Chemist. He received the report from the Government Chemist as produced by the Government analyst Mr. Lutta.

40. PW10 further testified that on 3/10/2018, he went to the Bondo Sub-County Mortuary where he witnessed the autopsy being performed on the body of the deceased Francis Ogolla Odundo. That the Postmortem showed that the deceased died due to excessive bleeding and he had a broken femur bone. PW10 produced as exhibit 3 (a) the blue pair of trousers which he said he recovered from the accused person's house and took to the government chemist for DNA profiling.

41. He also produced as exhibit 3(b) the treatment notes dated 18/9/2018 given to him by the deceased's brother following an alleged assault reported by the deceased at the police station vide OP No.3026/2018 and later he recorded statements of witnesses and charged the accused person herein Raphael Matengo Chiaji whom he identified in court, with the offence of murder.

42. On cross examination by Mr. Mirembe counsel for the accused person, PW10 stated that at the scene of alleged murder, he found some minimal blood and that he found the door to the deceased person's house broken but never found any blood stains or any sharp objects.

43. He stated that the scuffle was at the deceased's house and not at the accused person's house. He stated that he was not the one who booked the deceased's report on 18/9/2018 and that he had not produced the OB extract of that report. He stated that in the treatment notes, there were bruises in the left leg but that no Xray was done before his demise. He reiterated that the deceased was found dead on 22/9/2018.

44. In reexamination, PW10 stated that the first report was an assault report at the station and that the witness was only minuted to deal with Murder.

45. At the close of the prosecution's case, Mr. Mirembe submitted on no case to answer. This court found the accused person to have a case to answer and placed him on his defence. He opted to give sworn statement of defence and called his wife as a witness.

46. Testifying on oath as DW1, the accused person identified himself as Raphael Matengo Chiaji a mason from Nyangoma Sublocation, Central Sakwa within Siaya County. He denied killing the deceased and recalled that on 18/9/2018 at 9 pm, the deceased Francis Ogolla Odundo was abusing him continuously by saying that the accused person had sired Kevin Ayoma whom he claimed was his brother's son and that he told the accused to go and bring him and stay with him. Further, that the deceased was claiming that the accused person was a husband to two women in the village but that the accused did not respond. That the accused went to the deceased's home to try and settle the issue with him but found the deceased very hostile and warned the accused not to reach his home. According to the accused, the deceased entered his house and came out with a jembe which he attempted to hit the accused with but the accused held it because the deceased was drunk and unstable. That they fought and the deceased fell down and the accused took the jembe and threw it away. That the deceased was cooking so the accused took one of the thorny firewood which he used to hit the deceased on the leg and it pricked the accused person's right hand as well.

47. The further stated that people intervened and he left the place for his home but the quarrel was never resolved so on 22nd September 2018 he went to the village elder seeking for help to resolve the issue with the deceased. He also stated that on 21st September 2018 at 10 am he saw the deceased at a political rally and that the deceased went and spoke to him saying that he was hungry and wanted some meal from the accused so the accused walked away but the deceased followed him and the accused gave him Kshs 100 which he went and bought tea.

48. In his further testimony, the accused stated that in the early morning hours of 22/9/2018 he woke up at 5am and milked his cows and proceeded to the home of the village elder to revive the resolution of his issue with the deceased because he heard that the deceased had also abused some people at a political rally. That he arrived at the home of the village elder at 7am but did not find the village elder so he asked the wife who gave him the telephone contacts and he called the village elder, asking him to come and help him resolve the matter with the deceased. That the Village elder told him that he would take them to the Chief on Monday and the accused left for his home and at about 8am he heard screams and learnt that the deceased had died. That one of his in laws went and told him that people were saying that the

accused had killed the deceased so he stayed at his house until he was arrested at about 10.30am and escorted to Kopolo police station.

49. He added that the deceased was his cousin and was more of a son to him. That when they fought on 18/9/2018 the deceased was injured on his leg which injury the deceased showed him on 21/9/2018 when they met. He denied going to the deceased's home to pick a quarrel.

50. In cross examination by Mr. Okachi f Senior Principal Prosecution Counsel, the accused person admitted fighting with the deceased after a quarrel and further admitted that the deceased had annoyed him with his claims that the accused had a love affair with some two women and that he had sired Kevin. He also admitted to picking the thorny firewood and hitting the deceased on the leg and confirmed that the deceased died four days after the fight.

51. **DW2 Angeline Otieno Matengo** testified and stated that she was the wife to the accused person. She recalled that on 18/9/2018 she heard Ogolla abusing the accused telling the accused to take Kevin and live with him and that the accused was dating and prostituting with two other widows Mary and Margaret. She stated that Ogolla abused Raphael for a long time until Raphael went to the home of Ogolla and she also followed and found Dick and she informed him of what was happening but Dick told her off. She stated that on 20th September 2018 she called her husband to bring home food which he did and she cooked, ate and they slept till the following morning when she went about her own business as Raphael went at 6am to report to the village elder the issue of Ogolla abusing him the previous night. That when she returned, she found the accused arrested on allegations that he had murdered Ogolla.

52. In cross examination, DW2 stated that Raphael had no issues with the deceased Ogolla. She stated that on 22/9/2018 she slept in their house with Raphael and at about 10pm until morning.

SUBMISSIONS

53. Mr. Mirembe Counsel for the accused filed written submissions urging this court to find that the prosecution had not proved its case against the accused person beyond reasonable doubt and to acquit him of the murder charge. He submitted that the prosecution should have called Kevin Ayoma to corroborate PW2's testimony and that there was contradiction in the testimony of prosecution witnesses' evidence. That there was no evidence on the whereabouts of the deceased from 18th to 22nd September 2018 when he was found dead. Further, that treatment notes were inconsistent with the injuries established by the postmortem report. He relied on **R V Moses Otara[2018]e KLR** citing **Joan Jebichii Sawe v R , CRA 2 of 2002** where the Court of Appeal held that suspicion however strong cannot lead to a conviction. Further reliance was placed on **May v O'Sullivan [1955]92, C.L.R, 654**.

54. Counsel further submitted that the murder weapon was never retrieved and produced in evidence and that the court should consider the accused person's alibi as he was away having gone to report the issue he had with the deceased to the Village elder when he learnt that the deceased had been found dead. Further submission was that the abuses hurled by the deceased against the accused were provocative.

DETERMINATION

55. I have considered the evidence adduced by the prosecution witnesses, the defence and written submissions as well as the authorities cited. In my humble view, the main issue for determination in this case is whether the prosecution proved the offence of murder against the accused person beyond reasonable doubt. The accused person Raphael Matengo Chiaji stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 of the Penal Code provides:

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

56. The burden of proof always lies with the prosecution to prove the guilt of the accused person beyond reasonable doubt.

57. From the onset, I must state that this case turns purely on circumstantial evidence because none of the prosecution witnesses saw the accused person murder the deceased. The only evidence relied on by the prosecution to establish their case is circumstantial evidence. PW1 the wife to PW3 testified that the accused went to her house on the early morning of 22nd September 2018 asking for her husband who is the village elder and when he could not find him, he asked her for his telephone contacts which PW1 supplied and the accused called her husband, PW3 and told him of what had taken him to his place that early being that the accused had an issue with the deceased and that the accused wanted PW2 to assist him resolve. A few minutes after the accused had left, PW1 saw motorcyclists pass by and on asking them what had happened, they told her that the deceased Ogolla had died.

58. PW2 testified that he was the brother to the deceased Francis Ogolla Odundo. He stated that on 18th September 2018 at about 9pm he heard screams from the home of the deceased and on proceeding there he found the accused leaving the house of the deceased. He found the door to the house of the deceased broken into pieces and the deceased had injuries on his leg and told PW2 that the accused had beaten him. Together with his other brother Ayoma they administered on the deceased first aid and escorted him to Bondo Hospital for treatment but found no medical personnel so they returned him home and advised him to go to hospital. When he returned on 21/9/2018 he found treatment notes from Uyagi Dispensary for the deceased in his house which he later handed over to the police. PW2 is the one who discovered the body of the deceased person on a path on the morning of 22/9/2018 when he was going to fetch water. He called the Assistant Chief Michael Osare Amolo and informed him of what he had seen and the Assistant Chief went to the scene with police.

59. The testimony of PW3 corroborated the evidence of PW1 and added that the accused on calling PW2 told him that he had beaten the deceased the previous night and that shortly after they had spoken, the accused again called PW3 the second time and told him information reaching the accused was that the person he had beaten had died.

60. PW4 testified that the deceased had reported to him on 19/9/2018 that the accused had assaulted him. The deceased showed to PW4 bruises on the leg. This witness met the deceased on 21/9/2018 at Nango market but that they never spoke. The following day which was on

22/9/2018 he received a telephone call from the deceased's brother of the demise of the deceased that the deceased had died. He went to the scene and confirmed the report.

61. **PW5 CPL Douglas Wamalwa** is the scenes of crime popersonnel who took photographs of the deceased's body on 22/9/2018 and produced them as exhibits 1a-c

62. **PW6 Polycarp Lutta Kweyu** the Government Chemist Analyst and the evidence of the village elder ancarried out a DNA sampling and profiling of the exhibits supplied to him the investigating officer. He received blood samples of the deceased Francis Ogolla Odundo and of the accused herein together with the stripped long trouser recovered from the accused person's house and carried out DNA sampling. He produced a report as PEXhibit 3 a showing that the stripped navy blue trouser recovered from the accused person's house had blood which when DNA was carried out it matched the DNA profile of the deceased Francis Ogolla Odundo.

63. PW7 is one of the witnesses who recovered the stripped navy blue trouser from the accused person's bedroom after a thorough search at his house and after arresting the accused person as a suspect in the alleged murder of the deceased Francis Ogolla Odundo. The witness stated that when they went to the accused person's house they found him tensed and looking frightened.

64. PW8 a village elder was called by PW3 after the latter learnt of the demise of the deceased after the accused had called PW3 on the morning of 22/9/2018. PW8 was also present when the accused was arrested and witnessed the recovery of the navy blue stripped trouser from the house of the accused person.

65. PW9 produced a postmortem report on the autopsy carried out on the body of the deceased showing cause of death to be hypovolemic shock due to haemorrhage. She produced the report on behalf of Dr. Willis Ochieng her colleague. She stated that the deceased had multiple cuts and bruises on the head, lower limb and a fracture of the left femur. The spleen was also ruptured and there was accumulation of blood in the abdomen.

66. PW10 was the investigating officer who gathered evidence and recorded statements of witnesses and escorted exhibits to the Government Chemist for DNA analysis. He also produced the stripped Navy Blue trouser recovered from the house of the accused as exhibit. He also witnessed the autopsy on the body of the deceased as carried out by the Doctor in the presence of Joseph Odinga Odundo and Bernard Otieno Otom.

67. In his defence the accused person denied committing the offence and stated that he fought with the deceased on 18/9/2018 and hit the deceased with a thorny firewood on his leg and he also sustained injuries on his hand. Further, he stated that he fought with the deceased over the insults that the deceased had persistently been hurling at him to the effect that the accused had sired a son with his brother and that the accused was having an illicit affairs with two women in the area. The accused person stated on oath that on the morning of 22/9/2018 he had gone to the home of PW3 and PW1 to request PW3 the village elder to assist in resolving the dispute between the accused and the deceased over the insults so that they could have peace as the accused had heard that the previous day the deceased had abused other people.

68. DW2 the accused person's wife testified on the events of 18/9/2018 saying that she heard the deceased insulting the accused saying that the accused had sired Kevin so he should take Kevin and live with him. That in addition, the deceased insulted the accused and told him that the accused was having a love affairs with Mary and Margaret, two widows from the area. She also testified on the events of 20th September 2018 and concerning the events of 22/9/2018 she stated in cross examination that she slept in her house with her husband the accused at about 10pm until morning.

69. The fact of the death of the deceased is not in dispute as the postmortem report shows that fact and the cause of death too is not disputed. The deceased was found to have sustained multiple cuts and bruises on the head and hand including a fracture of femur. He was found lying dead near his home by the road side on the morning of 22/9/2018.

70. The evidence adduced by all the prosecution witnesses is purely circumstantial.

71. To found a conviction on circumstantial evidence the principles applicable are espoused in **Republic v Kipkering Arap Koskei & Another 16 EACA 135 that:**

“in order to justify the inference of guilt, the inculpatory facts must be incompatible with the guilt of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

72. The same principles were echoed in **Musili Tulo v Republic CRA No. 30 of 2013** where the court held:

“i. the circumstances from which an inferenece of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite 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.”

73. It is therefore the duty of this court to examine the evidence as adduced on record to determine whether it meets the above criteria of circumstantial evidence.

74. The accused person readily admitted in his defence that he had a serious quarrel with the deceased Francis Ogolla Odundo because the

deceased was continuously insulting the accused, labelling the accused as the one who sired Kevin Ayoma with his brother's wife and asking the accused to bring home Kevin and care for him. The accused also accused the deceased of defaming him by alleging that the accused was having an illicit affair with two widows Mary and Margaret. Additionally, the accused person accepted that on 18/9/2018 he fought with the deceased over the same abuses and that this was at the home of the deceased and that he hit the deceased with a thorny firewood which injured his leg while the accused sustained an injury on his right hand. The accused person also admitted that on 22nd September 2018 at about 7am he went to the home of the village elder PW3 to report the abuses being hurled at him by the deceased and seeking for a resolution thereto but he never found the village elder and only spoke to him on phone with the village elder promising to escalate the matter to the Assistant chief. The accused denied killing the deceased saying the deceased was his cousin but was like a son to him.

75. The deceased was found dead by the roadside near his house on the morning of 22/9/2018 the day the accused went to the village elder's house seeking to resolve his issue with the deceased. According to the accused, he only heard of the death of the deceased after leaving the village elder's home and that one of his in laws told him that people were claiming that it was him who killed the deceased so he never went to the scene.

76. PW10 testified that when he went to the home of the accused they found him tensed and frightened. According to the post mortem report produced as exhibit, there was no possibility that the deceased died due to the leg injury that he had sustained on 18/9/2018 following a fight with the accused person. According to the postmortem report as produced by Dr Phelgona Kabibi on behalf of Dr. Willis Ochieng, the injuries that Dr. Willis Ochieng found that could have led to the deceased's death are:

External appearance:

- Multiple bruises on the head. 5 in number, the largest was 10 cm by 3cm.
- Deep cut wounds on the head, 2 in number.
- On the left lower limb, a fracture of the femur was noted.

Digestive system:

- Splenic rupture grade 3 spleen was completely out of the ligaments.
- Haemoperitonium - blood in the abdomen.

77. The cause of death was found to be hypovolemic shock due to hemorrhage.

78. According to PW3, the village elder, the accused person called him the second time on 22/9/2018 and told him that he had heard screams and that it appeared as if the person that the accused had beaten the previous night had died.

79. The evidence of PW2 the brother of the deceased was that after the fight between the accused and the deceased on 18/9/2018, on 21/9/2018 at 9.00 pm he heard his brother Francis the deceased screaming saying **"even if you broke my door and hit me, a club, panga or gun cannot do anything."** PW2 however, did not go to check on the deceased to find out whether at that time he was being assaulted and by who. The following morning on 22/9/2018 at about 6.00 am when PW2 was going to fetch water on a bicycle is when he saw Francis lying on the side of the road. He moved closer and realized that Francis was dead.

80. The evidence of PW3 the village elder was that the accused called him and told him that he had had a quarrel with the deceased and that the accused had hit the deceased after the deceased provoked him. When the accused called PW3 the second time and told him that it seemed the person he had beaten had died is when PW3 called his fellow village elder and narrated to him the story and the latter went and confirmed that indeed the deceased had died. PW4 the Assistant Chief Nyangoma Sub location on receiving information accompanied the police in arresting the accused person from his house where he was found looking terrified and tense.

81. The above evidence in my view strongly places the accused person as a person of interest in the murder of the deceased person as there was no other evidence to show that the deceased had disagreements with any other person other than the accused, who from his own admission in cross examination by the prosecution, was so much angered by the abuses hurled at him by the deceased that he followed up the deceased to his home on 18/9/2018 and in the process a fight ensued and that he hit the deceased with a thorny firewood on the leg which caused an injury on the said leg.

82. However, the evidence above only creates a strong suspicion that the accused person had reason to kill the deceased. The question is whether that strong suspicion is sufficient to convict the accused. The law is clear that suspicion however strong cannot be used to find a conviction. **See Joan Jebichii Sawe Republic [supra]**. In this case, there is however, another angle to the deceased person's demise which this court must examine.

83. The accused person was arrested from his house after which a thorough search was conducted and in his bedroom, a blue navy blue stripped trouser produced as exhibit herein was recovered by the police in the company of local administrators. The police took possession of the trouser and they submitted it to the government chemist for DNA analysis with the blood samples taken from the deceased and the accused person.

84. The results from the Government Analyst as stated by Mr. Polycarp Lutta were that the blood stains found on the Navy Blue stripped trouser submitted matched the DNA of the deceased. This trouser belonged to the accused person and was recovered from his house after a

search. There was no contrary evidence.

85. The photographic evidence showed a closed view of the deceased with external injuries which the postmortem report confirmed to be multiple cuts and bruises including a fractured femur. I have no doubt in my mind that these injuries caused the demise of the deceased as established in the postmortem report.

86. The only issue therefore for determination is whether there was proof beyond reasonable doubt that the accused committed the unlawful act which caused the death of the deceased. The prosecution's case lay on the findings by the government analyst that the accused persons' clothing was found with blood that matched the deceased's blood. There was no contrary view or evidence. In my humble view, this evidence was cogent and credible enough to connect the accused person with the deceased's demise. The evidence irresistibly points to the accused person's guilt and is incompatible with his innocence. The accused was not pleased with the insults hurled at him by the deceased. The presence of the deceased's person's blood on the accused person's clothing which was hidden in his bedroom is incapable of explanation upon any other hypothesis than that of his guilt. The burden of proof lay with the prosecution to prove their case beyond reasonable doubt. The prosecution having established the nexus between the deceased's blood and the clothing found with the accused person, I find no reason to doubt that evidence.

87. I am on the above evidence which is purely circumstantial satisfied that the accused person and not any other person committed an unlawful act that led to the death of the deceased and it matters not that the murder weapon or weapons were not recovered, as it is rare that a criminal would wish to leave trails of evidence behind to easily link him to an offence.

88. The evidence of the pathologist was clear that the deceased had cut wounds an indication that the weapon used must have been sharp.

89. In **EKAI V. REPUBLIC (1981) KLR 569** it held:

“Failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”

90. In **KARANI V. REPUBLIC (2010) 1 KLR 73**. At page 79, the Court delivered itself as follows:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”

91. The Court took a similar approach in **RAMADHAN KOMBE V REPUBLIC Mombasa CR.A NO. 168 OF 2002** where it was held:

“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious.

The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission.”

92. The next question is whether the prosecution have proved that the accused person had malice aforethought when he killed the deceased. Section 206 of the Penal Code provides that malice aforethought is deemed to be established when any of the following circumstances are proved by evidence adduced against an accused person:

a) An intention to cause death 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 or of 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 intention 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.

93. In **John Mutuma Gatobu v Republic [2015]e KLR**, the Court of Appeal observed that:

“malice aforethought in our law is used in a technical sense properly defined under section 206 of the Penal Code.....there is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of the malice aforethought.”

94. Further in **Joseph Kimani Njau v Republic [2014]e KLR**, the Court of Appeal stated:

“In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution...”

In the present case, the circumstances that led to the fight between the appellant and the deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another.”

95. What emerges from the defense of the accused person is that he was angered by the habit of the deceased person insulting him continuously to the effect that the accused had sired Kevin who was his brother’s son and that the accused was prostituting around with two widows. This evidence was never controverted by the prosecution. In addition, PW3 the brother to the accused testified and the accused confirmed in his defense that on 18/9/2018 the accused and deceased fought over the same insults and the accused injured the deceased on his leg for which he sought medication and reported to the police. Treatment notes were produced as exhibit to show the injuries sustained by the deceased but as stated the said injuries could not have caused his death. Before the police could take action in the reported assault case, the deceased was found dead four days later. In his evidence in cross examination by the prosecution, the accused stated:

“it is true that Francis caused me annoyance by claiming that I had sired Kevin and that I was having an affair with some two women. I was not pleased with him...the deceased died four days after I had fought with him.”

96. From the treatment notes of the deceased, it is unlikely that those injuries sustained on 18/9/2018 after a fight with the accused caused his death as they were minor injuries as compared to the more serious injuries that were found on the deceased during postmortem. The deceased had sustained deep cut wounds and bruises on the head and a fractured left femur. His spleen was also ruptured and there was blood in the abdomen. In my view, the deceased was viciously attacked and seriously injured. And in attacking and inflicting such deep wounds on the deceased, the assailant must have known or have had reasonable belief that the deceased would sustain grievous harm or that such injuries would result in death of the deceased. In **Daniel Muthee v Republic [2007] e KLR** the Court of Appeal held:

“When the appellant set upon the deceased and cut her with a panga several times and proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased person on the head with a sharp instrument would cause death or harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the Penal Code.”

97. In the circumstances of the present case, it can also be inferred from the nature of the injuries suffered by the deceased that the assault was intended to cause death or grievous harm and therefore malice aforethought can be inferred under section 206(b) of the Penal Code.

98. Albeit the accused’s theory was that he never killed the deceased and that he had gone to report to the village elder to assist in resolving the dispute, because the accused had heard that the deceased had abused or insulted other people, in my humble view, the act of the accused going to the village elder was to cover up his trajectory after assaulting the deceased and leaving him dead.

99. In my humble view, even provocation cannot be a defence in this case because the accused had an opportunity to cool his tempers after the incident of 18/9/2018. Section 208 of the Penal Code defines provocation as follows -

“208(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit the assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another person who is under the immediate care of that other or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.”

100. In **Tei S/O Kabaya vs. Republic [1961] EA** the court held:-

“In consideration whether the defence of provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used”.

101. In the instant case, the accused person did not raise any defence of provocation because he vehemently denied ever killing the deceased under any circumstances. In addition, the issue of provocation was not put to any of the prosecution witnesses and it was not suggested that the deceased either assaulted or came into contact with the accused on 22/9/2018 or on the night of 21/9/2018. There was no evidence that the deceased was armed at the time of the attack before he was found dead, or that he posed any threat to the accused. The accused had the opportunity, if at all there was any such provocative conduct by the deceased, to avoid the deceased. The accused did not have to follow the deceased to silence him through death.

102. I have considered whether there are any other circumstances that could weaken the inference of guilt on the part of the appellant. I am

unable to find any such weak link because what the accused person's counsel considered to be alibi defence evidence in his submissions was discounted by the accused himself and contradictions in the evidence of DW2 his wife. The accused stated that during that material morning when the body of the deceased was discovered, he had gone to report to the Village elder. His wife, DW2 contradicted her husband when she stated that her husband did not leave their house that night and that he slept at 10pm the previous night until morning. She could not tell where the accused was before 10pm on 21/9/2018. In addition, she did not mention anything to do with 22/9/2018 in her evidence in chief and only mentioned it when she was asked by prosecution counsel. Her evidence concentrated on 18th and 20th September, 2018.

103. The accused person also stated that he left his house to go and report to the village elder at 7am but his wife told the court that he left at 6am on 20/9/2018 and that she left at 6.30am. DW2 concentrated on 18th and 20th September 2018. This evidence in my humble view did not in any way weaken the strong circumstantial evidence against the accused.

104. The evidence implicating the accused included the accused having admitted beating up the deceased on 18/9/2018; the deceased's blood having been found on the trouser that was found in the accused person's house; the deceased having suffered serious injuries that resulted in his losing much blood and eventual death, which all point irresistibly to the death of the deceased having been caused by the accused and no one else, and the motive is that the deceased had been insulting the accused.

105. In this regard, taking into totality all the circumstances in this case, I find that the prosecution has proved beyond reasonable doubt that the accused had malice aforethought within the meaning of section 206 (a) of the Penal Code CAP 63 of the Laws of Kenya. The accused intended to cause grievous harm which actually caused the death of the deceased with malice aforethought.

106. I find the accused person guilty of the offence of murder contrary to section 203 of the Penal Code and convict him accordingly.

107. Orders accordingly.

Dated, signed and delivered at Siaya this 17th day of February 2020

R.E. ABURILI

JUDGE

In the presence of:

Ms. Odumba Prosecution h/b for Mr. Okachi Senior Principal Prosecution Counsel for the Republic

Mr. Mirembe Counsel for the Accused

Accused person

CA: Brenda and Modestar