



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC NO.115 OF 2017

FORMERLY MACHAKOS HCCRC. NO. 11 OF 2014

REPUBLIC..... PROSECUTION

-VERSUS-

FREDRICK MAKAU KASIYA.....RESPONDENT

JUDGMENT

1. **Fredrick Makau Kasiya** the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on 17th and 18th day of February, 2014 at Tutini sub-location in Nzau district within Makueni county murdered **Francis Mutua Kasiya**.
2. He denied the charge and the case proceeded to full hearing with the prosecution calling seven (7) witnesses. The accused gave a sworn defence and called no witness.
3. Pw1 **Agnes Katunge Kamuya** is the mother to the accused and a stepmother to the deceased. She does business at Kiundwauni and so does not stay in Tutini sub location Nzau area which is home. She testified that on 18/02/2014 at 5:00 pm she received a telephone call from a neighbor who informed her that her child had hanged himself.
4. On the way home, she was informed by one of her children that infact it was the deceased who was dead. A week before 18th February, 2014 the accused had sold her donkey and the deceased had reported him to her. She came to know who had bought the donkey and she refunded the money to the purchaser around 14/02/2014. She did not see the accused until 18/02/2014.
5. On reaching home she found police officers and neighbors there and her house was locked. The deceased, accused and herself had keys to the house but it is the deceased who lived in the said house. The door to the house had been locked from inside.
6. One of the windows had been broken and a child used it to gain entry and open the main door. The body was hanging in the sitting room. She suspected the issue of the donkey to have caused the problem. She explained that in her compound are three houses i.e. her house, kitchen and the two roomed house where the accused sleeps.
7. Pw2 **Joseph Muthiani** is an uncle to both the accused and deceased. He is the one who identified the body of the deceased for post mortem.

8. Pw3 **Francis Kithinzi** recalled meeting with the deceased a neighbor at Emali at around 9:15 pm on 17th February 2014. The deceased who was a motorbike rider already had two customers and they agreed he waits for him as he dropped the two customers. Pw3 was joined by Paul, another neighbor who needed transport. At 9:56 pm, the deceased came and the three of them left. Paul was dropped at Tutini secondary post. Thereafter, they left for home and he was dropped at their gate.

9. Since he was leaving very early the next day, they agreed that the deceased picks him at 5:00 am. He called the deceased at 5:00 am as agreed but he was not picking the call. He decided to go to the deceased's home. He called out the deceased's name to no avail. His brother who is the accused and who was in his house responded and asked him to check in the next house. He found an open house which was like a store. He informed the accused that he was not getting the deceased and the accused told him the deceased had left.

10. He left to check on Simeon another neighbor who is a boda boda rider. Just after going for ten (10) steps the accused called him back saying he had remembered that the deceased had slept in their mother's house. Accused picked a stone and started knocking on the window of his mum's house, but there was no response. He knocked on the door but still there was no response. He went back to the window which was open and pushed his hand and drew the curtain.

11. He requested Pw2 to flash at the window with his phone. He did so and saw the deceased hanging on a rope and he was surprised. His legs were stepping on the floor. He asked him a few questions but the accused never answered him.

12. He asked the accused to report the matter as he also called his home and alerted them of the happenings. He left for his work place. In cross examination he confirmed that the deceased entered his home after dropping him.

13. Pw4 **Alphonse Masila Kataa** a village elder was on 18/02/2014 5:30 am informed by the accused that the deceased had hanged himself. Pw4 informed the assistant chief (*Sammy Mwenze*). They met on the road and went to the accused's home. People were already gathered there. He peeped through the window and confirmed the report. The assistant chief called the police who came. A young man entered the house and opened the door which had been locked from inside. He never entered the house.

14. The chief took photos and the body was placed in the police vehicle. Police asked for the person who lived with the deceased. It was said it was the accused. They went to his house where they found a jembe without a handle, metal rungu with blood, and a jacket with blood stains under the bed. These items were taken by the police.

15. This witness identified the jembe (EXB2), metal nob (EXB1) grey jeans trouser (EXB3) and brown tee-shirt (EXB4). The accused was arrested after returning from Ndivuni.

16. In cross examination he said the accused's mother and sisters do not stay in the home. He said the clothes taken that day were the ones before the court.

17. Pw5 **Nicodemus Mulei Mutisya** a neighbor to the accused was in his house on 18/02/2014 at 5:30 am when he heard the accused calling him. He told him the deceased had hanged himself. He notified a number of people and went back to his house. He went to the scene with others later at 9:00 am.

18. Pw6 **No. 235013 C.I. Caleb Nathan Owino** testified that on 18/02/2014 at 9:00 am he accompanied the OCS to Tutini at a murder scene. They found the house locked from inside. The

accused led them to the house. They saw a person hanging on a rope from the roof. A person entered through the window and opened the door. Upon entry he observed the following:

- The person's right foot was stepping on the floor while the left one was hanging.

- The body's lower limbs had bruises.
- The area around the neck was reddish
- In normal cases of suicide, the tongue hangs out, there is urine or faeces. None of these was on this body.

19. They removed the body and conducted a search in the home. From a nearby house (10-15metres apart) belonging to the accused they found some items with blood stains viz:

- Brownish tee-shirt (EXB4)
- Jembe handle (EXB5)
- Rungu (EXB1)

They established that the tee-shirt EXB4 belonged to the accused. He did so after talking to the neighbours and the accused himself. It was confirmed by the post mortem that the deceased died of strangulation.

20. The blood stains on the tee-shirt (EXB4) belonged to the deceased. Same to those on the jeans trouser (EXB3). The exhibit memo and report were by consent produced as (EXB 6a and b).

21. In cross examination he said it is the accused who took them round the compound. Accused was arrested after the recovery of the exhibits. He said it is him who recovered the tee-shirt and jembe from different rooms in the accused's house. That the jeans trouser (EXB3) had been worn by the deceased. He admitted that there were two statements recorded by him because of some omissions.

22. Pw7 **Doctor Patrick Musyoki Kibwana** is the doctor who did the post mortem (EXB7) on the deceased's body at Kilome nursing hospital. He found the cause of death to be cardiorespiratory arrest due to strangulation. He further stated that because of the strangulation marks on the neck there is a high possibility of another person having been involved.

23. In his sworn defence the accused testified that he is a businessman. On 17th February, 2014 at 8:00 pm he arrived home and slept. At 4:30 am he heard a person outside his door calling the deceased's name. He directed him to where the deceased was sleeping but there was no response. He went out and found Pw3 walking away. He checked on the deceased's door but it was locked from inside. They flashed inside through the unlocked window. They saw the deceased hanging on a rope.

24. Pw3 told him he was going to report on duty and return. He went and reported to a neighbor and Mulei Mutisya and people including the chief and police came. The door to the house was opened by a boy (*Mutisya*). He was called and he entered the house and they asked for a mattress and a knife for cutting the rope which he gave them. The deceased had bled a lot from the mouth. As he cut the rope the blood from the deceased went on his tee-shirt (EXB4). He therefore went to change into other clothes.

25. Police asked for his keys and went back to his house in his absence. They took the tee-shirt (EXB4) and trouser which he had removed and threw them in the vehicle. They then went to the mortuary where all the deceased's clothes were removed. He saw a black mark on his neck.

26. He recorded his statement the next day. He stated that the deceased was his brother and they stayed in different houses and he did not have a copy of his keys. He added that the deceased was found in his house and there was no way one would lock the house from inside.

27. He had last seen the deceased the day before his death. He said there was no grudge between him and his step brother (*deceased*). He denied there being any issue about a donkey though one had been sold. The donkey belonged to their mother (*Pw1*) and she had not asked about it. When Pw4 arrived the

body had not been removed.

28. He explained that the windows to the house where the deceased's body was had grills and an adult could not go through it.

29. Counsel for both parties filed written submissions. Mr. Kihara for the prosecution summarized the evidence of the witnesses. He submits that there is circumstantial evidence showing that the accused killed the deceased. That there was evidence of a previous dispute regarding ownership of a donkey belonging to their father. Further that the accused and deceased lived in the same compound.

30. Counsel submits that the murder had been carefully choreographed to appear like a suicide. It is his submission that the evidence adduced is cogent with no contradictions noted. Relying on the case of **Abanga alias Onyango –vs- Republic Criminal Appeal No. 32 of 1990 (UR)** counsel submits that for circumstantial evidence to be relied on to found a conviction the following must be proved:

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 guilt of the accused;

iii. The circumstances taken circumstantively, 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.

He contends that the prosecution has established the test laid down above and proved a case of murder against the accused.

31. Mr. Muia for the accused submits that the prosecution has not proved a case against the accused to warrant a conviction. He contends that the prosecution relies on mere suspicions with no cogent evidence. He too refers to the case of **Abanga alias Onyango –vs- Republic (supra) and Republic –vs Kipkering Arap Koske and Anor 16 EACA 135** to show the standard required of circumstantial evidence to found a conviction.

32. Counsel submits that there is glaring inconsistencies in the evidence of the witnesses on the ownership of EXB 3 and 4; where exhibits were recovered from; whether the accused ever disappeared from the scene; the condition of the metallic grills; why Pw6 had two contradictory statements. It's his contention that the witnesses cannot be believed in showing how the accused was involved in the death of the deceased.

33. Referring to section 206 of the Penal Code and the case of **Roba Galma Wario –vs- R (2015) eKLR** counsel submits that there is nothing to show that the accused committed the offence. It therefore, follows that it cannot be said the accused had the malice aforethought to murder the deceased. He finally submits that the accused offered a reasonable explanation as to how his tee-shirt which was produced as evidence got deceased's blood stains.

34. This is now the case before the court for determination.

Analysis and determination

35. The accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Murder is defined under section 203 of the penal Code as:

Murder:

“Any person who of malice aforethought causes death of another person by an unlawful act or

omission is guilty of murder”.

36. Malice aforethought is on the other hand defined under section 206 of the Penal Code:

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

a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c) An intent to commit a felony;

d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

37. To prove the offence of murder, the prosecution is mandated to prove the following ingredients:

a) The fact and cause of death of the deceased.

b) That the death of the deceased was as a result of an unlawful act or omission on the part of the accused (actus reus).

c) That such unlawful act or omission was committed with malice aforethought or was intentional (Mens rea).

38. I have read through the submissions by both counsel and noted that they have relied quite ably on the witness statements more than the witnesses evidence in court. This court is relying on the evidence adduced before it and what the witnesses were cross examined on. The witness statements were in possession of the prosecution and defence and can only be relied on by the court if produced as exhibits. In this case none was produced.

Fact and cause of death

39. The evidence from all the prosecution witnesses confirms the death of the deceased. His body was found hanging in the sitting room of his mother's house. Pw2 identified the body for post mortem. The rest of the witnesses saw the body hanging in the house as well as it being removed from the said house.

40. Pw7 **Doctor Patrick Musyoki Kibwana** who conducted the post mortem besides finding the cause of death to be cardio-respiratory arrest due to strangulation found the body to have the following injuries:

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- **A cut and bruise above right eye region with clots of blood.**

- **Multiple bruises on jaws and chin.**

- **Extensive and strangulation marks on the neck**

- **Rope mark on neck**

- **Tongue was blue (lack of oxygen)**

- **Bruises on left side of chest.**
- **Both legs (anterior) had bruises**
- **Wound on left thigh by the mortuary attendant.**

41. He also found that due to the bruise marks on the body there was a possibility of force having been exerted by an external force. In cross examination he said there is a high possibility that another person was involved. This is because of the strangulation marks on the neck. I therefore find the fact and cause of death to have been proved.

(ii) Whether the deceased's death was as a result of an unlawful act or omission on the part of the accused (*actus reus*).

42. From the evidence there is no witness who witnessed what happened to the deceased on the night of 17th February and 18th February, 2014. All that has been presented to the court is circumstantial evidence. The place of circumstantial evidence is very clear in the law. Justice Osiemo in the case of **Mohammed and 3 Others –vs- Republic (2005) 1KLR 722** defined circumstantial evidence as follows:

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved”.

43. The Court of Appeal in the case of **Sawe –vs- Republic (2003) KLR 364** held that:

a) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

b) Circumstantial evidence can be basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

c) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

Later in the case of **Nzivo –vs- Republic (2005) 1 KLR 699** the Court of Appeal held thus:

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.”

44. Guided by the above principles, I now wish to analyse the evidence on record. Pw1 is the accused's mother and a step mother to the deceased. It appears that the deceased did not have his own house. In the compound was the accused's house and Pw1's house and a kitchen. The rest of the family members were not living on the said compound. The accused's father and step mother (*deceased's mother*) had long died.

45. The seemingly last person to see the deceased on the material night was Pw3. His evidence is that the deceased who was a motorbike rider carried him from Emali town centre to his home in Kavete village on 17th February, 2014 10:00 pm. It's not indicated what time they arrived home. Pw1 and deceased were neighbours. The deceased dropped Pw3 at their gate and left for his home. The deceased

was to pick him from his home at 5:00 am the next day which never came to pass. Pw3 called the deceased as agreed at 5:00 am to no avail until he decided to go to the deceased's home.

46. On reaching the home he called out the deceased's name and there was no response. The accused who was in his house advised Pw3 to check the next house for the deceased but he never found him, and was on his way back when the accused asked him to flash his torch for them to check on pw1's house where the deceased had slept.

47. Despite the heavy knocking with a stone there was still no response. Finally, the accused opened the window to Pw1's house and drew the curtain. Pw3 used his phone's torch to flash inside the house and that's when he saw the deceased's body hanging.

48. The accused could not answer the questions Pw3 put to him. Both the accused and Pw3 notified neighbors and others. From this evidence, it can conclusively be said that the deceased actually went home in whatever state he was after dropping Pw3. It's not clear how far his home is from Emali town but what is documented is that the deceased and Pw3 left Emali town at 10:00 pm.

49. In his defence the accused said he arrived home that night at 8:00 pm and was only woken up by the presence of Pw3 on their compound. What the accused is saying in other words is that he never heard the deceased arrive home that night. Pw3 did not go with the deceased to his home so as to ascertain whether the accused was awake or not when the deceased arrived there.

50. At some point in his evidence in chief Pw3 stated that when he was asking for the deceased, the accused told him the deceased had already left. However, when pressed down in cross examination plus presentation of his written statement which he read he responded saying:

“I can't recall if I recorded in my statement that he said he had left!”

51. Pw1 told the court that the accused, deceased and herself each had a key to her house. It means any one of them would access that house anytime. Pw6 **No. 235013 C.I. Caleb Nathan Owino** testified that the OCS received the report on 18th February 2014 9:00 am and they proceeded to the scene. They found the house locked from inside.

52. The person who opened it entered through the window. Pw1 said one of the windows was broken when she arrived home. She had come home on 18th February 2014 after she received a call which had been made at 5:00 pm. She must have arrived home after 5:00 pm.

53. Pw6 the investigating officer informed the court that they arrived at the scene on 18th February 2014 early morning. They used a good Samaritan to pass through the window to gain entry into the house to open the door to Pw1's house as it was locked from inside. There were no photographs of the scene taken and if any were taken they were not produced in court as exhibits.

54. It is therefore not clear what type of windows these were and even how big or small they were. Whether a person of the size of the accused would have gained entry by use of that window in order to escape after locking the house from inside is unknown to this court.

55. The deceased's body was found hanging in the sitting room. The evidence is that the deceased used to sleep in that house and could not have been sleeping in the sitting room. There is no evidence of any search having been conducted in the other rooms for any leads into what may have exactly taken place.

56. Pw3 said he had been calling the deceased that early morning to no avail. There is no evidence of any search of the deceased's phone to confirm whether Pw3's assertions are correct, or whom the deceased had been in contact with that evening and early the next morning.

57. The prosecution's narrative is that there are items with the deceased's blood which were found in the accused's house. It was Pw4's evidence that the recovered items from the accused's house were:

- Metal rungu with blood (*EXB1*)
- A jembe without a handle (*EXB2*)
- Jacket with blood
- Grey jeans trouser (*EXB3*)
- Brown tee shirt (*EXB4*)

58. All these he said were found under the accused's bed in his presence. Pw6 testified that the items recovered from the accused's house and which had blood were:

- Brown tee shirt with blood (*EXB4*)
- Jembe handle (*EXB5*)
- Rungu (*EXB1*)
- Deceased's jeans trouser (*EXB3*)
- Jembe fixed to the handle (*EXB5*)

59. It is his evidence that the t-shirt (*EXB4*) belonged to the accused. He explained that it is the neighbors who identified it as belonging to the accused. He prepared an exhibit memo and sent all the recovered items to the government analyst alongside the blood of the accused and the deceased.

60. The analyst's report (*EXB6b*) shows that the tee-shirt (*EXB4*) and the jeans trouser (*EXB3*) were moderately stained with human blood, while the wooden stick (*EXB1*) had no blood on it. The DNA profile generated from *EXB 3* and *4* matched that of the DNA generated from the deceased's blood sample.

61. An analysis of the recovered items and the analyst's report narrows down the issue to two main items. The grey/black trouser (*EXB3*) and the brown tee-shirt (*EXB4*). Pw4 was clear that *EXB3* belonged to the deceased while *EXB4* belonged to the accused. Contrary to the submissions by the defence Pw4 never stated that *EXB3* belonged to the accused person.

62. The investigating officer (Pw6) clearly indicated that *EXB4* belonged to the deceased and it is what he was wearing. It simply means it was removed from him. The same had blood stains which matched his DNA profile. There is no issue about that.

63. The only exhibit left with an issue and also connecting the accused to the killing of the deceased is the brownish tee-shirt (*EXB3*) which is said to belong to the accused. The said tee-shirt was found to have blood stains. Pw7's report confirms that the DNA profile from the blood stains on *EXB 3* matches that from the deceased's sample.

64. The investigating officer (Pw6) told the court that *EXB3* among others were recovered from the accused's house. The accused was with them as he is the one who was taking them round. In cross examination he said *EXB1* and *EXB2* were recovered from different rooms of the accused's house. Mr. Muia submitted that there was a material contradiction as to where the items were recovered from, in the evidence of Pw4 and Pw6. It is true Pw4 said the items were all recovered from under the accused's bed.

65. First of all, Pw4 was a village elder and not one of the police officers who were at the scene. Secondly, his evidence in chief was that the police entered the accused's house and came out with the recovered items. Nowhere in his evidence in court does he mention that all exhibits were found under the bed. On the ownership of *EXB3*, Pw6 stated that it is the neighbors of the accused and the deceased who

confirmed to him that the tee-shirt (EXB3) belonged to the accused.

66. Mr. Muia in his submissions questions how the investigating officer (Pw6) knew that the tee-shirt belonged to the accused. Besides what Pw6 told the court, the accused in his own sworn statement of defence confirmed that the tee-shirt (EXB3) which had the deceased's blood was his and he had worn it that morning. That rests the issue of ownership there.

67. The next issue is why the deceased's blood would be found on the accused's tee-shirt. In his defence, the accused has testified that after the house was opened by a boy called Mutisya the police entered the house with them. It's the police who called him, and asked him for a mattress and a knife which was used to cut the rope. He said the deceased had bled a lot from the mouth and as he cut the rope his blood splashed on his white tee-shirt which was produced in court. He went to his house and changed into something else.

68. On a point of correction there was no white tee-shirt which was produced in court as an exhibit. The one and only tee-shirt produced was a brownish one (EXB3). Accused went on to state that the police asked for his keys and went back to his house in his absence and took the tee-shirt (EXB3) and trouser which he had removed and they threw them into the vehicle.

69. The witness who explained how the deceased's body was removed was Pw6. He explained his observations on the body of the deceased and the conclusions he arrived at. There after the body was removed and a search in the home begun. It is nowhere stated that the accused was called to bring a mattress and knife and even made to cut the rope. If indeed this had been the case, this would have been a very crucial issue for the defence to inquire into during cross examination since the accused's defence is hinged on it.

70. The accused claims that the deceased had bled so much from the mouth such that as he cut the rope blood from the deceased splashed on him. This takes me to the postmortem report (EXB7) and the evidence of Pw7. There is no evidence of excessive bleeding or even bleeding by the deceased. The report (EXB7) shows that above the deceased's eye were clots of blood and not any bleeding from the mouth or anywhere else.

71. The exercise by Pw6 and team was done in broad light. If indeed there was any splashing of blood on the accused's tee-shirt as he cut the rope this was not anything that could have been hidden from the crowd that was present. There would therefore have been supportive evidence of the same and I find none. The police were in charge of the scene and could not have asked the accused to cut the rope.

72. It is true that the open window which had grills could not be accessed by an adult. It is however true that a boy (*as Mutisya*) would be used to gain entry, lock the door from inside and come out through the window. On this point the evidence of Pw1 is very crucial. She was clear that the accused, deceased and herself had keys to her house where the deceased lived. So the accused had unlimited access to the said house. Accused denied any access to that house. Pw1 said the accused had a key to the said house.

73. Pw6 ruled out the possibility of suicide by pointing out that in normal cases of suicide the tongue hangs out, and there is urine and faeces. None of these was on the deceased's body. Instead this is what they found.

- The deceased's right foot was stepping on the floor while the other was hanging. The body's lower limbs had bruises and the area around the neck was reddish.

74. From all this one clearly comes to the conclusion that the deceased did not commit suicide. There was a human hand that was involved. There was no disturbance reported to have been noted in the house where the deceased's body hang.

75. The deceased's body had a cut and bruises. This led to some mild bleeding and not massive bleeding. That explains why the tee-shirt (EXB3) was found to have just some stains of blood, and not

being soaked in blood.

76. The mystery of this blood stained tee-shirt (EXB3) being recovered from the accused's house without any cogent explanation from him cannot be taken lightly by this court. The accused's explanation on how this tee-shirt got stained with the deceased's blood is not convincing. The reason is that the moment the body was removed the officers started the search of the home with the accused.

77. He had no single time of going to change clothes as he claims. The clothes had been there long before the police landed there with him. Thereafter he was arrested while in his house. His assertion of police having sneaked back into his house is neither here nor there as it was never put to Pw6 for him to respond.

78. The mother of the accused and stepmother of the deceased (Pw1) was clear that her two sons had each a copy of the house keys. She had not been seen there but the accused was there on the material night. It means the accused could access the house at will. Pw1 had no reason to come and lie against him.

79. Accused says him and his brother (*deceased*) lived so well together, yet when Pw3 came looking for the deceased, the accused was very reluctant to say where the deceased was. Their houses were about five metres apart.

80. When the deceased's body was discovered hanging in Pw1's house, Pw3 tried to inquire a few things from the accused but he never answered a single question. He remained silent throughout. One wonders why he could not answer the questions from Pw3.

81. Pw1 also told the court that just about a week before this incident the accused had sold her donkey without her permission. The deceased reported this to her. It forced her to look for the person who had bought the donkey and she refunded the money on 12th February, 2014. She never saw the accused again until 18th February, 2014. All these facts outlined above though circumstantial leave me in no doubt that the accused person is the one that killed his brother the deceased.

(iii) Whether malice aforethought was proved

82. The remaining issue for determination is whether the accused had the intention to kill the deceased. In the case of **Roba Galma Wario –vs- Republic (2015) eKLR** it was held that

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the Appellant; and that he had the required malice aforethought. Without malice aforethought, the Appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

83. In the case of **Republic -vs- Tubere S/O Ochen (1945) 12 EACA 63** the Court of Appeal held that in determining whether malice aforethought has been established the following elements should be considered:

- i. The nature of the weapon used
- ii. The manner in which it is used
- iii. The part of the body targeted
- iv. The nature of the injuries inflicted either a single stab/wound multiple injuries.
- v. The conduct of the accused before, during and after the incident.

84. In **Nzuki –vs- Republic (1993) KLR 171** the Court of Appeal expounded on section 206 of the

Penal Code when it comes to proving malice aforethought. In the case of **Daniel Muthee –vs- Republic Criminal Appeal No. 218 of 2005 (UR)** and cited in the case of **Republic –vs- Lawrence Mukaria and Another (2014) eKLR** the Court of Appeal while considering what constitutes malice aforethought observed as follows:

“When the Appellant set upon the deceased and cut her with a panga several times and then 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 grievous harm to the victim. We are therefore satisfied that malice aforethought was established in terms of section 206(6) of the Penal Code.”

85. From the evidence it has been shown that the deceased underwent a lot of pain before he died and was hanged using a rope. The intention was not even to cause him grievous harm but to kill him which was done. The reason for this was well put by their mother (Pw1). The deceased had reported the accused to Pw1 for selling her donkey. Pw1 had to look for the buyer and refund his/her money. Accused cannot pretend to have been ignorant of the same. He was aware and he was not happy.

86. For my part I find malice aforethought proved and I find the accused guilty of murder. I accordingly convict him under section 322(2) of the Criminal Procedure Code.

Orders accordingly.

Delivered, signed & dated this 8th day of May 2020, in open court at Makueni.

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H. I. Ong’udi

Judge