



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 21 OF 2017[MURDER]

STATE.....PROSECUTION

VERSUS

JOSHUA OKOTH ODERA.....1ST ACCUSED

WILLIAM OCHIENG WANGO.....2ND ACCUSED

JUDGMENT

1. The two accused persons **JOSHUA OKOTH ODERA** and **WILLIAM OCHIENG WANGO** were jointly charged with the offence of murder contrary to Section 203 as read with **Section 204 of the Penal Code, Cap 63 Laws of Kenya**. Particulars of the offence are that on the 4th day of September 2017 at around 7.30 am at Kaudha West sub-location, Gem sub-county, Siaya County, the two accused persons jointly murdered **Rose Anyango Outa**.

2. The prosecution case was opened by PW1 (**Susan Anyango Owang**) who testified on oath and stated that on 4.09.2017 at about 7.20 am she was to attend a meeting at Green Arrow Sacco but since it was raining, she left at 8.00 am and after the Sacco meeting, she went to plant some potatoes on her farm and then she went home, prepared dinner and after the meal she went to sleep.

3. She stated that on 5.09.2017 she went to a church meeting and on returning, she learnt from her husband that Phenny Rose Outa had come looking for PW1 but did not find her so the said Phenny Rose Outa left a message with PW1's husband who told PW1 that she had been at the home of PW1.

4. That on 7.09.2017 PW1 left in the morning to see the Sacco Chairman and when she returned, she found Phenny Rose Outa who told PW1 that her grandmother (Rose Anyango Outa) had sent Phenny to ask PW1 for money the previous day, which money PW1 owed Rose Outa.

5. PW1 stated that Rose Outa (deceased) was her co-wife as they were married in the same family but both their husbands were deceased. That PW1 then requested Phenny Rose Outa to wait for PW1 as the latter went to borrow a phone from the Sacco's Chairman so that she could call Rose Outa. She stated that when the said Chairman tried to call Rose Outa, the phone did not go through and so, PW1 went back to her house and picked Phenny and they proceeded to Rose Outa's place. That on arrival, they found one of her in-laws and when (PW1) asked the said in-law on the whereabouts of Rose Outa, the in-law told PW1 that she did not know the whereabouts of Rose Outa as the latter's house was always locked. That they then looked for Rose Outa without success as she could not be reached on phone.

6. PW1 further testified that at that time, they heard dogs barking at the home of Joshua Okoth (the 1st accused) and so, PW1 passed by Joshua Okoth's door on hearing dogs bark and she found the dogs eating something like bones and that some of the dogs were from her home as they were neighbours with the 1st accused. PW1 stated that she had known the accused persons from the time she was married in 1980. She recalled that the time she was going to Rose Outa's house, she had met Okoth (1st accused) but he said that he was going somewhere and that when PW1 went to check on the dogs barking, she met William Ochieng (2nd accused and who is her biological son) and he asked her where she was going and she told him that she had seen something strange at Okoth's (1st accused's) place. At that moment, PW1 stated that since Rose Outa was missing, she could have been killed and buried there and that the 2nd accused told her that the 1st accused had killed and burned some two mongooses.

7. PW1 testified that she then told the 2nd accused that she was going to call one Jacob Onyango Otindo (her in-law) and that on her way, she met the said Jacob Onyango Otindo and together, they called the Assistant Chief Joseph Ogombo Ongiyo who went to her home and after other people had gathered, they proceeded to the home of Joshua Okoth (1st accused) and they found a place which was dug. That the Assistant chief ordered the digging of the place but the people said that Joshua Okoth (1st accused) ought to come and dig it himself.

8. That the Assistant Chief left on a bicycle to look for the 1st accused and he came back with the 1st accused and told him to dig out the

mongoose that he had allegedly buried in his homestead and the 1st accuse complied and dug the place where something was buried. She testified that initially, the 1st accused had resisted to dig but when he dug, a jumper came out and that the 2nd accused told PW1 that the said jumper was a cloth which the deceased had been wearing all along and that she, (PW1), knew the sweater as Nyagem (the deceased) wore it often. TPW1 stated further that the 1st accused dug again and brought out a jaw bone and she also saw the skirt and blouse belonging to Rose Outa (deceased) and further that the headscarf that Rose used to wear was found at the place and also the thigh bone too was found buried in that same place.

9. PW1 also stated that she could identify the mobile phone which the deceased owned because she used to see the deceased using the said phone. She identified the jumper (brown) which was marked as "PMFII." She further identified the skirt (cream in colour) marked as "PMFI II." She identified the shuka (sheet) which she said belonged to the deceased and was marked as "PMFI III" and she further identified the bag (cream) which she said the deceased used to carry her books in when going to 'chama' and it was marked as "PMFI 'IV.'" She further identified the kikoy (blue pink in colour) which she said belonged to the deceased and the same was marked as PMFI 'V.' She further identified three books which she said belonged to the deceased and which according to PW1, the deceased was using in the 'chama' and which were found in a nearby bush. The three books were identified and marked as PMFI 'VI.' She further identified a phone which belonged to the deceased and which she said was found with a certain lady called Ruth Adhiambo Okatch make ITEL, IMEI No. 35726107479882 and the said phone (black) was identified and marked as "PMFI VIII".

10. In cross examination by **Mr Oduor**, counsel for the two accused persons, PW1 stated that on 4.09.2017, she prepared and went to the Green Arrow Sacco and left the 2nd accused person in her house. That from her home to Okoth's home (1st accused) was about 50 metres apart but there was a fence in between. That one could hear what is happening on either side but she never heard anything and that there was a path behind the 1st accused's house which was used frequently and which she also frequently used but not for going to fetch water. That it was the Assistant Chief and the mob who led the 1st accused to the 'grave' after being suspicious that there was something wrong and that before the 1st accused was made to dig out the 'grave,' no report had been made to the police and that people started assaulting the 1st accused and asking him to name other people who killed the deceased and he stated that he was with William (2nd accused) when they both killed the deceased. Further, she stated that prior to the incident, the deceased had at one time claimed that the 1st accused had stolen her chicken and she reported to the Assistant Chief. PW1 was emphatic that the phone in court belonged to the deceased and that when the items were recovered, the Assistant Chief took them away to Bondo, together with the recovered bones.

11. In re-examination, PW1 testified that when the Assistant Chief left, he was with police officers from Akala Police Station and that they also went away with the 1st accused and later came back for William the 2nd accused.

12. **PW2 (Ruth Adhiambo Okach)** testified on oath and stated that on 4.09.2017 at about 8.00 am, she was in her house with her children (Diana Akoth, Michelle Atieno, Ian Otieno and Sheldon Otieno), when the 1st accused went in wearing a coat and he dipped his hand in his pocket and removed an Itel phone and told her that he had bought the phone with the money he got after selling his piece of land but that he was sick and that he wanted to sell the phone so that he could go for treatment in hospital and also buy food for himself. That he told PW2 that he had bought the said phone at Sh. 2500/= but he was willing to sell it to PW2 at Sh. 1000/=. That PW2 told the first accused that she only had Kshs 800/=. That she asked him for the receipt but he said it was in his house and that once she completes payment for the purchase of the phone, he would give her the receipt. That she paid him Sh. 800/= and he gave her the phone and that at the time she gave him the money for the phone, she was with her children. That in the evening, the said 1st accused returned to the house of PW2 in the company of the 2nd accused (identified in court) but that they never found her so, her daughter who was at home called her and informed her that the 1st accused had come back for the money and she told her to tell him to give her more time to pay the money.

13. PW2 further testified that the following morning, the two accused persons went to her house asking for the money for the phone but she pleaded with the 1st accused to give her more time to enable her pay. She only managed to raise Kshs 330/= as the 1st accused said he was to use for his medication and that she did not pay the balance.

14. The witness further testified that on 7.09.2017 in the morning hours, the 1st accused went and found her in the shamba cultivating and he lay down and started crying saying he was very sick and wanted the balance of the money but she did not have the money. She however spoke to her neighbour who lend her Sh.50/= silvers which she called her child Michelle and gave her the Sh.50/= and told her to give the money to the 1st accused.

15. That as she was talking to a certain lady, she saw the Assistant Chief Joseph Okongo arrive on a motor bike carrying Michelle (PW2's daughter) and he stopped the motor bike where PW2 was and asked her if Okoth had sold her some phone and after PW2 agreed, the Assistant Chief asked her to show him the said phone and the Assistant Chief told her that the 1st accused had done a terrible thing but he did not say what thing he had done. That she gave the phone to the Assistant Chief and he left and that the phone was Itel. PW2 identified the phone (PMFI VII) and testified that she later went and recorded her statement at Akala Police Station.

16. In cross examination by counsel for the accused persons, PW2 testified that she knew the deceased and that they stayed far from each other and further that she was not present when the accused persons were arrested. Further, that the Assistant Chief did not tell her how he knew that she had the phone.

17. **PW3 (Diana Akoth Okatch)** a minor testified after voire dire examination that on 4.09.2017, she was at home with her mother –PW2 and with Sheldon, Lenox and Ian (her siblings). That the 1st accused (identified by the witness in court) went to their home and removed a phone from his coat and told her mother that he had bought the phone from sale of land proceeds and that he had all the documents and the phone was an Itel phone. Further, that the accused stated that he bought it at Sh. 2500/= but that he wanted to sell it to go and buy food. That he asked for Ksh.800/= but that her mother had no money so she sent PW3 to a certain grandmother who gave her Sh. 300/= which she brought to her mother who in turn gave it to the 1st accused.

18. That later at about 8.00 pm, the 1st accused returned with the 2nd accused (2nd accused identified in court by witness), saying that he wanted his money and that PW3 called her mother who was away and who said that she was far and had no money. That the 1st accused went away but again returned on 5.09.2017 and PW3's mother gave him Sh. 350/= and he left but returned on 7.09.2017 at or about 9.00 am and asked for the balance of the money and her mother borrowed money from a certain old lady and gave money (Sh. 50/=) to one Michelle to take the money to the 1st accused after which the 1st accused then left and soon thereafter, while she was at her grandmother's home, the Chief came on a motorcycle and asked her on the whereabouts of her mother. The witness identified the ITEL phone which she claimed that she saw the 1st accused give or sell to her mother. (She identified the phone- which was marked as "PMFI 'VII').

19. During cross examination by counsel for the accused persons, PW3 stated that she knew the 1st accused although they were not neighbours. She stated that she did not know the deceased and further that she never saw anything on the 1st accused's clothing.

20. **PW4 Nicholas Otieno Outa** gave sworn evidence and testified that he was a student at Kisii University. He recalled that on 4.09.2017, at around 2.00 pm, he received a call from his younger step mother, Agnes Onyango, who informed him that his other stepmother had been murdered and that he should go home. That he boarded a matatu for Kaudha village and on arrival, he found many people in their compound but he did not find his stepmother's body at home. That he found people engaged in searching through nearby bushes and when he enquired, he was told that they were searching for the deceased's body in the nearby bushes. That he went back to Kisumu before the body was found but later on 14.09.2017, he was called by his sister (one Lillian) who told him that some body parts of his step mother's body (bone) had been recovered so he should go and identify her body (bones) in Bondo Hospital mortuary. That he went and saw the bones and the doctor wrote a report on the bones and the police said that they wanted to take DNA samples from his sister to identify the deceased. That he recorded his statement at the mortuary.

21. In cross examination by counsel for the accused persons, PW4 stated that he saw some bones and that he was told that they had been recovered from the bush and that he saw some clothes but due to trauma, he could not tell how they looked like.

22. **PW5 Phenny Aluoch Outa-** a minor aged 12 years old testified on oath after *voire dire* examination and stated that on 4.09.2017, at around 7.30 am she prepared to go to school and that she was with her grandmother (Rose Outa-deceased) and her other younger siblings and that her grandmother who was preparing to go to the 'chama' wore a grey sweater, sleeveless white blouse and a multi-coloured skirt and she carried a pink bag with books inside and covered herself with 'kikoy.' That she (PW5) left for school accompanied by her grandmother and when they parted ways, her grandmother told her that she was going for 'Bura' (chama). That thereafter she never met her grandmother later in the evening and had not seen her again.

23. The witness further stated that when she returned home from school in the evening she never saw her grandmother and that she went to sleep with her brother and younger sister without their grandmother. That the following day, her brother Ian whom she followed age-wise went to school but she did not go. She identified in court the books, a bag and kikoy, which she claimed belonged to her grandmother and which she stated, were found with 1st accused (witness points to the 1st accused in the dock by pointing at him).

24. PW5 further testified that the 1st accused used to go to their home to see (Rose) her late grandmother. That she knew the 2nd accused and that he lived near their home and he also used to go to their home. That she was at home when her grandmother's clothes, bag and books were found by the Chief, whose name is Joseph at the home of the 1st accused.

25. On being cross examined by counsel for the accused persons, PW5 stated that she was at the 1st accused person's place when the items were recovered, buried in a hole next to his house and that it was him (1st accused) who removed the said items from where they were buried, upon being beaten by people who demanded from the 1st accused to reveal where he had hidden the items then he led them to where he had buried the said items.

26. **PW6 Joseph Ogombo Ongiyo** gave sworn evidence and testified that he was the Assistant Chief for Kaudha West sub-location and that on 6.09.2017, he received information that the Late Rose Outa- deceased had gone missing. That he received the information in the evening from one Phenny, the granddaughter of deceased who told him that her grandmother had left for chama on 4.09.2017 but had not returned home. That PW6 called one of the in-laws of the deceased one Sylvanus Omondi and asked him the whereabouts of the deceased and he answered that he had not seen her.

27. PW6 stated that the following morning, he received a call from Jacob Onyango who asked him that they meet at the home of Susan Owango and that PW6 obliged. While at the home of Susan Owango, he met William Ochieng (2nd accused) and that Susan told the witness that she had seen something at the home of Okoth the 1st accused, which looked like a grave. That they went to the home of Joshua Okoth (1st accused) and saw something dug out and soil covered and when PW6 tried to uncover, Susan told him to stop so that they could look for Okoth (1st accused). That he asked for the whereabouts of the 1st accused and he was told that he had gone to the home of Ruth Okatch to claim for payment over a phone that he had sold to Ruth Okatch and that (PW6) took a motor cycle and followed the 1st accused to the home of Ruth Okatch. That on arrival, PW6 found Ruth who told him that the 1st accused had left and she further told him that Okoth (1st accused) had sold her a phone which she showed him and he took it told her that if there were issues with the phone then he would revert to her. That PW6 returned and met with the 1st accused going home and he told him to board a motorcycle and he asked him (1st accused) if the phone he (PW6) had recovered from Ruth was his and he admitted that it belonged to him and they proceeded to the home of Susan Owango. That as they proceeded on, they met Millicent and Susan and asked them if they knew the owner of the phone and the two ladies said that they knew the phone belonged to Rose Outa, the deceased.

28. PW6 stated that people gathered and they proceeded to the home of the 1st accused and went to where it appeared to be a grave dug and they gave the 1st accused a jembe and asked him to dig out and (when he dug out) they found the deceased's sweater inside. PW6 identified PMFI being a greyish sweater (jumper). That the 1st accused dug further and pulled a blouse – whitish and muddy- PMFI II and he dug further and they found a bone of the deceased -lower jaw. That on seeing this, people started screaming and assaulting the 1st accused saying

that he (1st accused) had killed Nyagem Rose (deceased) and that when he was assaulted, he said that he was not alone. That he mentioned that he was with the 2nd accused.

29. That he (PW6) called the police and they searched near the 1st accused's house in a thicket and they found the wrist bone and that the police came and took the accused person away. He further stated that the 2nd accused was also called "Ajebu". She identified the two accused persons in the dock.

30. **PW6 further stated that** they picked the items recovered from the homestead of the 1st accused and they continued searching in the nearby thicket and recovered more bones of the leg. That the next day, he was called and informed that a plastic paper bag had been recovered near the 1st accused person's home and further, that a skull had been recovered. The witness went and found a skull and some books inside that paper bag after which he called the police who went and recovered them. He later recorded his statement at Akala Police Station. The witness identified the books (PMFI 6a, b, c).

31. On being cross examined by counsel for the accused persons, PW6 stated that there was a grave-like dug near the house of the 1st accused and that the house was not new. He stated that he knew the 1st accused and that the 1st accused person used to live in the said house. That the grave was 30 metres from the 1st accused person's house and there was no fence and that Susan told him that Ruth Okatch had the deceased's phone and further that the grave was not near the road (path). That PW6 directed the 1st accused to move near the grave and dig out so that they could establish what it was and that they found a jaw bone and clothes and placed them at Okoth's house. That they did not enter William's house but they received information that something which may have been used to strangle the deceased was found and further that they learnt that the 1st accused and the deceased had some issues as they used to quarrel and reports were made at the Chief's Office.

32. In re-examination by Mr. Okachi Senior Principal Prosecution Counsel, PW6 stated that he knew that the 1st accused wanted to inherit the deceased but she refused and further that he had also stolen her chicken which she reported to the Chief and they resolved the issues.

33. **PW7 (No. 233895 Chief Inspector of Police (C.I) Jared Gichaba Nyaosi** gave sworn evidence and testified that he was the Station Commander at Akala Police Station and that on 7.09.2017 at 11.30 am or thereabouts, he received a telephone call through his mobile from the Assistant Chief of Kaudha West, Mr. Joseph Okombo who informed him that the lady who had gone missing on 4.09.2017 at about 9.00 am (one Rose), her remains had been spotted within Kabura village and that he, together with CPL John Turunya and driver Menya boarded a land cruiser and proceeded to the scene of crime and that Enroute, they met with the Assistant Chief who guided them to the scene. That at the scene, they found an angry mob trying to lynch the 1st accused but they (police) managed to rescue him and they interrogated the 1st accused (identified in the dock) who told them that he had killed the Late Rose Outa and that they inquired from him what he used and he showed them the scarf which he claimed he used to suffocate her with. PW7 identified the scarf, marked as MFI V identified and added that the 1st accused person also told them that he had already washed the scarf which was in his house. That they searched outside the homestead of the 1st accused person, about 50 metres of his compound and in the process, they recovered a newly dug shallow grave and there was a bad smell. That they found clothing which were identified to belong to the deceased. PW7 identified the jumper (PMFI I) and a pink bag (PMFI IV) and documents (books PMFI VI) which it was claimed the deceased was taking to chama. He also identified a white dirty (muddy) blouse (PMFI II). He further stated that the mobile phone which was recovered from Ruth (Itel) was found on Ruth who said that she bought it from the 1st accused at Kshs. 800/= and that she paid partially but the two accused persons went to collect the balance of the debt (PMFI VII was identified S/N 35726107479882) black in colour with a red strip. That they also recovered a grey/black/brownish scarf which the deceased had carried (PMFI III identified).

34. PW7 produced the following items as exhibits: PEx I - Jumper – grey; PEx II - Blouse - White muddy; PEx III - Green / Red scarf; PExIV - Pink handbag; PEx V - Black (white/brown scarf (zebra) scarf; PExVI – Books and PExVII - Phone black / red strip – Itel.

35. It was further testimony of PW7 that they escorted the bones to Bondo District mortuary and the doctor conducted DNA and post-mortem on the body of the deceased. He identified the Post-mortem form on the bones of Rose Anyango Outa and was marked as PMFI VIII.

36. Later, they arrested the 2nd accused after receiving information from the 1st accused who said he was with the 2nd accused when he killed the deceased and that they found the 2nd accused at his home. The bones were sent to the Government Chemist for analysis.

37. On being cross examined by counsel for the accused persons, PW7 stated that they visited the scene and found a shallow grave about 50 metres from the deceased's house and that bones were scattered so they were recovered at different times from thickets. That he collected the items and bones that were recovered and that they searched for the remains from the area and recovered them but not all parts were recovered as the dogs had run away with some parts.

38. That they had to rescue the 1st accused from an angry mob and took him to hospital and interrogated him after he was treated and that later a confession was taken from the 1st accused person by another officer from Kombewa Police Station, who wrote statement under inquiry and that the 2nd accused acted with the 1st accused, and that Ruth told them that the 1st accused person sold the phone to her and the 1st accused implicated the 2nd accused. Further, that the green /red scarf was recovered from the house of the 1st accused person after he took them to his house upon leaving hospital. That photographs were taken from the scene but were not ready and further that the post-mortem report and the remains of the deceased were some of the basis that led them to charge the accused persons and that the autopsy report concluded that the cause of death of the deceased was not conclusive and that he drew the sketch plan to aid the court.

39. PW7 was later recalled and he testified that the rough sketch as drawn showed the home of the deceased, the route she used, the home of the 1st accused and the geography of the area and the shallow grave where items and bones of the deceased were found and that it showed the neighbourhood. Further, that from the 1st accused's house to the grave was 50 metres. The said sketch report drawn on 7.09.2017 was

produced as PEx IX.

40. When cross examined by counsel for the accused persons further, PW7 reiterated his testimony in chief and added that one had to go through the shamba of the 1st accused to reach the grave, which was not visible from the road path.

41. **PW8 Doctor Phelgona Kabibi** a medical officer at Bondo sub-county Hospital gave evidence on oath to the effect that she had the post-mortem report done by her colleague Dr. Willis Ochieng who had since left the hospital. She stated that she had worked with him for one year and thus familiar with his handwriting. The court admitted the said report and allowed the doctor to rely on the same. The defence had no objection.

42. PW8 testified that the said post-mortem report had been done on 14.09.2017 on the body of Rose Anyango Outa (deceased) at 3.08 pm at Bondo sub-county Hospital. General observations of the body was that bones were recovered in a sheet and the sex not possible to ascertain as only parts of the skeleton were submitted.

- Age - 50 years
- Race - African
- Nutrition - N/A
- Physique - N/A
- Height - N/A

Post-mortem changes: Completely decomposed, soft tissues and only skeleton was present.

External appearance of the body: The skull had 5 deep cut wounds; left femur bone and left tibia present, left humerus present.

Internal appearance of the body: Respiratory system: only two lobes of the lungs were present.

- Ribs were absent

Cardiovascular system:

- Totally not present

Digestive system:

- Not present

Genito urinary system:

- All organs were missing.

On the head:

- ***Deep cut wounds, 5 of them, the largest measured 10 cm. Object used most likely a sharp object.***
- The nervous system:
- No brain tissue present.
- Spiral column and spiral code missing.

43. The doctor testified that as a result of the examination, the cause of death was not conclusive as only the skeleton was availed. However, she stated that there was a possibility of several haemorrhage prior to death as a result of deep cut wounds. She produced the post-mortem report as PEx VIII.

44. On being cross examined by counsel for the accused persons, the witness stated that she was not present during post-mortem examination and that she could not know the identity of the bones but that specimens were requested and that the bones were just bones and further that the object used was sharp but she could not tell which specific object was used and neither could the gender of the person be ascertained.

45. **PW 9 No. 49359 Corporal Evans Ambuga** gave sworn testimony and stated that he was attached to Akala Police Station performing general duties. He recalled that on 14.09.2017, he was at Akala Police Station and that he took over investigations from CPL Turunya and his OCS CIP Jared Nyaosi. He stated that a post-mortem was done on the remains of Rose Anyango Outa (deceased) on 14.09.2017 and samples from the deceased were taken to the Government Chemist and that a tooth was taken from the deceased (marked A) and taken to the

Government Chemist for DNA sampling and analysis, with the DNA samples from one Lilian Akinyi (marked B). That the samples were submitted to the Government Chemist on 15.09.2017 and an exhibit memo filled.

46. By consent of counsel for the accused persons, and the prosecution, PW9 produced the Exhibit Memo as PEx X(a) and the Government Chemist Report as PEx X(b). He stated that from the findings of the Government Analyst, there was 99% chances that the deceased was the biological mother to Lilian Akinyi who was her daughter.

47. In cross examination by counsel for the accused persons, PW9 testified that some parts of the body and bones of the deceased were recovered and that he was not aware of photographs of the body parts.

48. At the close of the prosecution case, the accused persons were placed on their defence. They elected to give unsworn evidence and not to call any witnesses.

49. **DW1 (1st accused) JOSHUA OKOTH ODERA** testified that before being arrested, he was a farmer and that he knew the deceased as she was his sister in-law and further that he knew he was in court as he was a murder suspect and that it was not true that he killed Rose Anyango Outa (deceased). That the deceased was his late brother's widow and they lived in harmony and that there was a time they had quarrelled because he took her chicken and slaughtered for those who came to plough the land in 2016. That he had inherited the deceased after the demise of his cousin Maurice Outa and as such, the deceased was his inherited wife. That the deceased reported him to the Chief and he compensated her and he returned to his wife and children in Mbita as he was against her brewing of chang'aa in the home after she told him that Chief had allowed her to brew as a widow to fend for herself and her children. That he returned in 2014 and constructed a house and started living with his wife in Mbita but his wife then left for her brother's home. That later, the deceased brought him a report that she had disagreed with her customers over payment for the brew and after three months, he heard that Rose had died. The first accused closed his defence.

50. **DW2 (2nd accused- WILLIAM OCHIENG WANGO)** testified that he knew the 1st accused and that he was his uncle (a brother to the 2nd accused's father). He stated that the deceased was his mother's best friend and that he knew that he was in court as he was charged with murder of the deceased Rose Anyango Outa. That the deceased's death did shock him and that he had never been arrested before and that he did not know anything concerning the death of the deceased. That the 1st accused was the one who mentioned his name to the police and that he had seen him with the phone of the deceased Rose and further that he had never disagreed with the deceased. The second accused then closed his defence case.

51. No submissions were filed by the defence counsel despite leave to file the same being granted.

DETERMINATION

52. I have considered the evidence adduced by all the prosecution witnesses and the defence tendered by each of the accused persons herein.

53. In my humble view, the main issue for determination is ***whether the prosecution proved the case against the two accused persons to the required standard and which standard have been held to be that of beyond any reasonable doubt.*** This is what Section 111 (1) of the Evidence Act (Cap 80 of the Laws of Kenya) provides and as was held in ***Miller vs. Ministry of Pensions, [1947] 2 All ER 372.***

54. Section 203 of the Penal Code creates the offence of murder and its ingredients. The section stipulates that:

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

55. In ***Anthony Ndegwa Ngarivs Republic [2014] eKLR*** the Court of Appeal (at Nyeri) held:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

56. In the instant case, to sustain a conviction for the offence of murder against the two accused persons, this court must be satisfied that the prosecution has proved beyond reasonable doubt the following key elements:

- a. That there was the death of the deceased and the cause of the said death
- b. That the death was caused by unlawful acts
- c. Each of the two accused persons jointly or severally committed the unlawful acts which caused the death of the deceased
- d. Whether the 1st accused confessed to having committed the offence
- e. That each of the two accused persons had malice afore thought

57. **On whether there was death of the deceased and the cause of the said death,** it is not in dispute that the deceased herein had gone missing from her home after she was last seen going to her Chama or local association's meeting early in the morning on the 4th day of

September, 2017 but that she never returned home.

58. Later, some body parts, bones and clothes known to have been worn by her and clothes that she was believed to have worn on the day that she disappeared were found buried in a shallow grave about 50 meters from the house of the 1st accused person and other body parts were recovered in the nearby bushes. Those body parts were subjected to DNA sampling and analysis using the DNA sample obtained from the deceased's daughter Lilian and the results as produced as exhibit show that the body parts recovered belonged to the deceased as they matched her daughter at 99%.

59. PW1 testified on the fact that she went to look for the deceased after trying to get her via the Sacco Chairman's phone and that she found one of her in-laws and when she asked the said in-law as to whereabouts of the deceased, the said in-law said that she did not know where the deceased was as her house was always locked and thus they did not find her and their efforts to trace the deceased were futile as her phone did not go through and it was after that that she heard dogs barking and finally the bones and clothes of the deceased were found at a shallow grave in the 1st accused's homestead.

60. PW4 testified that on 4.09.2017 at around 2.00 pm he was called by his younger step-mother who told him that his younger step mother had gone missing and that he proceeded home and on arrival, he found many people in their compound. He went back to Kisumu before the body was found but later on 14.09.2017, he was called by his sister (one Lillian) who told him that some body parts of his step mother's body (bone) had been recovered so he should go identify her body (bones) in Bondo Hospital mortuary.

61. PW5, a minor who testified in camera after *voire dire* examination stated that on 4.09.2017, at around 7.30 am she prepared to go to school and left together with the deceased and as they were parting ways, the deceased told her that she was going for 'Bura' (chama) but she never met her grandmother (deceased) later in the evening and that she never saw her again.

62. The evidence of PW6 was that when he received information from the deceased's grandchild (Phenny) that her grandmother (deceased) had left for chama on 4.09.2017 but had not returned home, he called the in-law of the deceased one Sylvanus Omondi and asked him the whereabouts of the deceased but the in-law told him that he had not seen her. That he slept and the following morning, he received a call from Jacob Onyango who asked him to meet him at the home of Susan Owango and Susan told him that she had seen something at the home of the 1st accused like a grave and they went to the 1st accused's home, where he saw something dug out and soil covered and he decided to look for the 1st accused. Later, the 1st accused was traced, brought to his home and asked to dig in the said suspected shallow grave and from therein came out various items including the bones and clothes which were positively identified to belong to the deceased.

63. PW7 testified that when they went to the 1st accused's home they identified a newly dug shallow grave and there was a bad smell and when the 1st accused person dug the grave, the various items which were produced as exhibits were recovered from the said grave. That bones were also recovered and which bones were taken to Bondo District mortuary for post mortem which was conducted but the results showing cause of death were inconclusive. Consequently, DNA samples from the recovered bones and the daughter to the deceased were sent to the Government Chemist for analysis which results showed that the DNA from the bones(tooth) recovered matched the deceased's daughter Lilian Akinyi's DNA 99%, an indication that she was the biological daughter of the deceased. The witness produced the Exhibit Memo as PEx X(a) and the Government Chemist Report as PEx X(b) pursuant to the consent between the prosecution and the accused' advocate.

64. From the analysis of the above evidence, it is trite that the deceased could not be found after she went missing on the morning of 4.9.2017 and that pursuant to some search and digging of a grave in the 1st accused' compound, some bones and clothing which were positively identified to belong to the deceased were found in the said grave. The Government Chemist Report produced as an exhibit confirmed that the said bones belonged to the deceased.

65. Accordingly, I find and hold that the prosecution proved beyond reasonable doubt that Rose Anyango Outa indeed died.

66. On **the cause of the said death**, P8 Dr Phelgona testified and produced as an exhibit a post mortem report which was done by her colleague Dr. Willis Ochieng. She testified that the said post-mortem report had been done on 14.09.2017 on the body of Rose Anyango Outa (deceased) at 3.08 pm at Bondo sub-county Hospital and that as a result of the examination, the cause of death was not conclusive as only the skeleton was availed. The doctor however found that there was a possibility of several haemorrhage prior to death as a result of deep cut wounds. The skull which was recovered had deep cut wounds. During cross examination, she testified that the object used was sharp but she couldn't tell which specific object and neither could the gender of the person be ascertained at the time of post-mortem.

67. The evidence by PW8 was clear that the medical evidence was not certain as to the cause of the death. The question therefore is whether **the prosecution proved the cause of the death to be the injuries suffered as a result of the alleged acts of the accused?** In **Chengo Nickson Katama versus Republic (2015) eKLR**, the Court of Appeal sitting in Mombasa (**Makhandia, Ouko, & M'inoti, J.J.A**), dealing with the issue of failure to produce medical evidence on the cause of the death and referring to its earlier decision in **Ndungu v Republic [1985] eKLR** held 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 postmortem examination report of the deceased.”

68. In other words, whereas death and the cause thereof must be proved beyond reasonable doubt, but that in certain exceptional circumstances or cases, the cause of death need not be proved by medical evidence. Appreciating the weight of the above authorities, the High Court 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....”

69. Therefore, even in the absence of medical evidence as to the cause of the death of the deceased, the evidence on record clearly indicate that the deceased was killed, her body dismembered and later buried. The cause of the death was an act of another person and could not have been a suicide and her body was dismembered and parts thereof thrown here and there then other parts and some of her clothing were buried in a shallow grave as was in this case, 50 meters from the house of the 1st accused person and in his homestead.

70. Accordingly, I find and hold that even in the absence of clear medical evidence as to the cause of the death of the deceased herein, the deceased must have died out of an unlawful act of another person.

71. Albeit there was no eyewitness to the horrific death of the deceased Rose Anyango Outa, whose body was found dismembered with only bones recovered. It is as if her killer butchered her for a sumptuous meal and none of her flesh was ever recovered. She was only identified by her daughter’s DNA profiling. However, the circumstances in which the deceased’ body was recovered clearly indicate that the acts which caused her death were indeed unlawful. If at all the killing was lawful, the death would have been reported to the authorities and the body disposed of in her homestead and in a known legal way by obtaining a burial permit. The fact that this was not done, in my opinion, this can only lead to a conclusion that the acts which led to the killing of the deceased were unlawful and the secret burying of her bony remains in a shallow grave was just to conceal the said killing.

72. Article 26 (1) of the Constitution of Kenya 2010 provides that every person has the right to life. Sub-Article 3 provides that a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law. In **Gusambizi Wesanga v Republic [1948] 15 EACA 65** the court stated that:

“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.”

73. The evidence before court clearly show the act which led to the death of the deceased was an unlawful act. There can be no doubt that the deceased’s death was caused by someone who intended it or intended grievous harm to her, which satisfies the definition of “malice aforethought” in **Section 206** of the Penal Code.

74. ***On whether the two accused persons committed the unlawful act which caused the death of the deceased,*** from the evidence tendered before court it is clear that none of the prosecution witnesses saw the accused persons kill the deceased. All the evidence points to the fact that a shallow grave was found in the 1st accused’ compound and after the 1st accused was called to dig out the same, some items were recovered and which were produced in court as exhibits (PEx I, II, III, IV, V and VI). The DNA profile from the deceased’s daughter also proved that the body parts recovered were for the deceased person. The question is whether this evidence which was purely circumstantial is sufficient enough to establish the involvement and therefore the guilt of the accused persons beyond reasonable doubt?

75. The Court of Appeal in **Musili Tulo v Republic [2014] eKLR** held:

“circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics. If there is a weak link in that chain, the whole chain must collapse.”

76. The conditions for circumstantial evidence to sustain a conviction were laid down in **Abanga alias Onyango –vs- R CR. A NO.32 of 1990(UR)** where the Court of Appeal held :

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards 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.”

77. In **Sawe vs Republic [2003] KLR 364**, the Court of Appeal stated:

“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”

78. Therefore, for a conviction to be sustained in this case, the evidence tendered by the prosecution must satisfy the above conditions so as to be taken as conclusive circumstantial evidence to prove the guilt of the accused persons.

79. Revisiting the evidence adduced by the prosecution witnesses, PW1 testified that when the Assistant Chief came with the 1st accused and ordered him to dig out the mongoose he had allegedly buried in his homestead, and when the 1st accused dug the said ground, under pressure

from the mob which had gathered to know the whereabouts of the deceased, some clothes belonging to the deceased came out of the shallow grave. These items included a jumper, skirt, blouse and a headscarf all which the deceased used to wear. The evidence of this witness was corroborated by that of PW5 who testified that she was at the scene when the above items together with the books and all clothing belonging to the deceased were recovered from the shallow grave in the 1st accused's compound. This testimony was further corroborated by the testimony of PW 6 (the Assistant Chief) who was present when the items were dug out of the said shallow grave. The sketch map drawn by the police and produced as an exhibit shows that the said shallow grave was within the precincts of the 1st accused person's homestead.

80. The identity of the bones which were recovered from the said grave was confirmed by the evidence of PW9 who produced the Exhibit Memo as PEx X(a) and the Government Chemist Report as PEx X(b). This evidence was from the Report of the Government Analyst Report produced by consent of both the prosecution and the defence counsel. The DNA sampling and profiling of the recovered bones—a tooth and the DNA sample from the deceased's daughter revealed that there were 99% chances that the deceased was the biological daughter of Lilian Akinyi. From the above evidence, it is not in doubt that the body parts and clothing which were recovered from the 1st accused' compound and buried in a shallow grave belonged to the deceased.

81. However, as to whether the two accused persons were responsible for the deceased' death, PW2 testified that on 4.09.2017 at about 8.00 am she was in her house with her children and the 1st accused came and removed a phone from his pocket (Iitel make) and he told her that he had bought the phone with the money he got after selling his piece of land but as he was sick, he wanted to sell the phone so that he could go to hospital for treatment and to buy food for himself. PW2 bought the said phone in instalments but before she could complete paying for it, the phone was confiscated by the Assistant Chief after he traced her to her home. This testimony was corroborated by that of PW3 who testified that on 4.09.2017, she was at home with her mother and her other siblings when the 1st accused came and offered for sale a phone and which he alleged to have bought with the proceeds of sale of his land but which phone he wanted to sell so as to buy food but that her mother did not pay the whole of the purchase price and that the 1st accused kept on going to her home to get the balance of the purchase price from her (PW3's) mother (PW2) until on 7.09.2017 when the 1st accused was paid Kshs. 50 which her mother had borrowed and after which the 1st accused left and thereafter the Chief came on a motorcycle and asked for her mother. The witness identified the Iitel phone which the 1st accused gave to her mother. PW6 the Assistant Chief also corroborated evidence of PW2 and PW3 when he testified that when he received information from PW1 that she had seen something like a grave at the home of the 1st accused, and after he went there, he asked for the whereabouts of the 1st accused and he was told that he had gone to the home of Ruth Okatch (PW2) to claim for payment over a phone he had sold to her and he pursued the 1st accused to the home of PW2. He found PW3 who led him to where PW2 was. PW2 told PW6 that the 1st accused had just left and she further told him that the 1st accused had sold her a phone which she showed him and he told her that if there were issues with the phone then he would revert to her and that he later met the 1st accused who admitted that the phone which had been recovered from PW2 belonged to him.

82. Placed on his defense, the 1st accused claimed that after they settled an issue with the deceased where he was accused by the deceased of stealing her chicken, he returned to his wife and children in Mbita as he was against the deceased brewing of chang'aa in the home and that he then constructed a house and started living with his wife in Mbita but his wife then left for her brother's home and that later, the deceased brought him a report that she had disagreed with her customers over payment for the brew and after three months, he heard that Rose had died. This was therefore a defence of alibi by the 1st accused person.

83. The burden of proof always lie on the prosecution to prove the guilt of the accused person beyond reasonable doubt. Albeit the defence of the accused that he was in Mbita was brought late in the day, the burden of proof still lay with the prosecution to establish his involvement in the death of the deceased.

84. However, having heard all the prosecution witnesses and observed their demeanour, I have no reason to doubt that they were all telling this court the truth, including the minor witness who recalled how her grandmother left her house on the morning of 4/9/2017 for her Chama never to return again.

85. In my humble view, the analysis of the above testimonies of the prosecution witnesses clearly leads to an irresistible inference and conclusion that the 1st accused was responsible for the death of the deceased Rose Anyango Outa.

86. The body parts of the deceased being found freshly buried in a shallow grave in his homestead in my view is not a coincidence. His involvement in the sale of the Iitel phone belonging to the deceased after the disappearance of the deceased and his being found coming from claiming for balance of purchase price for the said phone yet in his defence he claimed he was in Mbita when he heard that Rose had died is defence evidence that cannot be believed at all. That defence in my humble view is a sham.

87. Despite there being no direct evidence linking the 1st accused person with the killing of the deceased, the circumstantial evidence adduced by the prosecution witnesses was so strong as against the 1st accused as to link him to the death of the deceased. The inculpatory facts herein were incompatible with the innocence of the accused, and were further incapable of explanation upon any other reasonable hypothesis than that of his guilt. There were no other co-existing circumstances weakening the chain of circumstances in this matter. The only inference in my opinion which can be made from the above evidence is that the 1st accused indeed was the killer of the deceased and he either did it alone or was in company of other persons. The fact that the deceased's remains were found buried in his compound and he was found to have sold the deceased's phone to PW2 puts him right at the centre of the killing of the deceased.

88. Despite the 1st accused raising the defense of alibi, I find nothing in that defence that would dislodge the watertight circumstantial evidence linking him to the death of the deceased. The alibi defence in my humble view was an afterthought and the same is dismissed as such. This is so because there was no dispute that the 1st accused was a neighbour of the deceased and that he had even inherited her after she was widowed. He was also arrested within the locality where the offence had taken place and not in Mbita where he alleged to have moved to and from where he allegedly heard that the deceased had died.

89. That defense could not stand in the circumstances where the prosecution evidence overwhelmingly pointed to his guilt. There was no doubt that the 1st accused indeed killed or participated in the killing of the deceased. He never explained as to how he came about the deceased's phone which he subsequently sold to PW2. This is taking into consideration the doctrine of recent possession. PW2 explained how she came in possession of the phone and which evidence was well corroborated by that of her daughter (PW3). This phone was positively identified by PW1 as belonging to the deceased.

90. The two witnesses having placed the possession of the ITEL phone belonging to the deceased on the 1st accused (and thus making him the recent possessor in the circumstances), the 1st accused had the burden of proving how he came into possession of the said phone. The Court of Appeal observed in ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008*** that:

“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.”

91. By PW2 and PW3 placing the 1st accused as the one who sold the phone to PW2, the 1st accused person therefore became the recent possessor in the circumstances and thus it was the duty of the 1st accused to prove how he obtained the same. Failure to do so in my opinion can only lead to a conclusion of his guilt.

92. In the end, I have no doubt in my mind that the prosecution have proved beyond any reasonable doubt that the 1st accused indeed killed the deceased.

93. Concerning the 2nd accused person, PW1 testified in cross examination that when people started to assault the 1st accused and asking him to name other people who killed the deceased, he revealed that he was with William (2nd accused) when they both killed the deceased. PW3 testified to the effect that when the 1st accused went to ask for money from her mother (PW2), he was with the 2nd accused and she identified the said 2nd accused. PW6 further testified that when the 1st accused dug the “grave” they found a bone of the deceased -lower jaw and that people started screaming and started assaulting the 1st accused saying that he (1st accused) had killed Nyagem Rose (deceased) and that when he was assaulted, he said that he was not alone but that he was with the 2nd accused.

94. In his defence the 2nd accused testified that he 1st accused was his uncle (a brother to the 2nd accused's father) and further that the deceased's death did shock him and that he had never been arrested before and that he did not know anything concerning the death of the deceased but that it was the 1st accused who mentioned his name to the police.

95. Analysis of the above set of evidence clearly show that the 2nd accused person was arrested just because the 1st accused mentioned him. No witness linked him to the killing of the deceased except the 1st accused. In my view, the prosecution did not tender any sufficient evidence to prove that the 2nd accused indeed participated in the killing of the deceased. The circumstances under which the statements made by the 1st accused incriminating the 2nd accused were not favourable for the said 1st accused to have given any genuine and honest statement on the 2nd accused person being his accomplice. Further, the statements were made to the witnesses and which statements the 1st accused did not repeat in court. It is my opinion that the 2nd accused cannot be convicted only based on the above evidence. More evidence as to his involvement ought to have been adduced. This is in appreciation of the fact that the prosecution has a duty to prove the case against an accused person beyond any reasonable doubt. This was not done in this case. There are chances that the 1st accused was assisted by other people the 2nd accused included, in the killing of the deceased but the evidence is merely that of suspicion. Suspicion alone, however strong cannot found a conviction. In the end,, I find and hold that the prosecution have not proved to the required standard the involvement of the 2nd accused person to the killing of the deceased.

96. On ***whether the 1st accused confessed to having committed the offence***, I note that PW 6 in his evidence in chief testified that when he met the 1st accused going home and he told him to board a motorcycle and he asked him (1st accused) if the phone he (PW6) had recovered from Ruth (PW2) was his, That the 1st accused admitted that it belonged to him. I further note that PW7 testified to the effect that when he met with Assistant Chief who guided them to the scene and at the scene they found an angry mob trying to lynch the 1st accused whom they had beaten but they managed to rescue him and they interrogated the 1st accused who told them that he had killed the Late Rose Outa and that they inquired from him what he used and he showed them the scarf which he used to suffocate her with. He identified the scarf (MFI V identified) and that he said that he had already washed it but it was in his house. However, during cross examination, the said PW7 testified that they had to rescue the 1st accused from an angry mob and took him to hospital and interrogated him after he was treated and that later a confession was taken from the 1st accused person by another officer from Kombewa Police Station, who wrote statement under inquiry.

97. The question then is ***whether these statements can be said to be a confession?*** Confessions in Kenya are governed by the Constitution of Kenya 2010, the Evidence Act (Cap.80), the Evidence (out of Court Confessions) Rules, 2009 and case law. Article 49 of the Constitution guarantees rights of an arrested person which includes the right to remain silent and the consequences of not remaining silent; and not to be compelled to make any confession or admission that could be used in evidence against the person (amongst other rights). Sub-article 4 of the said Article provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. Further, Article 50(2) guarantees an accused person the right not to give self-incriminating evidence.

98. In addition, section 25(1)A of the Evidence Act Cap 80 Laws of Kenya provides that:

“A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the

investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

99. Pursuant to sub-section 2 of the said section, the Evidence (out of Court Confessions) Rules, 2009 were enacted. Rule 4 of the Rules requires the officer recording the confession (recording officer) to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others. Rule 4 (3) further requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded. The Rules (Rule 7) further require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him; the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5).

100. Applying the above legal provisions to the evidence by PW6 and PW7 claiming that the 1st accused person admitted to them that he killed the deceased, the said "admission" does not meet the legal requirements above and thus cannot be admitted to prove the guilt of the 1st accused person.

101. PW7 testified that he interrogated the 1st accused after he was treated and that later a confession was taken from the 1st accused person by another officer from Kombewa Police Station, who wrote statement under inquiry. However, the rank of the alleged officer was never disclosed in court and therefore it was not proved that the said officer was of a rank not below **the rank of Chief Inspector of Police and further, there was no evidence whether there was a third party of the 1st accused's choice. Neither was there any evidence of compliance of the other rules as to confession. In addition the statement under inquiry allegedly recorded from the 1st accused was never availed to court for interrogation.**

102. For the above reasons, the evidence of an alleged confession by the 1st accused person was not properly taken from the 1st accused as required by the law and therefore the same is hereby rejected.

103. The other very important element of murder is whether the prosecution have proved that the 1st accused in killing the deceased had **malice afore thought**. Section 206 of the Penal Code provides for instances where malice aforethought ought to be deemed to have been proved. The section provides:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-

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."

104. The evidence tendered before this court clearly show that the deceased was a widow who had nonetheless been inherited by the 1st accused person. The 1st accused gave evidence in defence that he had inherited her after her husband who was his cousin died. The deceased was found killed and buried in a shallow grave. Only her body parts in the form of bones were recovered. The body was dismembered. From the post-mortem report, the weapon used to kill the deceased was a sharp object. I believe that only a sharp object could have removed all flesh from the bones and separated all the bones from the main body frame for scatter. The skull was found to have deep cut wound.

105. The manner in which the deceased's body parts were found-bones buried in a shallow grave and others scattered all over the bushes, an indication that the 1st accused person wanted to conceal the body of the deceased clearly show that the 1st accused had malice aforethought at the time of committing the act. I am persuaded that the 1st accused person had the intention to cause the death of or to do grievous harm to the deceased. He further had knowledge that his act would ultimately cause her death. But killing the deceased was not enough for the 1st accused. He removed all her flesh and dismembered every part of her body and scattered the body parts and left some to the dogs to feast on.

106. Accordingly, I find and hold that the 1st accused person had malice aforethought when he unlawfully killed the deceased by dismembering all the body parts and in concealing her body by burying some body parts and clothing of the deceased in a shallow grave and scattering other body parts into the nearby bushes.

107. In conclusion, it is my finding and holding that the prosecution proved all the elements of the offence of murder against the **1st accused person JOSHUA OKOTH ODERA beyond reasonable doubt to warrant and sustain a conviction for murder against him. The prosecution proved that the 1st accused person indeed caused the death of the deceased Rose Anyango Outa through an unlawful act and with malice aforethought in that he committed the act with intention to cause the death of or to do grievous harm to the deceased and further with the knowledge that his act would cause death of the deceased. He is hereby found guilty of the offence of murder contrary to section 203 as read with sections 204 of the Penal Code and convicted accordingly.**

108. *As against the 2nd accused person, WILLIAM OCHIENG WANGO, I find and hold that the prosecution did not prove their case against him beyond reasonable doubt. He is accordingly acquitted and discharged from the Information of murder. Therefore, unless otherwise lawfully held, William Ochieng Wango is hereby set at liberty forthwith.*

Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype due to Covid-19 situation.

R.E. ABURILI

JUDGE