



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 32 OF 2017 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

COLLINS OLUOCH OGWENO.....ACCUSED

JUDGMENT

1. The accused person **COLLINS OLUOCH OGWENO** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Chapter 63 Laws of Kenya. Particulars of the offence are that on the night of 9/12/2017, the accused person, Collins Oluoch Ogweno murdered one Vallery Apondi Odhiambo.

The Prosecution's case

2. **PW1, PENNINA ABUNGA ODHIAMBO** the mother to the deceased testified on oath that on 9th day of December, 2017 at about 3.00 am she received a call from the Dean of Students, Jaramogi Oginga Odinga University in Bondo, informing her that her daughter the deceased **Vallery Apondi Odhiambo** had been killed by her boyfriend. She proceeded to the University where she was led to the Police Station who escorted her to Bondo Hospital Mortuary and she was able to identify the body of the deceased. She also identified the body to the Doctor for postmortem. She stated that she had not known or met her daughter's alleged boyfriend. There was nothing significant in her cross-examination by counsel for the accused person.

3. **PW2 Coulson Mikawa Owuor** who was the deceased's paternal uncle testified that he was at home in Migori with PW1 when they received a call and information from Jaramogi Oginga Odinga that his niece the deceased Vallery Apondi Odhiambo had been murdered by her boyfriend and that her body was lying at Bondo Hospital Mortuary. In the company of PW1 they left Migori for Bondo and were led to the mortuary where they identified the deceased's body. He stated that the body had several cuts all over the head and neck. They returned home and on 11/12/2017 they collected her body for burial in Migori. He did not know the deceased's alleged boyfriend. Nothing significant came out of cross examination of this witness.

4. **PW3 George Onditi** from Homa Bay and an Administrator at Jaramogi Oginga Odinga University, Bondo testified on oath and recalled that on the 9th day of December, 2017 at about 3.00 a.m., he was sleeping as a guest at the J.J Guest House and that his room was next to the room which the deceased and the accused had booked themselves in. The witness recalled that on the material night at about 3.00am he was awakened by noises of someone screaming for help from the room next to his. He slept in Room 9. That the person was screaming for help and saying she was being killed. He rose from his bed and opened the window curtains to observe what was happening. He saw, with the help of bright security lights outside the room, two men approaching so he got out and met them and together they went to the door of the room where the noise was emanating from. He identified the two men as the caretaker of the J J Guesthouse and one Benson Ochire, PW4 and PW5 and together they went towards the room where the noises were, which was Room No. 10.

5. PW3 stated that on arrival they found other people who had gathered and they knocked at the door and that a man from therein answered saying that everything was fine, and that at that time, the noise had ceased. That on inquiring from the man that PW3 had heard noise from a lady inside the Room, the man inside told PW3 that they had had a disagreement which had now been sorted out and that the lady was now asleep. That when PW3 asked the person to identify who he was, the person said that he was Collins and that the said person also told PW3 on further inquiry that the lady was his wife and that they had disagreed but they had now settled the matter and she had fallen asleep.

6. PW3 further testified that PW5, they were not satisfied with the answers given by the accused person so the Caretaker went and brought a padlock and locked the door to room 10 from the outside. That Collins and his alleged "wife" remained inside. PW3 then remained outside the room guarding as PW5 went to call the Police. And that PW5 returned with two Police Officers and found the room 10 still locked from outside. On arrival, the Police Officers spoke to the person inside the room. He switched on the lights and on being asked about the condition of the lady inside the room, PW3 heard the person inside the room tell the Police that he had killed the deceased using a panga which was under the bed. That at that point one of the Police Officers retreated and came back accompanied by more police officers and they asked the

Caretaker, PW5 to unlock the padlock from outside which he did. That when the door was opened, PW3 saw a lady lying on the floor on her stomach facing down, with deep cuts on the head and cuts on the backside and right side of the ear. That the Police retrieved the panga from under the bed.

7. PW3 was able to recognize the accused as the one he saw in the room on the material night as there was and he also confirmed that the panga marked MF1 was the one which was retrieved by the police on the material night from the room where the accused and the deceased were.

8. In cross examination by Mr. Korongo Advocate for the accused person, PW3 reiterated his testimony in chief and added that he heard the lady scream saying: **“please help me, please help me, this man is killing me.”** He added that he heard a bang like hits or falls on the door.

9. **PW4 Benson Ondigo Onchiri** testified on oath and stated that he was an employee of Kenya Power and Lighting Company Limited and stationed in Bungoma. His testimony corroborated that given by PW3. He added that on the material night of 9/12/2017 he was on an assignment at Bondo so he left the KPLC vehicle at their Bondo KPLC Office and looked for a place to sleep. He found JJ Quest House and rented room number 11 for a night. While asleep, he heard noises from Room 10, from a lady screaming for help and saying that she was being killed. He went to call the caretaker and together they proceeded to the room where the noise was coming from. They reached the Room but the noise had slowed down. On asking the room occupant as to what was happening, the man in the room replied that he was only disciplining his wife following a disagreement but that they had already sorted out their issues.

10. PW4 together with other residents told the person inside the room to tell the lady inside the room to speak and confirm that indeed the two had sorted out their disagreement before the residents could go back to their respective rooms to sleep but that the lady never spoke. The residents then told the Caretaker to avail a padlock and lock the room's door from the outside and call the police which he did as the residents kept vigil at the door to ensure that the person inside did not escape. The other series of events that took place in the evidence he gave are similar to the testimony given by PW3.

11. PW4 stated that on arrival of the police, they cocked the gun and asked the person inside the room to open the door. That the person in the said room switched on the lights from the inside of the room and the caretaker opened the padlock from the outside of the room. The police gained entry into the room and PW4 heard them say that the lady was already dead. The lights were on so the witness and other residents managed to see a lady lying on her stomach on the floor with deep cuts on the head, back and all over the body and in a pool of blood. PW4 also stated that he saw the person who was inside the room and whom he identified as the accused person herein. He stated that the accused was dressed in black jeans -like trouser but he could not recall how his shirt looked like. Further testimony was that the deceased who lay on the floor was bare naked and that there was a mobile phone on the floor which he identified in court, an (Infinix Gold backside) marked for identification as MFI 3. He also saw an ATM card and the Safaricom PUK card (MFI 9) on the floor in the room.

12. According to PW4, when the police officer asked the accused what he had used to kill the deceased with, the accused said that it was a panga, and that the accused was also asked to say where the said panga was and that the accused stated that the panga was under the bed and he was told by the police officer to retrieve it and the witness saw the accused pull the panga from under the bed and the police officer took it. The witness identified the panga (MFI 2) which was later produced as an exhibit.

13. PW4 also stated that he saw a small bottle of poison labelled **“sure killer”**, and that the bed sheets, the walls and all items in the room were bloodstained. He also saw a blanket which is checked black and red identified and marked as (MFI 6) and a blood stained white towel all which were later produced before court by the investigating Officer as exhibits.

14. In Cross Examination by Mr. Korongo Advocate for the accused person, PW4 stated that he entered the room where the deceased and accused were and that he saw the ATM card, phone and PVC card which were all on the floor next to the deceased. That there seemed not to be a big struggle as the bed was intact with a mattress and he was of the opinion that the accused had changed his clothes because every place was bloody yet the accused person appeared clean. He reiterated that the noises he heard were of a woman begging for help but he did not hear a conversation between the two occupants in that room prior to the screams for help. He stated that the police officer poured down items that were in a black bag and he saw poison in a bottle. He later that very morning recorded his statement with the police.

15. **PW5 Samson Otieno Ochiel** a caretaker at Bondo JJ Guest House testified that on 8/12/2017, at about 10.00pm he was at the JJ Guest House performing his usual duties when the accused person herein arrived with his lover a lady called Apondi aged about 24 years old and that they asked for a room to sleep in. That the accused person whom he called by name as Collins Oluoch Ogweno asked for the price and PW5 told him that it was Kshs 600 per night which the accused paid and PW5 took the two to room number 10 and left them there then he went on his usual patrol and later he slept.

16. Deep into the night on the morning of 9/12/2017 at about 3.00am, PW5 heard noises and when he went out he met with PW4 who was their guest and who had been booked in Room number 11. That PW4 told him that the guests in the room next to his were fighting so together they proceeded to room number 10. On arrival at Room 10, PW5 asked Collins the accused person herein as to what was happening and that the accused person told PW5 that the noises were because they had had a fight but that they had resolved the issue. PW5 asked the accused to allow them speak to the lady but that the accused responded that the lady was asleep and that despite PW5 insisting on talking to the lady, the accused person said that he was tired. PW5 told the accused to open the door so that they could speak to the lady but the accused refused so the witness went and picked a padlock which he brought and locked the door from the outside and he proceeded to Bondo Police Station to call the police.

17. That when the police arrived, they asked the accused whether he had killed the lady and he answered in the affirmative. PW5 was then instructed to open the padlock from the outside which he did and the police entered the room and told the accused to open the door from the inside. That the police entered the room and found a body of the deceased lying on the floor. That they asked the accused of the weapon used to kill the deceased and he stated that he had used a panga which he had hidden under the bed, which the police retrieved. The police then handcuffed the accused person herein and took him out of the room together with the panga which PW5 identified in court (MFI 2). He also identified other items recovered from the room being mixed colored bedcover, 1 blanket, 2 bedsheets, , a black bag which PW5 stated

that the accused Collins had when he went to ask for a room for accommodation in the company of the deceased, a cream pillow. The witness later recorded his statement on what he had witnessed.

18. In cross-examination by Mr. Korongo counsel for the accused person, PW5 stated that he had booked in the accused and a lady but did not give them a receipt because receipts had no serial numbers. He stated that he spoke to the customers who went to look for rooms and that he had not met the accused before but that he spoke with them for some time before assigning the two the room. Further, that he could not tell if the two had disagreed as they spoke well. He stated that the deceased was lying on the floor on her stomach and there was nothing broken in the room. He added that he only heard the screams of a person asking for help. He stated that he heard the police ask the accused of what he had used to kill the deceased and the accused said it was a panga. Further, that he saw a police officer carrying the panga when the accused and the police got out of the room.

19. In reexamination by Mr. Okachi Senior Principal Prosecution Counsel, PW5 stated that he heard a lady screaming in Dholuo (*Konyauru*) and in Kiswahili saying “*come and help me iam being killed.*”

20. **PW6 Polycarp Lutta Kweyu** a Senior Chemist at the Government Chemist Kisumu at the DNA section testified on oath and stated that he had worked as such for six years. He stated that on 19/12/2017 they received under escort of DCI Bondo, Linus Omuse the following items for analysis:

a. *Blood sample indicated to be of the deceased Vallery Apondi Adhiambo marked ‘A’*

b. *A panga marked ‘B’*

c. *Blood stains scrapped from the scene marked ‘C’*

d. *A white bloodstained vest indicated to be of accused Collins Oluoch, Marked ‘D’*

e. *A blood stained bed sheet Marked ‘E’*

f. *2 phones: -An gold coated Infinix phone indicated to be for the accused marked ‘F’ with two IMEI numbers 352256084211509 & 352256084211517 and A WICKO phone indicated to be for the deceased marked ‘G’ whose IMEI number is 354682077206982*

g. *Soil scrubblings from the scene being with blood marked PMFI 13*

21. The witness assigned all the exhibits the laboratory Reference No. A139/2017 and stamped as acknowledged receipt of the exhibits, on the Exhibits Memo. He stated that the request was to ascertain any genetic relationship between the exhibits marked A-G. After his analysis in the lab, the witness produced the following report: -

- ***The red stains on the exhibits were confirmed to be human blood. He generated DNA profiles to carry out the matching and after analysis he generated profiles from all exhibits generated.***
- ***After analysis and comparison of profiles, he found that the DNA profile from the panga, the blood on the panga and from the blood scrubblings from the scene, blood from the white vest, blood on the stained bed sheet, blood on the Infinix phone and blood on the WICKO phone, all matched the DNA profile from the deceased’s blood. He stated that that meant that the DNA profile from the exhibits matched the DNA profile of the deceased female person Vallery Apondi Odhiambo.***

22. He compiled the report on 18th July, 2018 and he signed it and produced it together with the Exhibit Memo as Exhibits 2a and 2b respectively.

23. **PW7, 85809 PC Shadrack Mwendwa** attached to Bondo sub-county DCI’s office testified as that on the 9/12/2017 at around 03.00 hours he was in his house when he received a call from one Inspector Awuor who was by then the Deputy OCS Bondo Police Station informing him that there was a murder scene near Bondo Market.

24. The officer proceeded to the scene in the company of the said Inspector Awuor and proceeded to JJ Guesthouse in a Police Land Cruiser. On arrival at the Guest house, they found a group of people gathered at one of the doors to the rooms in the JJ Guesthouse. It was the second door from the right side. He peeped through the metallic door with glass at the top in which the lights were on in the room and saw a man standing and on the ground lay a body of a naked lady. He informed the man inside to open the door and the man complied. The witness then entered inside the room and immediately handcuffed the man who was in the room. He asked the man his name and the man told the witness that he was Collins Oluoch. PW7 saw scattered items in the room and started searching in the room.

25. He stated that the naked body of the lady was lying in a pool of blood, on the floor on her belly. The room was full of blood stains on the bed, pillows, bed sheets and all over. He recovered the identification card for the dead lady. He identified the pillows, the panga, and the plastic bottle written “sure killer,” the student identity card of the deceased and two used condoms as exhibit. The scene was photographed and the body was removed to Bondo Sub-county Mortuary.

26. In cross-examination by Mr. Korongo Advocate for the accused person, PW7 stated that when he entered the room he saw signs of a struggle and it looked like there had been a fight. That on arresting the accused he had no injuries or marks on him. He stated that they did not subject the suspected poison to any chemical test. He maintained that the deceased body was found on the floor.

27. **PW 8, Dr. Paul Oloo**, a Medical Officer at Bondo sub-county Hospital was allowed to produce the post mortem report of the deceased because the Medical Superintendent Dr. Odhoch Ochieng who carried out the autopsy on the deceased's body was handling a crisis situation at the hospital where nurses were on strike. The production of the postmortem report by Dr Oloo was not objected to by the accused person's counsel. The witness was familiar with the handwriting of the maker of the report as he had worked with him from 25/9/2018 and that he could interpret what the maker wrote.

28. The postmortem was carried out on 11/12/2017 at Bondo sub-county Hospital at 12.36 hours. The body was for Vallery Apondi Odhiambo who is the deceased, aged about 23 years. Externally, the body had multiple cut wounds. The Head frontal had a deep cut 9cm on the right side of the cheek to the chin extending to the ear severing several muscles and into the dental cavity measuring 13cm. On the left anterior side of the neck was a cut wound of 3 cm. On the right shoulder, was a 10cm cut wound. It was deep enough to expose the bone. On the left wrist joint was a 10 cm cut wound. There were no other external injuries noted. All the internal systems were normal. On the head was a skull fracture on the front. The spinal column and spinal cord were not exposed.

29. As a result of examination, the doctor who conducted the post mortem formed the opinion that the cause of death was anemic shock due to massive blood loss caused by multiple cut wounds. The post mortem report was produced as P-Exhibit No 1.

30. **PW9 No. 101915 PC Linus Omuse** attached to Wajir Airport undertaking investigations duties and formerly of Bondo DCI testified that on 9/7/2017 he was called by Chief Inspector (CIP) Abwog, over investigations into a murder case. The officer who visited the scene, PC Mwendwa told him that the incident happened at JJ Guest House Room No. 10 around 2 kilometers from the Bondo Police Station. That PC Mwendwa handed over to him the exhibits along with them was a panga which had been cut (shortened) and sharpened; two mobile phones one Infinix for accused and a WIPO phone for the deceased and beddings which were stained with blood. The witness revisited the scene and scrubbed blood which was on the floor. He also collected blood sample from the deceased and prepared an exhibit memo. He recorded statements from the witnesses and charged the accused person with the offence of murder. He produced the items mentioned as exhibits numbers 2 to 16 as seen and marked by the court as follows:

- *The wooden handle panga cut and sharpened one side was produced as PEx.2*
- *The Infinix phone MFI 3 as PEx 3.*
- *Liquid in a bottle 'sure killer' produced as PEx 4.*
- *2 Blood stained white bed sheets produced as PEx 5(a) and PEx 5(b).*
- *Blanket checked with red, green and black produced as PEx 6.*
- *White blood stained towel MFI 7 produced as PEx 7.*
- *Assorted ladies clothing produced as PEx 8*
- *PUK card produced as Safaricom, PEx 9.*
- *Coloured bedcover produced as PEx 10.*
- *A black bag is hereby produced as PEx 11.*
- *A cream blood stained pillow produced as PEx 12.*
- *Soil scrubs produced as PEx 13.*
- *WICKO phone - Black produced as PEx 14.*
- *A white vest stained with blood hereby produced as PEx 15.*
- *Student ID for the deceased Vallery Apondi, at Jaramogi Oginga Odinga University, Adm No. B231/0929/2016 as PEx 16.*

31. The investigator then charged the accused person with the offence of murder. He identified the accused as Collins Oluoch Ogweni in court.

32. In Cross examination by Mr. Ochanyo Advocate holding brief for Mr. Korongo for the accused person, PW9 stated that he was assigned investigations into this murder by the then DCIO and that PC Mwendwa is the one who arrested the accused from the scene of murder and handed over the accused and exhibits but that the blood scrubbings were collected when the accused was already in custody. He denied being the first person to reach the scene of murder.

Defence case

33. At the close of the prosecution's case, the accused person was found with a case to answer. He elected to give sworn statement of defence. He testified as DW1 and called no witnesses.

34. **DW1 Collins Oluoch Ogwen**, the accused testified that on 9/12/2017, he was in Kisumu and he communicated with his girlfriend Vallery Apondi Odhiambo, the deceased and agreed that they would meet at Bondo as she was a student at Bondo University. That they agreed to meet at the market at 2.00pm to select clothes for his brother. That the accused left Kisumu and arrived in Bondo at 3.00 pm. That he then went to a hotel near the stage and called her. That they ate food and went together to Bondo-Jaramogi Oginga Odinga University at about 5.00 pm. After sometime, someone called the deceased and she told him she was with her boyfriend. That when the accused asked her who it was, she said it was her classmate friend. That at about 6.00 pm, they went and sat at the University Gate where they met the deceased's friend called Jane Awuor and they conversed for some time then he agreed with the deceased to go and spent the night together at JJ Guesthouse lodging in Bondo town, a place they had slept before so they found a lady whom they asked for accommodation and she said there were rooms. That they paid and got a receipt then entered the room, bathed and slept.

35. The accused further testified that at about 3.00 am, the deceased went to the toilet and they heard the door being knocked. That the deceased went to check the door and opened it and 2 gentlemen entered, wearing black and one had a cap. That he was tall, medium and fat and black skinned and wore brown clothing and a black trouser. That the second was fat, wearing a blue jacket, navy blue long trouser and was chocolate skinned. The accused said that he did not know them. That when they entered the room, they asked the deceased why she had been cheating on them and she asked how. The accused stated that he went and sat on a chair and it seemed the deceased knew them. That one of them removed a panga and cut the deceased on the head and she named James. That the accused person then went and hid in the toilet as he was scared, then the people who had attacked them locked the door and told him not to scream. That he then left the toilet after they went away and found blood all over and so he started crying and heard people talking from outside and that when he opened the door, calling them out, they never moved near. That he then saw police who found him standing and they took photos and their items which were blood stained and he was taken to the police. That he asked for his phone to speak to the deceased's mother but the police denied him.

36. In cross-examination by the prosecutor, the accused said that he was the boyfriend to the deceased from 2013 April and that they were lovers. That at the police station he asked for his phone to speak to the deceased's mother because she knew him. That at one point he attended a family funeral of burial of a child. That he treated the deceased as his future wife and used to buy her gifts and take her out to have fun. That he could buy her bags, shoes and necklaces.

37. He further stated that on 9/12/2017 he was at JJ Guest House with the deceased Vallery Apondi and that he is the one who paid for the lodging and that it was not the first time they were sleeping in the lodging. He further stated that when the deceased's friend called her, she told the accused that it was her friend who gave her a laptop which she used to write her research proposal but that he did not check on her phone to see the person because he highly trusted her so he believed in her word. He stated that he did not see a lady that night as he was in bed. He added that he was in the room and confused and that he did not know for how long the two men came into the house after the deceased said she saw a lady.

38. He responded that after a knock on the door, the deceased went to the door and told him that she had seen a lady. That the two men entered the house and he saw the two men who were violent but that he did not know them before. That the two men started questioning the deceased why she was cheating on them. That when the accused asked them what they were up to, they hit him with a panga on his head causing his head to swell but he did not go for treatment. That they told him not to scream. He stated that there were other rooms adjacent to his room and that whoever was in the next room could hear noise from an adjacent room.

39. The accused further stated that when the 2 people left the room, he opened the door and went out to call for help but nobody responded to his distress call. He stated that the two men had a panga each, one had a long panga while another had a short one. He stated that the short panga produced as an exhibit in court was with the tall man and which the man used to hit the accused with on his head. The accused also admitted that the bag which was produced in court as an exhibit was his but that he could not tell if the small panga could fit in that bag. According to the accused, the room remained bolted from inside until the police arrived.

40. On being questioned further by the prosecutor, the accused stated that for the four years, he never knew any other suitor for the deceased and that they used each other's phones. He claimed that he still loved the deceased and that her photos were still in his phone. He maintained that the two had a smooth love affair all the way.

41. The accused then closed his defence case without calling any witness.

Submissions

42. There was no submission made by the advocate representing the accused thus the defense case was marked as closed.

Analysis and issues determination

43. For the Prosecution to secure a conviction on the charge of murder, it has to prove the following ingredients against an Accused person. Those ingredients are:

(a) Proof of the fact of death and its cause;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission;

(c) That the death of the deceased was caused by the Accused which constitutes the ‘actus reus’ of the offence;

(d) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.

44. ***on Proof of the fact and cause of death of the deceased Vallery Apondi Odhiambo***, the death of the deceased was proved by the evidence adduced by PW1 Penina Abunga Odhiambo the deceased’s mother, PW2 Coulson Mikawa Owuor the deceased’ uncle who both witnessed the postmortem and PW3, PW4 and PW5. PW 7 is the Police Officer who went to the scene on the material night and secured the scene. He found the deceased lying dead and he arrested the accused and found no sign of injuries on him. He also recovered a panga, blood stained clothing and some bottle containing what was suspected to be poison written “sure killer.”

45. Further, PW8 Dr. Paul Oloo produced a postmortem report done by his colleague Dr. Odhoch Ochieng and the postmortem established a fracture of the skull on the front, 9cm, multiple cut wounds on the right cheek extending to the ear severing several muscles and into the dental cavity measuring 13 centimeters, cut wound on the left anterior side of the neck measuring 3 cm, cut wound on the right shoulder 10cm exposing the bone, cut wound on the left wrist joint 10cm. the autopsy report concluded that the cause of death of the deceased was anaemic shock due to massive blood loss caused by multiple cut wounds.

46. This court therefore finds as a fact that indeed the prosecution has proven beyond reasonable doubt the death of the deceased herein Vallery Apondi Odhiambo did occur and that the cause of death was established to be due to the anaemic shock due to multiple cut wounds in the areas identified above as per the autopsy report produced as exhibit No. 1. The type of injuries which were cut wounds all over the deceased’s body are evidence of an attack on the deceased. Those injuries could not have been self-inflicted. There was no defence of self defence that would justify that type of killing of a human being therefore I find that the deceased died as a result of an unlawful act.

47. ***On the third element of whether the accused person was the one who caused the death of the accused***, there was no eye witness to the material incident leading to the demise of the deceased Vallery Apondi Odhiambo. The prosecution relied on circumstantial evidence to establish a prima facie case against the accused person. The standard of proof required in all criminal cases is that of beyond reasonable doubt and this case is no exception. It was incumbent upon the prosecution to prove the guilt of the accused person beyond reasonable doubt throughout the trial, whether the accused person tendered any defence or chose to remain silent throughout the trial and in defence. The burden of proof does not shift to the accused person to establish his innocence.

48. The Court of Appeal set out the test of determining whether the prosecution has established its case against an accused based on circumstantial evidence in the case of ***Abanga alias Onyango vs. Republic CR A NO.32 of 1990(UR) in the following terms:***

a) The circumstances from which an inference of guilt is sought should be drawn and must be cogently and firmly established.

b) The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused person.

c) 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.”

49. The same Court of Appeal while considering a case in which the prosecution was relying on chain of circumstantial evidence in the case ***Charles Mathenge Mwangi & another v Republic CA NO. 72 of 1997 (UR), (Omollo, Tunoi & Ringera AG JJA held:***

“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge” see Republic v Kipkering Arap Koskei & another [1949] 16 EACA 135.

50. The evidence adduced by the prosecution witnesses No. 3, an Administrator at Jaramogi Oginga Odinga University and who was a guest on the material night of 9/12/2017 at the JJ Guest House in Bondo, and PW4 who was also a guest at the said Guest house and who both heard noises of cries from a lady saying she was being killed from the room No. 10 adjacent to their rooms and who proceeded to the door of Room 10 where the accused was found locked from the inside, and the evidence of PW5 the Caretaker of JJ Guest House who rented out Room 10 to the accused person and the deceased on the night of 8/12/2017, as well as PW7 PC Shadrack Mwendwa who went to the scene on the material morning at about 3.00am and found the deceased lying dead on the floor and the accused was in the room and ordered the accused to open the door and handcuffed (arrested) him and searched the room and found the deceased’s University Identity Card and a panga and organized for removal of the deceased’s body to Bondo Hospital Mortuary all place the accused person at the scene of the crime.

51. In addition, the accused person in his defence admitted that he indeed booked and paid for the room where he lodged with the deceased that material night of 8/12/2017 but that while him and the deceased were in the said room, they were attacked by some two unknown men who claimed that the deceased was cheating on them.

52. PW3 George Onditi who was a guest at J.J guest house, in his testimony stated that he heard noises from the next room and when he went to find out what was happening, it was the accused who told them he had a disagreement with his wife but that they had sorted out the issue and that when he insisted on hearing from the said wife, the accused told them that she had fallen was asleep.. This evidence was corroborated by both PW4 Benson Ondigo Onchiri who was also a guest at the JJ Guest House on that night and PW5 Samson Otieno Ochiel the Caretaker at the JJ Guest House.

53. The prosecution majorly relied on the evidence of PW3, PW4 and PW5. They all testified that they heard a lady screaming for help from the room adjacent to where PW3 and PW4 were sleeping that night. That the lady was saying that she was being killed. PW4 went to call PW5 who is the caretaker of the Guest House. According to the evidence adduced by all the three witnesses, the accused person was the one

who spoke to them and told them that he had a disagreement with his wife. They were not able to see the deceased because the accused told them that she was asleep. His actions were however suspicious which prompted PW5 to lock the door from the outside with a padlock as he went to call the police to come and establish what was happening in that room as the lady had gone quiet.

54. When the police arrived, led by PW7 PC Shadrack Mwendwa, they spoke to the accused while the door was still locked and the accused opened the door from the inside. They got into the house and on seeing the injuries on the deceased's body as she lay dead in a pool of blood, they also recovered from the said room a panga which was cut and sharpened. PW3, PW4 and PW5 corroborated evidence of PW7.

55. PW6 Polycarp Lutta Kweyu received exhibit memo and items which were found in the room where the deceased and the accused were found on the night of 8th and morning of 9th December 2017. The items were a panga, beddings, clothing of the deceased, some blood stains scrubbed from the scene where the deceased was found, a vest belonging to the accused, blood stained bedsheet, blood sample of the deceased, an Infinix Phone belonging to the accused and a WICKO Phone belonging to the deceased and scrubblings of soil from the scene. He was requested to ascertain any genetic relationship between the exhibits and after carrying out an analysis, he found that the DNA Profiles from all the exhibits matched the DNA profile of the deceased Vallery Apondi Odhiambo. He produced the report as P-Exhibit 2a and exhibit memo as exhibit 2b.

56. From the evidence of PW6 it is clear that the short sharpened panga produced as an exhibit was used to cut the deceased that is why it had blood that matched the DNA of the deceased Vallery Apondi Odhiambo.

57. There was nothing in the evidence of the above prosecution witnesses to suggest that they could have been lying or that they had any reason to lie to the court or frame up the accused person. I believed and still believe their evidence which was consistent as they all impressed the court as truthful witnesses.

58. The accused in his defense denied killing the deceased saying that he loved her very much and that the two had no disagreements. He blamed two men who went to the room led by a lady whom he alleges the deceased saw and that they beat him using the panga that was found in the room and cut the deceased while accusing her of being an infidel to them. He also claimed that they hit him on the head but PW7 testified that when they found the accused in the house he had no injuries.

59. Further evidence which would not qualify as a confession as it was not made to a person in authority as stipulated in sections 26, 25A and 26 of the Evidence Act and which would otherwise be treated as hearsay but which I find admissible under Section 6 of the Evidence Act as Res Gestae is the evidence by PW3 that when the police arrived at the scene, and entered the room, PW3 heard the Police ask the accused what weapon he had used to kill the deceased and that the accused said that it was a panga and that when the accused was asked on the whereabouts of the panga, he said that it was under the bed and the police retrieved it from under the bed. This evidence as narrated by PW3 who was at the scene through ought until the police arrived and secured the scene and arrested the accused as they took away the deceased's body to the mortuary also links the accused to the death of the deceased. PW4 too gave similar evidence to that of PW3 on what the accused told the police officer who asked him what he had used to kill the deceased.

60. In **Nguku v Republic [1985] eKLR** the Court of Appeal stated:

“in most cases the issue of whether something testified to can be admitted as part of the res gestae arises in relation to whether that which would otherwise be inadmissible as hearsay can be admitted as an exception to the hearsay rule, but the wording of the section is wide enough to cover the circumstances prevailing in this case provided the events of January 19 “are so connected with the facts in issue as to form part of the same transaction.” In Ratten v The Queen [1971] 3 AER 801, in relation to the admissibility of words spoken over the telephone by a woman about to be murdered Lord Wilberforce said at page 806-

“When a situation of fact (eg a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing in a broader sense, what was happening. Thus in O’Leary v Regem evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J said :

‘Without evidence of what, during that time, was done by those men who took any significant part in the matter and specially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.’

In the instant case we take the view that the events of January 21 could not be properly understood unless the antecedent events of the preceding two days were admitted into evidence. We agree with Mr. Bwonwonga, who appeared for the republic, that the events of January 19 were sufficiently connected with the facts in issue, namely the events of the Wayside Bar on January 21, as to form part of the same transaction. It would be wholly artificial in circumstances of this case to separate the soliciting stage from the receiving stage, so as to create two distinct offences, instead of that which was in reality a chain of events leading up to and constituting the offence of which the appellant was charged. It follows that in our judgment ground 3 of the memorandum of appeal fails.”

61. In my humble view, the evidence of a conversation between the accused and PW7 as heard by PW3 and PW4 forms part of facts relevant in this case on the basis that they are so connected with the facts in issue as to form part of the same transaction. They are admissible as Res Gestae.

62. I find that the prosecution witnesses' evidence places upon the accused a statutory burden to discharge a rebuttable presumption that having been the person last seen and found locked up in a room with the deceased and the deceased having been heard screaming for help saying a man was killing her on that material night in the same room where she was found dead and with the accused therein, the burden lay

on him to explain how she died. The statutory rebuttable presumption is spelt out under **Sections 111(1) and 119 of the Evidence Act**. These sections stipulate as follows:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

63. Having been placed at the scene of the incident as the person who was last seen with the deceased before she died, the accused has a duty to give an explanation of how the deceased met her death, or alternatively how they parted company.

64. Regarding the doctrine of “last seen with deceased,” the Nigerian case of **Moses Jua v The State (2007) LPELR-CA/IL/42/2006** is relevant. In that case, the court, while considering the ‘last seen alive with’ doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”

65. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna v The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** and opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

66. The courts in India have developed the doctrine of the last seen further. In the case of **Ramreddy Rajeshkhanna Reddy & Another. v State of Andhra Pradesh, JT 2006 (4) SC 16** the court held:

“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”

67. The evidence adduced by the accused person in his defence that they were attacked by some two men and a lady and that the deceased was hacked to death by the said men using the short sharpened panga after accusing her of cheating on them was in my humble view not believable and not credible. The evidence by PW3, PW4, PW5 and PW7 was so watertight against the accused person and proved beyond reasonable doubt that the accused was the last person seen alive with the deceased.

68. PW5 the caretaker of the guest house was clear that on the material night, the accused was with the deceased when they booked a room. He gave them room No. 10 and left after they had locked the room. The accused was carrying a black bag and from this court’s own observation of the way the short sharpened panga appeared, I have no doubt in my mind that that panga was a long panga which was cut shorter and sharpened for purposes of fitting in the black bag and carried therein by the accused person purposely for purposes of committing an offence.

69. I reiterate that in his defense, the accused claimed that two gentlemen entered their room and asked the deceased why she was cheating on them. The court observed the demeanor of the accused who showed difficulty and hesitated while giving his explanations which should not have been the case had he really seen these 2 gentlemen and if at all he had been attacked and assaulted as alleged, using the short sharpened panga, he would have sustained some visible injuries. secondly, why was the deceased heard by PW3 and PW4, crying calling on people to go and help her out as a man was killing her and why was the voice of the accused not heard screaming for help, if at all both the accused and deceased had been attacked that night?

70. The accused claims to have hidden in the bathroom after one of the men removed a panga and cut the deceased on the head. That he only came out after the two men had left. However, he contradicted himself during cross-examination when he stated that he was able to talk to the two gentlemen and when he asked them what they were up to, one of them hit him with a panga. The court finds this statement to be false because the accused had no injury when he was arrested.

71. My conclusion is that the accused was aware of what he had done to the deceased. This is so because when PW3, PW4 and PW5 went to his door to ask him about the noises they heard emanating from his room before the police arrived, the accused told them that he had had a

disagreement with his wife and that they had nonetheless resolved the issue and that the deceased was now asleep. He never told the witnesses that him and his lover had been attacked by two men and or that the deceased or himself had been injured by the said two men.

72. PW5, The caretaker of the Guest House locked the door of the room where the accused and deceased were, from the outside and left PW3 and PW4 watching and guarding at the door as he went to look for the police therefore the two men could not have come and attacked the accused and deceased after the caretaker had left. Further, when the accused was told by PW3, PW4 and PW5 to let the deceased speak and say whether the alleged disagreement that the accused and deceased had had that night had indeed been resolved, the accused told the witnesses that the deceased had now slept and that is what aroused suspicion from the witnesses who decided that the door should be locked from outside and the police be informed to come and confirm the position. When the police arrived, they found the deceased in a pool of blood and with several cuts on the body as confirmed by the post mortem report. If, as the accused person tried to persuade this court that the deceased was cut by one of the two men on the head, the question is where did the other multiple injuries found on the deceased's body and particularly the below injuries come from? These injuries are:

- ***Right side of the cheek to the chin extending to the ear severing several muscles and into the dental cavity measuring 13cm.***
- ***On the left anterior side of the neck was a cut wound of 3 cm.***
- ***On the right shoulder, was a 10cm cut wound. It was deep enough to expose the bone.***
- ***On the left wrist joint was a 10 cm cut wound.***

73. The accused was the last person to be seen with the deceased, entering the lodging before she was found dead and butchered. He even recognized the panga produced before court even though he stated it belonged to one of the men who attacked them. I do not believe the defence by the accused person. In my view, it was made up to cover up his heinous act. I am persuaded beyond reasonable doubt that the accused person was fully involved in the death of the deceased and his defence that he was a victim of other persons was a pure lie. If two gentlemen had really accosted the accused and deceased, the accused could have reported this to the police or even informed PW3, PW4 and PW5 the people who went to inquire what was going on in his room, following the screams for help by the lady in the room. The accused merely told the people that he and his wife had a disagreement but that the matter had been resolved. This court rejects the accused's defence that two other gentlemen went to the room and caused the death of the deceased. I find that the circumstantial evidence adduced by the prosecution witnesses irresistibly points at the accused person and no other person as being the person who killed the deceased using the sharpened and shortened panga which fitted very well in his bag produced as exhibits.

74. **On the issue as to whether malice aforethought has been established**, Section 206 of the Penal Code provides that malice aforethought is deemed to be established when any of the following circumstances are proven;

- An intention to cause death of or do grievous harm to any person, whether that person is the person actually killed or not***
- Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by wish that it may not be caused***
- An intention to commit a felony***
- 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.***

75. In **Republic v Tubere s/o Ochen (1945)12 EACA 63**, the court held that an inference of malice aforethought can be established by:

- ***Considering the nature of weapon used***
- ***The part of body targeted***
- ***The manner in which the weapon was used***
- ***The conduct of the accused before, during and after the attack***

76. In **Republic v Tuper S/O Ocher (1945) 12 EACA 63**, the court held:

“The court has a duty to perform in considering the weapon used and the part of the body injured in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say a spear or a knife than the use of a stick.”

77. From the post mortem report of the deceased, the body had multiple cut wounds, the head frontal had a deep cut 9cm, the right side of the cheek to the chin extending to the ear severing several muscles and into the dental cavity measuring 13cm. On the left anterior side of the neck was a cut wound of 3cm; the right shoulder had a 10cm cut wound deep enough to expose the bone and the left wrist joint had a 10cm

cut wound. The cause of death was anemic shock due to massive blood loss caused by multiple cut wounds.

78. From the above enumerated injuries on the deceased body, and considering the murder weapon as recovered and produced in court as an exhibit which on observation was clearly cut and sharpened to fit in the accused person's bag just for the purpose, there is no doubt that those injuries were inflicted by a sharp object and solely with the intention to cause grievous bodily harm and eventual death of the deceased, which intention was achieved. The deceased had several deep cut wounds in her body. The weapon used to cause those cuts was a panga and the panga was produced before court. This is backed up by the Government Chemist Analyst's report produced by PW6, which confirmed that the blood from the panga matched the DNA profile of the deceased. The choice of weapon and the parts of body targeted show the existence of malice aforethought. I am persuaded beyond any shadow of doubt that the prosecution proved malice aforethought on the part of the accused person, beyond reasonable doubt.

79. In his defense, the accused claimed that two other gentlemen were the ones who cut the deceased. He further claimed that one of the gentlemen slapped him with the said panga. If this were the case, the report from the government chemist would have shown that the panga had mixed DNA profiles as stated by PW6. Instead, the DNA profile found on the panga only matched the DNA of the deceased Vallery Apondi Odhiambo.

80. I therefore have no doubt that the panga produced by the prosecution as an exhibit belonged to the accused person and that he cut it and sharpened it to fit in the bag which he carried to the lodging with the intention of using it to accomplish the mission of killing the deceased Vallery Apondi Odhiambo. The fact that he was carrying around a panga in his bag further shows that he had prior intention to kill the deceased because why else would the accused travel all the way from Kisumu to visit his lover, and carry a panga in a bag for the sake of spending a night at a guest house?

81. In his defense, the accused also claimed that he and the deceased had a smooth love affair, and that he still loved the deceased. In my humble opinion, the accused person's defence wanted the court to infer that he had no motive to kill the deceased. The prosecution also did not adduce evidence to show motive aside from the disagreement the accused said he had with his wife as told to PW3, 4 and 5 that material night. However, in the case of **Chogo Vs Republic (1985) KLR**, the Court of Appeal held that:

“Under section 9(3) of the Penal Code, the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the fact in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability.”

82. In the instant case, the fact that the accused told PW3 and PW4 who went to inquire on what was happening that he had a disagreement with the deceased was not sufficient to form motive. However, failure to prove motive is not fatal to the prosecution's case. The fact that the accused person was carrying a panga in his bag which panga was cut short enough to fit in the bag and sharpened is enough proof that the accused had malice aforethought and his sole intention of going to Bondo to look for the deceased girlfriend was for purposes of killing her using the weapon which he was carrying in his bag namely, the cut short sharpened panga.

83. In **R vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135**. It was held that:

“In order to justify circumstantial evidence, the inference of guilt, and 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.

84. Having considered all circumstances of this case, I find that the circumstances points irresistibly towards the accused person as the person who with malice aforethought butchered the deceased to death using the exhibited panga. The accused Collins Oluoch Ogweno was the last person seen with the deceased alive, there was no other person who went to their room that night and the two gentlemen he claims to have attacked them was just a figment of his own imagination and a made up lie.

85. I find that the defence tendered by the accused was a perfect lie and I reject it. The accused also claimed that he asked the police for his phone to call the deceased's mother because he knew her. However both the deceased's mother and the uncle had no idea on who the deceased's boyfriend was. The accused defense as a whole is therefore rejected.

86. Accordingly, the attack was with the intent to cause death or do grievous harm to the deceased. I am satisfied that the prosecution has proved that the accused had malice aforethought in causing the death of the deceased.

87. In conclusion, I find and hold that the circumstantial evidence adduced by the prosecution witnesses proved beyond reasonable doubt that the accused person Collins Oluoch Ogweno had malice aforethought and that he is the person and no other person, who unlawfully caused the death of the deceased Vallery Apondi Odhiambo. I find the accused person COLLINS OLUOCH OGWENO **GUILTY** of the offence of murder of the deceased VALLERY APONDI ODHIAMBO contrary to section 203 as read with section 204 of the Penal Code and I **CONVICT** him accordingly.

Dated, signed and Delivered at Siaya this 4th Day of May 2020 Via Skype due to Covid-19 situation.

R.E. ABURILI

JUDGE