



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 23 OF 2017 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

KENNEDY OTIENO OKETCH.....ACCUSED

J U D G M E N T

1. The accused person herein **Kennedy Otieno Oketch** stands charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 16th day of September, 2017 at around midnight at Kotoo Village in West Gem within Siaya County, he murdered **Gladys Achola Otieno**. He pleaded not guilty to the charge.
2. This matter was part heard before Hon. J. Makau. However, the Accused person elected to have the trial commence *de novo* before the current Judge in compliance with **Section 200 of the Criminal Procedure Code**.
3. The prosecution called five witnesses in support of their case which is summarised herein below.

The Prosecution Case

4. **PW1, Elisha Otieno Oduongo** an 87 year old man testified that on the 16.9.2017 at about 6.00 p.m. he was at his house when he saw the Accused person's brother, Owino, come to his home (**points at the Accused in the dock**) asking to be given a panga as the accused had a panga. Mr. Oduongo informed Owino that he did not have a panga and stood in between the accused and Owino and told them not to fight as they are brothers (**children of Oketch**) and Owino and the accused went away abusing each other.
5. Mr. Oduongo further testified that later at about midnight, he heard the door being crushed. He woke up and found someone pushing him behind. Mr. Oduongo then told his wife to run away. It was Mr. Oduongo's testimony that he held the person tightly and struggled with him but the person hit him with a chair. Mr. Oduongo identified his attacker as Kennedy Otieno, the accused whom he knew as he raised him (accused was his nephew) following the death of the accused's parents.
6. Mr. Oduongo further testified that the accused was abusing him saying that he brags that he has many Children who would defend him but they were nowhere to be seen. Mr. Oduongo further testified that the accused told him that he was going to finish him and the accused hit PW1 using a folded chair. He stated that when his wife saw the accused attacking her husband, PW1, she ran out screaming for help from neighbours to come and rescue PW1 and that the accused followed her.
7. Mr. Oduongo further testified that after wrestling with the accused, he fell down and rose and went out shouting for help to which one Joseph Oduor Omollo heard his cry called out for him. Mr. Oduongo further testified that it was drizzling and not very dark as he and Joseph went out and found his wife had fallen down and was unconscious lying on the ground.
8. Mr. Oduongo testified that he saw stones where his wife lay groaning and noticed that her brain was out and that she was foaming through her mouth and nose. Mr. Oduongo further testified that he found the Chief making a call and that the accused was seated nearby having been tied with ropes. That the Police arrived and took away the body of his wife Gladys as well as the accused and took the body of his wife to Bondo Hospital but as he went back for money to enable his wife be taken to theatre, he returned only to find his wife dead. He further testified that he and Orengo witnessed the post mortem being conducted on her body.
9. In cross-examination, PW1 reiterated his evidence in chief and further stated that the person who banged on his door was saying "**fungua, fungua**" – open, open was the accused. Further, that despite it being dark he knew his attacker by his voice very well because he was his son (nephew).

10. Mr. Oduongo further testified in cross-examination that the Accused had a panga and a rungu which he used to hit PW1 on his chest as well as using chairs and kicks. He further testified that he held the Accused tightly as he beat him as his wife ran out screaming for help. He further testified that he pulled and pushed with the Accused person in the house for about 5 minutes.
11. Mr. Oduongo testified that his wife was screaming going to her in-laws to seek help but she was caught in between and beaten to death. He testified that he found his wife hit with a stone on her head and she had a broken skull.
12. In re-examination, Mr. Oduongo testified that he was talking to the Accused person, who was abusing him and that he held him tight. He further testified that he knew the accused as Kennedy Otieno Oketch.
13. **PW2, Eunice Akinyi Ayuoyi**, the Chief of West Gem Location testified that on the 17.9.2017 at about 12.30 a.m. he was called by Joseph Oduor, one of his residents and told that one Kennedy Otieno Oketch had been arrested because he had assaulted Gladys Otieno.
14. Mrs. Ayuoyi testified that he went to the scene and found Kennedy assaulted and tied. She went where Gladys was and noticed that she was breathing heavily – groaning. She testified that the accused and the deceased were about 50m apart and that she called the OCS Akala and told him to come to the scene which he did in a vehicle with 2 other officers.
15. She further testified that the deceased and the accused were both taken to Aluor She further testified that the following day on 18th September 2017 at about 3.00 p.m. Mzee Elisha, PW1 called her and told her that Mama Gladys had died. She also testified that she called the OCS Akala who went and carried the deceased's body and took it to Bondo Mortuary.
16. Mrs. Ayuoyi testified that on the 19th September 2017 she went to Akala Police Station to record a statement before proceeding to Bondo Hospital where she spoke to the Hospital Superintendents to arrange for postmortem.
17. Mrs. Ayuoyi identified the accused in the dock and testified that when she went to the scene of crime she had a torch which she used to see Kennedy, the accused and Gladys the deceased, and that she had known Kennedy, the accused from the year 2000.
18. In cross-examination Mrs. Ayuoyi testified that the phone she received was from Joseph Oduor who told her that Kennedy had been arrested. She further testified that she received the phone call after midnight.
19. **PW3, Martins Orengo** testified that he knew the deceased Gladys who was his Aunt in the clan. He further testified that he went to Bondo mortuary on 27.9.2017 and identified the deceased's body to the doctor for post mortem.
20. **PW4 No.49359 CPL Evans Ambuga** attached to Akala Police Station testified that he did not investigate this case but took over investigations from CPL John Turunya who had since been transferred to Mombasa and who, despite being bonded 4 times through a signal, was not available. He further testified that he was conversant with the files and what CPL Turunya did.
21. CPL Ambuga further testified that CPL Turunya visited the scene, recorded statements of witnesses, arrested the Accused and compiled the file and charged the Accused. CPL Ambuga further testified that CPL Turunya also handed over the three stones found at the scene of crime and used in the commission of the offence by the Accused against the deceased who died.
22. In cross-examination by the defence counsel, CPL Ambuga testified that he was now the investigating Officer, conversant with what was recorded. He further testified that the stones were handed over to him by CPL Turunya who told him that he recovered them at the crime scene and that nothing else was recovered from the scene.
23. The prosecution then closed its case.

Defence Case

24. Placed on his defence after the close of the prosecution case, the accused, Kennedy Otieno Oketch gave an unsworn testimony in which he stated that on the material night at about 10.30 he heard people talking. Oketch further testified that he heard the voice of George Oduor asking "*Sijui kama ako kwa nyumba sahi*" so he got out of his house and saw about 10 people near his door. He also saw one Alfred Onyango. That he was told to go and check something that had happened and he followed them to some distance on the path where they found the deceased Gladys Achola who was not dead but was groaning.
25. The accused testified that he was questioned if he knew who had killed her but denied after which the crowd started beating him. He further testified that the Assistant Chief was called and later he and Gladys were taken to hospital.
26. The accused person further testified that Elisha PW1 was his father's brother and Gladys was the deceased, was PW1's wife. He testified that in March 2017 he had a disagreement with Gladys over land but the issue was resolved. He further testified that Alfred Onyango and George Oduor are among the people who removed him from his house however they never testified.
27. He maintained his innocence contending that he never killed Gladys and that his sister in law who gave him dinner on the material night of the incident disagreed with his brother and left for Migori.

Submissions by Mr. Ooro Advocate for the accused

28. In his written submissions dated 17th February 2020, Mr. Ooro counsel for the accused person set out the elements for murder and

submitted that the death of the victim of this case is not in dispute as both the prosecution and defence witnesses testified as to the death of the victim Gladys Achola Otieno.

29. On the cause of death of the deceased, counsel submitted that from the evidence of prosecution witnesses and the defence, no one knows what happened to the deceased after she ran out of her house as no witness stated that he saw the deceased being assaulted. Counsel submitted that the prosecution relied on circumstantial evidence to build a case against the accused person and that in his view, the prosecution did not prove beyond reasonable doubt that the accused unlawfully killed the deceased Gladys Achola Otieno. In his view, the evidence against the accused person is of mere suspicion which cannot sustain a conviction for murder. Reliance was placed on the case of **Sawe v Republic [2003] e KLR** where it was held that suspicion however strong cannot provide a basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

30. On whether there was proof that the deceased was killed by the accused person, counsel submitted that PW1 seemed to suggest that his nephew was the assailant but that it was late in the night and the victim and PW1 were sleeping, it was not easy to identify the assailant and that the accused was a heavily built man he could have easily overpowered PW1 an old frail man and that even though, why would the accused not use the panga to assault his uncle instead of following and assaulting the deceased. It was submitted that the defence by the accused was truthful and believable. The court was urged to acquit the accused person.

31. The prosecution did not make any submissions.

DETERMINATION

32. I have carefully read all the evidence by the prosecution witnesses and the defence together with written submissions by counsel for the accused. In my view, the main issue for determination is whether the prosecution have proved beyond reasonable doubt all the elements of murder. The elements of the offence of murder were set out in **Anthony Ndegwa Ngari v Republic [2014] eKLR** as follows:

(a) That there was death;

(b) That the death was due to an unlawful act or omission;

(b) That the accused committed the unlawful act which caused the death of the deceased; and

(c) That the accused had malice aforethought.

33. The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided for under Section 203 of the Penal Code. This definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted.

34. The prosecution must prove that death of a human being has occurred, the act or omission causing that death and the unlawfulness of that act or omission, the person that unlawfully acted or omitted to act and the intention (malice aforethought) of the person who so acted or omitted to act.

35. Malice aforethought has been defined under Section 206 of the Penal Code in the following manner:

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

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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.”

36. The death of the deceased has been proved by the evidence of Oduongo, PW1, who testified that he left his wife's side at Aluoro hospital where she had been taken by the police after the attack and being found on the way unconscious, groaning with brains out of the skull which was broken. He testified that he had gone to get money for theatre only to return and find his wife dead. PW3, Mr. Orengo also testified that he identified the deceased's body to the doctor for post mortem on the 27.9.2017. The accused person through his defence and submissions conceded that the victim was dead.

37. Generally and ordinarily, a pathologist or a medical Doctor should have been called to testify as to the cause of death of the deceased after conducting a post-mortem on the deceased's body. However, in the instant case, I note that the prosecution despite having had the post mortem conducted on the body of the deceased the report or outcome of the post-mortem showing cause of death was not produced as an exhibit. Neither did the investigating officer seek leave of court to produce the post mortem report on behalf of the maker thereof.

38. The question therefore is whether the prosecution can be said to have proved what the cause of death of the deceased was or whether she died as a result of the injuries suffered as stated by the witnesses who testified and stated that the deceased had a broken skull and that her brain was outside and she was foaming from her mouth and nose.

39. Albeit the post mortem report was not produced, the Court of Appeal in the case **Columbus Lekikunit vs. Republic** CRA. No. 27 of 2006 stated that the production of post mortem report adds no value if death was instant. This is what they stated:

“The postmortem report was not produced, however its production might not, in the circumstances, have added anything of value to the prosecution case as the deceased died instantly.”

40. In the instant case the deceased, as testified by PW1 died in hospital after he took her there with the police and on being told to go get money for theatre, upon his return he found her dead. She was then escorted to the mortuary. In **Chengo Nickson Katama versus Republic (2015) eKLR, the Court of Appeal sitting in Mombasa (Makhandia, Ouko, & M’inoti, JJ.A)** while dealing with the issue of failure to produce medical evidence on the cause of the death held:

“Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a post-mortem examination was conducted on his body on 7th February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno’s failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the post-mortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill-equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause.”[emphasis added].

41. The Court of Appeal made reference to its earlier decision in the case of **Ndungu v Republic [1985] eKLR** where it was held (Nyarangi JA, Platt & Gachuhi Ag JJA as they then were) that:

“The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.

Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.

To return to Cheya. It is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision....”(emphasis added)

42. In the **Chengo Nickson Katama versus Republic (supra)** case, the Court of Appeal concluded that:

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased.”

43. Thus from the analysis of the above authorities, it is clear that there are exceptional circumstances or cases where cause of death ought not to be proved by medical evidence. While appreciating this fact and the weight of the above authorities, the High Court sitting in Nyeri, **Ngaah Jairus J) in Republic v Frankline Mugendi Miriti & another [2019] eKLR** held:

“The approach taken by the Court of Appeal is what one would refer to as a common-sense approach; it is an approach which to a greater degree acknowledges the basic understanding that as much as expert opinion is necessary in certain instances, a trial judge is not so detached from reality that he cannot see the consequences that would naturally arise from a set of uncontroverted facts or make a rational decision from such facts without the help of an expert. I suppose it is for the same reason that in law, a court is not bound by expert opinion if in its view, the criteria employed to test the accuracy of his conclusions is inapplicable to the facts before it or inconsistent, in some way, with those facts...”

44. In my humble view, therefore even in the absence of medical evidence as to the cause of the death of the deceased, the evidence of PW1, PW2 and PW3 is all consistent as to the appearance of the condition of the deceased at the time they went to the scene. PW1 was her

husband and confirmed that his wife died after he left her in hospital and went to look for money to take to hospital for her to be taken to theatre. That she had an injury on her head of a broken skull with the brains out. That head injury on her head in my humble view, caused the death of the deceased.

45. **The next issue is whether the accused person caused the death of the deceased and whether the killing thereof was due to an unlawful act or omission PW1**, Mr. Oduongo testified that on the material night, the accused broke into their house at around midnight and attacked him and his wife. It was Mr. Oduongo's un rebutted testimony that whilst he engaged and wrestled the accused so that his wife would escape but that upon realising that the deceased was escaping, the accused knocked down Mr. Oduongo and pursued the deceased.

46. Mr. Oduongo further testified that when he got to his feet to pursue the accused, he did so in the company of one Mr. Joseph Oduor Omollo who had heard his cry and that they found his wife had fallen down and was unconscious lying on the ground groaning with stones besides her. Mr. Oduongo testified that he noticed that his wife's brain was out and that she was foaming through her mouth and nose. Mr. Oduongo also testified that the accused was restrained by ropes a few metres from the deceased.

47. I observe that Mr. Oduongo an 87 year old man and the paternal uncle to the accused as conceded by the accused in his defence evidence, knew the accused very well as his son and that there was no possibility of mistaken identity as he took sometime wrestling with the accused who told him that he was boasting about his children who were nowhere to help him out. The witness was firm in cross-examination reiterating his testimony in chief and further stating that he was positive it was the accused who attacked him and his wife because despite it being dark he knew the accused by his voice very well because he was his son having raised him since his (the accused person's) parents passed on.

48. In **Cleophas Otieno Wamunga Vs. Republic [1989] KLR 424** the Court of Appeal stated:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R. vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

“In the case of Kamau Vs. Republic [1975] EA 139 the East African Court of Appeal had the following to say:-

“The most honest of witnesses can be mistaken when it comes to identification.”

49. I had the opportunity to see and hear and observe PW1 testify and iam satisfied that he was telling the truth that he positively recognized his nephew the accused person herein as the person who broke into his house and started wresting him and that as they wrestled he advised his wife the deceased to escape upon which the accused left the witness and followed her in hot pursuit. This was evidence of recognition and not identification. The accused conceded in defence that the witness was his uncle. The witness stated that he knew the accused person's voice very well and that he raised the accused up as his own son after the accused person's parents died. I find no possibility of mistaken identity of the accused by the witness PW1.

50. Placed on his defence, the accused denied having killed the deceased stating that he was picked by a mob from his home on the material night who beat him up and that his sister in law who had served him dinner on the material night had since departed.

51. According to PW1, the accused attacked him and his wife in their house at about midnight and that he was in possession of a panga and a rungu. That the accused hit his chest using rungu, chair and kicks. That after wrestling him and the wife to PW1 escaping while screaming and calling on relatives to come to their help, and as he followed up on his wife who had escaped, he found her with a stone near her head. The skull was broken.

52. Although the accused claimed that Joseph Oduor Omolo who accompanied PW1 to where the deceased was, was not called as a witness, from the evidence of PW1, Joseph odour Omolo only heard the screams of PW1 and went to find out from him what was happening and he accompanied PW1 to the scene where they found the deceased lying on the ground and injured on her head with a broken skull and brain was out. She was groaning and foaming from her mouth and nose. In my humble view, Joseph Oduor Omolo was not an eye witness. His evidence was therefore not material and therefore failure to call him as a witness is not fatal to the prosecution's case.

53. I caution myself of the dangers of relying on evidence of a single identifying witness but PW1's evidence was consistent and left no doubt in the mind of this court that the accused having attacked PW1 and his wife and the latter having escaped with the accused in hot pursuit, it is the accused person who attacked and fatally injured the deceased on her head, as PW1 observed that her skull was broken and brain was out. In my view, the injuries seen on the head of the deceased by PW1 must have been inflicted by a third party. **PW4 CPL Evans Ambuga** who took over investigations from CPL Turunya testified that he received three stones handed over to him by CPL Turunya who told him that he recovered them at the crime scene.

54. The act of hitting a human being on his head which is very fragile cannot be said to be lawful in any way. There was no justification for the said act.

55. The aspect of when an act causing death can be said to be lawful has been recognized from time immemorial. In **Gusambizi Wesanga v Republic [1948] 15 EACA 65** the Court stated:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

56. The evidence before court irresistibly points to an unlawful act that led to the death of the deceased. Moreover, Article 26 (1) of the Constitution of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law.

57. Accordingly I find that the death of the deceased was caused by an unlawful act of the accused person herein.

58. **The next issue is whether there was malice afterthought.** Under section 206 it 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 death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.”

59. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a) to (e) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63**, it was held that: *an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.*

60. In the **Ogelo v Republic [2004] 2KLR 14** the appellant chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1) an intention to cause death or grievous harm, malice aforethought is deemed to have been established by evidence presented by the prosecution. Malice aforethought can also be inferred from the manner of killing. See the case of **Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990**. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

61. While giving directions on the matter the Court of Appeal in the case of **Nebart Ekaita v Republic [1994] eKLR** stated:

“It remained a matter of questioning whether or not the appellant knew that there was a serious risk that death or grievous bodily harm would ensue from his sustained assault on the deceased. The possibility therefore that the appellant killed the deceased by a sustained unlawful assault but without the intent necessary to constitute legal malice requisite to the proof of the offence of murder contrary to section 204 of the Penal Code cannot be excused. In the circumstances we are unable to uphold the appellant’s conviction for murder.”

62. In the instant case, it was PW1’s Mr. Oduongo’s un rebutted testimony that the accused was armed with a panga and rungu during the attack and further that he noticed three stones next to his wife’s body when he finally found her on the way after she escaped and was pursued by the accused. Mr. Oduongo also noticed that the deceased’s skull was broken and he could see her brain out and further that the deceased was foaming from the mouth and nose. The same was corroborated by PW4 CPL Evans Ambuga who testified that he received three stones handed over to him by CPL Turunya who told him that he recovered them at the crime scene where the deceased was found.

63. Applying the above principles in the cited cases, it is my considered opinion that the prosecution’s proven facts are that the accused at some point in the night of 16/9/2017 broke into the home Mr. Oduongo shared with his wife Gladys, the deceased, assaulted Mr. Oduongo and when he realised that the deceased was getting away, pursued her and attacked her with stones or the rungu which he was holding and which he also used to assault PW1 thus injuring her fatally.

64. Unluckily for the accused Mr. Oduongo and his wife who ran out screaming for help managed to alert other members of the community including PW2 the area chief. The accused was arrested by members of the public the same night and mob injustice administered to him before the police came and took him to hospital with the deceased who was still alive but she succumbed after PW1 was told to go and get money for her to be taken to theatre.

65. The nature of the weapons, a panga and a rungu, carried by the accused as testified by Mr. Oduongo as well the stones which were found at the scene where the deceased lay unconscious in my view, show that the accused intended to cause grievous harm to the deceased which he succeeded in fatally injuring her on the head.

66. I do note that the accused in his testimony denied all this but I do not believe the defence by the accused that he could be picked from his house for no reason and taken to the scene where the deceased was lying and the case of murder planted on him. That defence by the

accused person is in my view, made up to escape justice.

67. I am satisfied that the prosecution has discharged the burden of proof of beyond reasonable doubt for the offence of murder against the accused person contrary to Section 203 as read with Section 204 of the Penal Code.

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

Orders accordingly.

Dated signed and delivered at Siaya this 7th day of May 2020 via skype due to Covid 19 situation.

R.E. ABURILI

JUDGE