



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 15 OF 2019 [MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

EMMANUEL OTIENO PAMBA.....ACCUSED

JUDGMENT

1. The accused herein **EMMANUEL OTIENO PAMBA** is charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offences are that on or about the 30/8/2019 at Umala sub-location within Siaya County he murdered Pamela Adhiambo Ogola and in count 2, it is alleged that he murdered LOO. He pleaded not guilty to the two counts.

2. The prosecution called twenty (21) witnesses in support of their case.

The Prosecution Case

3. **PW1, Fredrick Wandera Ongweko** testified on oath that he knew the deceased Pamela Adhiambo Ogola who sometime in February 2018 sought his help in carrying out succession proceedings for three parcels of land namely, Parcel no Bukhayo/Bugengi/10560 in the name of the deceased's Brother Richard Odwori Ondeng, Parcel no. Bukhayo/Bugengi/11919 registered in the name of Charles Ondeng and Parcel No. **Bukhayo/Bugengi/11921** registered in the name of Eudia Adhiambo Ondeng.

4. Fredrick Wandera Ongweko further testified that the deceased approached him in the company of the accused, whom he learnt was taking care of parcel no **Bukhayo/Bugengi/10560**, when she sought his help and that the deceased informed PW1 to file succession petitions in the name of the accused herein which he did in succession cause No.81/2018 before Busia Chief Magistrate's Court.

5. PW1 further testified that for Parcel No. Bukhayo/Bugengi/11921 he filed the Petition in the name of the deceased vide Chief Magistrate's Court at Busia Succession Cause No. 506/2018 and subsequently thereafter the accused approached him and said he wanted to sell the said land to which PW1 responded that succession was not complete so he could not sell the land.

6. He testified further that after a few days, the deceased went and told him that the accused had sold 2 acres of the said land subject of succession Cause No.81/2018 after which he confronted the accused but the accused refused to accept the mistake forcing PW1 to engage the Land Registrar, Busia, Mr. Chepkwesi who revoked the registration.

7. PW1 further testified that the deceased told him that the accused was threatening to kill her so he referred her to the Police to report the threats and that subsequently the deceased went to him and informed him that since she was the heir, he should remove the name of the accused from succession Cause No. 81/2018 which was done.

8. PW1 then caused the accused to be served with revocation documents on 17.6.2019 by a Court Process server after which PW1 learnt that the deceased and her son had been killed by the accused person herein. He stated that when the accused learnt of the deceased Pamela Adhiambo seeking to have the grant obtained by the accused revoked, he became furious and that subsequently the deceased would call PW1 from time to time telling him of her fears following death threats issued to her by the accused person herein, to the point that the deceased got scared of going to Busia. PW1 identified several documents which he assisted the deceased and accused prepare for succession proceedings. These documents which were later produced as exhibits are:

1. Death Certificate No. 0676161 dated 21.3.2016 for Richard Oduori Ondeng MFI 1 (a)

2. Burial Permit for the said Richard Oduor Ondeng dated 21.3.2016 SN 810656 – MFI 1 (b).

3. Petition in Chief Magistrate's Court at Busia CM's Court plus accompanying documents in Busia CM P&A No. 81/2018 MFI 2.

4. *Affidavit of service for service of chamber summons for revocation of succession cause No. 81/2018 MFI 3.*

5. *Deed for parcel No. Bukhayo Bugengi/10560 transferred in the name of Emmanuel Otieno Pamba dated 16.3.2018 MFI 4.*

6. *The Green card for cancellation of registration of Bukhayo/Bugengi/10560 dated 16.3.2018 MFI 5.*

9. The witness added that both the accused herein and the deceased Pamela Adhiambo had given him their telephone contacts therefore he used to communicate with them.

10. In cross examination by Mr. Oduol Counsel for the accused person, PW1 reiterated his evidence in chief and maintained that it was the accused who threatened the deceased and further that the deceased used to report to him from time to time so he advised her to report to the Police which the deceased informed him that she had done. He also testified that he filed succession Cause Number 81/2018 with Emmanuel Otieno Pamba as the administrator and Pamela Adhiambo as the witness.

11. **PW2, Stephen Ouma Osige** the Assistant Chief Esikulu Sub-Location and Acting Chief of Busia Township Location testified on oath that he knew the deceased as she came from Mundika but was married in Umala and that he came to learn of her death on the 30.8.2019 when he met one Josiah Mdambade who asked him whether he knew that the deceased had been murdered prompting him to look for the accused who used to stay in the deceased's home. He further testified that the following Wednesday he went to the deceased's home and met other people from the area after which they agreed to record statements at Siaya Police Station as they did not know who killed the deceased.

12. Mr. Ouma Osige further testified that the deceased lived in Umala Siaya District at her matrimonial home when she was killed and that he later learnt that the accused had murdered Pamela and her nephew. He stated that Pamela had placed her land in the care of the accused herein. He further testified that he had known the accused for over 5 years as they both used to ride motorcycles (*Boda Boda*) and that the accused used to care for the parcel of land belonging to the late Pamela Adhiambo.

13. In cross examination, Stephen Ouma Osige testified that he did not know anything regarding the deceased's death.

14. **PW3, Edward Ochieng Ombimo** took oath and identified himself as a farmer from Busia District and that he knew both the deceased and the accused and identified the latter in the dock.

15. **PW4, Josiah Madambode Ondagi** testified on oath that he was not related to the deceased but knew her after she went to his home sometime in March 2018 and told him that her mother and brother had died and left pieces of land and that she had heard that the accused had gone to him wanting to do succession over the said parcels to which he had advised the accused on the succession process.

16. He further testified that he later met the accused at the market and the accused told him that he had used a short cut and obtained title already which left PW4 wondering how the accused had obtained title to land in a short period. He proceeded to testify that the accused had informed him that he was doing succession of his late brother's land Richard Oduor but that when the deceased went to PW4 and asked about the information the accused had sought, he told her that she was the right person to succeed her mother and advised her on the process of succession after which he took the deceased to PW1, Fred Wandera to assist her do the succession.

17. In cross examination, he testified that the police from Siaya Police Station went and recorded his statement.

18. **PW5, Dr. Gabriel Juma** testified on oath that he worked at Siaya County Referral Hospital as a Medical Officer qualified with a Bachelor of Medicine and Bachelor of Surgery, 2013 from Moi University. He testified that he carried out the post mortem on the deceased Pamela Adhiambo and prepared an autopsy report on 12.9.2019 at 9.00 a.m. He stated that the deceased was identified by her relatives Joshua Ouma Juma and Millicent Adhiambo and a Police Officer Fred Ochido. Dr. Juma testified that the deceased's body was of an elderly lady. It had seven stab wounds 5 on the ulterior – in the front part of the chest, one on the right hand and another on the right thigh as well as bleeding in the lung. He found that on the right lung, there were 2 sharp deep cuts with clots and that there was laceration on left ventricular wall with bleeding. Dr. Juma testified that his findings led him to conclude that the cause of death was due to hemorrhagic shock due to sharp chest trauma (penetrating) with *cardiac tamperant* and respiratory compromise (***not breathing well because of stab wound in the heart***). He produced the post mortem report for Pamela Adhiambo as exhibit 1.

Dr. Juma further testified that he also conducted a post mortem on LOO on 18.9.2019 at 1.30 p.m. whose body was identified by Cpl. Fred Ochido and Millicent Adhiambo. On examination, he found the body was of an African male 5 ½ feet. It had had 8 sharp wounds on the right chest, 3 stab wounds in the abdomen and 3 on the left leg measuring about 8 cm in length. There was marked parlor on the conjunctiva – lack of blood. In the Respiratory system, there was non-penetrating sharp anterior right chest wound touching on the 5th rib. There were no lung injuries. The Cardiovascular system was normal, the Digestive system had penetrating wounds on the transverse colon (***Large guts***) and maintaining (***blood supply to the colon***) and blood clots were noted in the injured areas. The Liver and spleen, head, spinal cord and other areas were normal. He opined that the cause of death was hemorrhagic shock due to sharp abdominal trauma with laceration of mesenteric vessels. He produced the postmortem form for LO Ouma as exhibit 2.

19. **PW6, Joseph Otieno** took oath and identified himself as a farmer from Umala and a neighbor to the deceased. He recalled that on the 30.8.2019 at about 8 p.m. he was in his house in Umala, East Alego when he heard noises – screams from the deceased Pamela's house prompting him to get out of his house armed with a panga and solar light while also screaming for help forcing other people to come out and follow him. He stated that on reaching the deceased's house, he found O, a 17-year-old boy who was living with the deceased lying on the ground with stab wounds all over the stomach and other parts of the body. The body was near the door of Pamela's house. He stated that the deceased L was a student at Umala. He subsequently entered the house and found the deceased lying down in a pool of blood. He touched her chest to establish whether she was breathing but found that she was already dead.

20. He further testified that he did not know the accused nor the person who killed the two deceased persons as he found them lying there. In

cross examination, the witness reiterated that he was the first person to reach the scene and did not find any other person other than the two deceased persons.

21. **PW7, Getruda Anyango Otieno**, a wife to PW6, Joseph Otieno gave testimony similar to what PW6 had stated. She added that unlike her husband, she did not enter the deceased's house as she remained outside screaming after seeing O's (L), Pamela's nephew body at the door and that went to the scene.

22. In cross examination she testified that she recorded a statement with the police and told them that the deceased Pamela had told her that she had a land dispute in Bukhayo and that her life was in danger. In re-examination she testified that the deceased Pamela had told her that she had a land dispute in Bukhayo with one Otieno whom the witness did not know.

23. **PW8, Maurine Adhiambo Onyango** testified that she lived at Umala and that on on the 30.8.2019 at about 8pm she heard screams from the deceased's house who was her neighbour and ongoing to the home of the deceased Pamela, he found the two deceased Pamela and her nephew Ondeng dead. She stated that only the two of them (Pamela and O) lived in that house. She further testified that she did not know who killed the two.

24. **PW9, John Odhiambo Sewe** a brother in law to the deceased Pamela Adhiambo Ogola and a peasant farmer in Umala testified that he lived about 200 meters away from Pamela's home. He recalled that on 30.8.2019 at about 10.30 p.m. he received a call from one Mamba Orenge informing him that his sister in law Pamela had been murdered after which he proceeded to her home and confirmed that indeed Pamela and her nephew had been murdered and that Pamela's body was inside her house whereas her Nephew's body was lying outside her house. He testified that he did not know who killed Pamela and her nephew.

25. **PW10, Kevin Ouma Otieno** from Umala village, Umala Sub-Location Testified on oath that he was a brother in law and neighbor to the deceased Pamela Ogola and that he knew that the deceased Pamela and her nephew were murdered on the 30.8.2019 and that on the 12.9.2019, he was asked to go and identify the body of the two deceased persons before post mortem could be carried out at Siaya County Referral Hospital. He further testified that he was together with John Odhiambo Sewe when they identified the deceased's bodies after which postmortem was carried out.

26. **PW11, Tobias Ochieng Odiedo**, a Senior Assistant Chief of Umala Sub-Location testified on oath and recalled that on the 30.8.2019 at about 8.30 p.m. he was in his house when Paul Owino Osiro called him and told him that Pamela Adhiambo Ogola and her nephew Ondeng had been murdered. He immediately called the Chief Jared Makana Abiero and informed him and he also notified the Police at Umala Police Patrol Base, after which he proceeded to the crime scene where he found the Police had already arrived.

27. He stated that he found the body of LOO lying on his back in front of the house of Pamela with cuts on the stomach, leg, knees and hands while Pamela was lying in her sitting room on her stomach with cuts all over her body and the house was full of blood. He stated that the OCS Kogelo arrived at midnight and removed the bodies to Siaya County Referral Hospital for postmortem.

28. The witness further testified that on inquiry from neighbours upon his arrival at the scene, he was informed that Pamela had been complaining to them that she feared for her life because someone was following her over a land dispute they had with him at Mundika in Busia, her original home. He further testified that two days after Pamela's death, an Assistant Chief from Mundika went and told them that Pamela had a land dispute with the accused which information he relayed to the investigating officer.

29. **PW12, Winfred Nyandoro Nyaberi**, the Lands Registrar, Busia County testified that he had worked there for 6 months from April 2019 and that according to the official records held at the Lands office, there was evidence that the accused was at one time registered as proprietor of Land Parcel No. Bukhayo/Bugengi/10560 which registration was found to be irregular hence it was reversed and he was deregistered for reasons that the documents that were used to register the accused as proprietor were found to be fraudulent. PW12 produced the said records and documents from the Lands Office which were used to register the accused person as proprietor of the aforesaid land parcel and the revocation thereof as exhibits 3 (a) to (j) The said documents are:

(1) Transfer of Land Form for Bukhayo/Bugengi/10560(MFI 4(b) produced as P EX3(a)

(2) Title Deed which was in his name but was later cancelled (MFI 4(a) produced as Pex 3(b)

(3) Title Deed for Bukhayo/Bugengi/10560 in the name of Richard Oduori Ondeng which was surrendered after the presentation of transfer documents (MFI 4(c) produced as PEX 3(c)

(4) A letter of consent from the Busia Municipality Land Control Board dated 22.2.2018 (MFI 4(d) produced as Pexb 3(d)

(5) A receipt of payment of KShs. 1,000 by Emmanuel Otieno Pamba for Transfer of Bukhayo/Bugengi/10560 produced as Pexb 3(e)

(6) Application for consent of Land Control Board by Richard Odwori Ondeng not dated (MFI4(f) produced as Pex 3(f)

(7) Copy of certificate of official search for Bukhayo/Bugengi/10560 conducted on 14.3.2018 – proprietor is Richard Odwori Ondeng MFI (g)produced as Pexb 3(g)

(8) Certified copy of the identity card of Richard Odwori Ondeng MFI 4(h)produced as Pexb 3(h)

(9) A certified copy of identity card for Emmanuel Otieno Pamba (MFI 4(i)produced as Pexb 3(i)

(10) E-slip for payment of an amount not indicated. (MF4(j) produced as Pexb 3(j)).

30. He witness further produced two green cards or Certified Copies of the Register for **Bukhayo/Bugengi/366 produced as P.Ex 4 and for Bukhayo/Bugengi/10560 produced as P.Ex 5.**

31. The said green cards show that the mother title for Bukhayo/Bugengi/10560 is **Bukhayo/Bugengi/366 and the** last proprietors before it was closed on partitioning were Charles Otieno Ondeng, Richard Odwori Ondeng and Alfred Odhiambo Oyoda as at 25.1.2013. The parent title was on 27.8.2013 on partition and new titles came into being namely: Bukhayo/Bugengi/10558, Bukhayo/Bugengi/10559 and Bukhayo/Bugengi/10560 (MFI 6).

32. He further testified that the certified copy of the Register for Bukhayo/Bugengi/10560 was opened on 28.8.2013 in the name of Richard Odwori Ondeng and on 11.9.2013, 9 Title deed was issued to him (MFI7).

33. Further, that on 15.3.2018, Emmanuel Otieno Pamba was registered as proprietor of the above land Bukhayo/Bugengi/10560 and a title Deed issued to him but he did not collect it. It was later cancelled through an entry in the register hence he is no longer the registered owner thereof, and that therefore the legal registered owner remains Richard Odwori Ondeng.

34. The witness further testified that the transaction carried out by Emmanuel Otieno Pamba were Irregular and so they were cancelled by the previous land Registrar and that the witness had personally not done any transaction for Emmanuel Otieno Pamba.

35. **PW13, James Makobi**, a Law Enforcement Liaison Officer at Safaricom Limited based at Kisumu and responsible for Nyanza and western Kenya Region testified that they received a request letter dated 20.9.2019 from Directorate of Criminal Investigations, (DCI) Siaya County, Mr. Nelson Muhaya requesting Safaricom Mobile service provider to provide the following information from the mobile number 0700361530 registered in the name of Emmanuel Pamba identity card No. 25612908 covering the period 28.8.2019 to 20.9.2019:

(1) MSISDN history on the said mobile phone handset.

(2) Incoming and outgoing calls from 28.8.2019 – 20.9.2019.

(3) For registered details.

(4) The Imei attached to the MSISDN

(5) The call data print out showing the Imei history of the handset, reflecting the incoming and outgoing calls and short messages service.

36. The witness showed the court and produced call data report generated from the named mobile telephone belonging to the accused Emmanuel Otieno Pamba and stated that the call data records is in columns. Column A is the mobile call number that is queried; column B is the mobile phone number that is in communication with the mobile phone in column A and also shows service type, whether it is a call or as SMS; Column C is for record type i.e. SMS or call or forwarded; Columns D is service type, whether it's a call or SMS; column E is the call type incoming forwarded or outgoing calls; column F is time – year, month, date and time in 24 hours; column G is duration in seconds; column H is the sub-location – Base Transceiver station – named according to localities where the mobile phone is found for identification, and also showing landmarks; column I is the sub-location name; column J is the Imei number or model name that the Simcard is inserted; column K is the model; column L is IMSI – the sim card and number; column M is Roaming mode capture; Column N is the ID/Name look up – showing subscriber details.

37. The witness produced as exhibit the call data records of mobile phone number 0700361530 registered in the names of the accused Emmanuel Otieno Pamba under identity card No. [...] covering the period 28.8.2019 to 20.9.2019 which he had processed after receiving a request from the DCI Siaya County to provide the same.

38. He further testified that as at 30.8.2019, the phone number 0700361530 first communicated at 0657 hours and the subscriber was at a place called Mundika. Again at 0716 hours he was still at Mundika. That the mobile phone remained at Mundika with a lot of communication until 1259 hours.

39. Mr. Makobi further testified that at 1329 hours, the accused's (subscriber's) phone number changed location to Busibwabo and at 1436 hours the subscriber was back at Mundika until 1512 hours, went to Matayos then Mundika. He further testified that at 1557 hours the phone was at Matayos, at 1602 hours it was still at Matayos, at 1618 hours it was at Sega up to 1638 hours. At 1653 hours, the subscriber was at Ugunja. At 1704 hours he was at Ugunja-Sira-Nyawita, at 1705 hours he was at Rangala. At 1831 hours, the subscriber was at Got-Ogenga and stayed there until 1842 hours. **At 1946 hours the subscriber was at Umala.** At 2032 hours, the subscriber was at Rangala. At 2033 hours he was still at Rangala. At 2161 hours, the subscriber was back at Mundika and there was so much communication from Mundika until 2202 hours and now on 31.8.2019 at 0639 hours the subscriber was captured at Mundika. The witness produced the letter of request for data records, as Pex 6, the Mobile date record for the accused person's mobile phone as Pex 7 and the certificate of electronic evidence as Pex 8.

40. In summation Mr. Makobi stated that as per the call data records, on 30.8.2019 the subscriber of phone number 0700361530 was operating from Mundika, he went to Umala and returned to Mundika.

41. In cross examination, by Mr. Oduol Advocate, Mr. Makobi testified that the records also reveal movement of the phone as the location is cell based depending on traffic and thus in some areas it covers wider location but in some areas it covers the landmark. He further testified

that the call data records did not show the content of the call as the law does not allow the company to show the content of communication.

42. **PW14, John Murimi Njagi** testified that he worked for Watu Credit Microfinance who dealt in lending and specialized in asset financing of motor cycles and TukTuks. He further testified that the accused Emmanuel Otieno Pamba was one of their clients who had visited their office on 1.7.2019 and requested for a facility asset motor cycle and having met all qualifications, he was advanced a loan and subsequently a motor cycle Registration No. KMEW 504H Red Boxer was surrendered to him. Mr. Njagi testified that the accused was to pay the loan in 61 weeks by weekly installments of Kshs2600 and that as at 30.8.2019 he had paid Kshs.12, 328.

43. He further testified that when the accused defaulted /stopped remitting the weekly repayments, they subsequently called him but his phone was off as well as those of his guarantors. He testified that the company had tracking devices on their motorcycles and that they traced the motor cycle to Siaya Police Station at C.I.D. Offices and soon established that the motor cycle was an exhibit in a Murder case. He also testified that the C.I.D. then asked him for the tracking history of the motor cycle, specifically on the 30.8.2019, and he accessed the tracking which showed that the motor cycle in question was operating between Mundika and Umala from 3 p.m. to 11 p.m. the witness submitted certified documents to the C.I.D. Siaya and recorded his statement at Siaya CID Offices. He identified the motor cycle Registration number KMEW 503H Red Boxer with a black seat and red front (motorcycle Registration No. KMEW503H which was brought to Court and marked for identification as MFI 6. The witness produced as exhibits the tracking data records and electronic evidence certificate as exhibits and stated that the company had retained ownership of the motor cycle until it was repaid for in full.

44. He produced the following as exhibits:

- (1) Certified as true copy of original, Delivery note dated 1.7.2019 signed by Emmanuel Otieno Pamba produced as P.Ex No. 9(a)*
- (2) The logbook showing the motorcycle Reg. No. KMEW503H was as at the time of delivery was owned by Terranova Autospares – 24.6.2019 because the company for the witness had bought it from Terranova Autospares and it was later transferred in their name produced as P.Ex 9 b.*
- (3) The invoice indicating the total amount paid for the motorcycle. It is dated 1.7.2019 No. 4383 produced as P. Ex 9 (c).*
- (4) The comprehensive original Insurance cover by Sanlam General Insurance Company, certificate No. D.3617700 issued on 1.7.2019 expiring 1.7.2020 for the Motorcycle Reg. No. KMEW503H produced as Ex 9(d).*
- (5) The motorcycle Reg No. KMEW503H sold to Emmanuel Otieno Pamba on 1.7.2019 produced as P.Ex.10*
- (6) The data from tracking device showing the movement of the motorcycle KMEW503H in question for 30.8.2019 from 3 pm to 11 pm produced as Pex 11(a).*
- (7) A certificate of production of the data from the company's own tracking system, duly stamped and dated 8.10.2019 produced as P.Ex 11(b).*

45. In cross examination by Mr. Oduol counsel for the accused, Mr. Njagi testified that on 30.8.2019 at about 9.28 p.m. the tracker showed that the motorcycle was along the road between Umala and Lumino and that at about 21.28 p.m. the motorcycle was at Modokomi Market. He stated that the 1st page of the report shows it as a stolen vehicle report but that the motorcycle was not stolen.

46. He also stated that the motorcycle was a co-joined asset with the company hence it was still their asset until the loan was cleared. On being asked by the court, the witness further told the court that according to the tracking device, the motorcycle was at Umala for 45 minutes and 31 seconds. On being asked further by Mr. Oduol Advocate, the witness stated that the tracking showing the rider rode for 31 minutes from Rangala to Umala and stayed there for 45 minutes and 31 minutes

47. **PW15, No. 6143 P.C. Francis Kinyua** attached to crime, Busia Police Station testified that on the 26.9.2018 at around 11.31 am while at the Crime Office Busia he received two people a lady and a man, Pamela Ogola and another gentleman and that Pamela told him that one Emmanuel Otieno Pamba had done succession of the land she had given him permission to take care of without her knowledge. He further testified that when he recorded her statement, Pamela stated that the accused had threatened to cut her into pieces because she was just a woman. The witness produced the original statement recorded from Pamela Adhiambo and thump printed as Pex 12.

48. He further testified that after recording the statement he summoned the Assistant Chief who went to the Police Station with Pamba. That the Assistant Chief the witness that the matter was being handled by Assistant County Commissioner, Matayos. That the OCS therefore advised that the dispute be referred back to the Assistant County Commissioner Matayos then the witness released the complainant and Pamba to go back to the Assistant Sub-County Commissioner Matayos. He then added that about two months before testifying in court, he was notified by DCI Officers Siaya who went to the Office accompanied by the relative who had gone with Pamela in 2018 reporting Emmanuel Pamba and they told the witness that Pamela Ogola had been murdered so they asked if the witness had recorded her statement which he retrieved from the police files. The statement is thump printed by Pamela Adhiambo Ogolla and also signed by the witness.

49. In cross examination by Mr. oduol counsel for the accused person, PW15 testified that the report of threats was made by Pamela and that the witness recorded the statement which was authentic despite him not producing an OB extract.

50. In re-examination he testified that the deceased Pamela was the one who gave him her statement which he recorded in his hand and that it was from her statement that he knew the accused person Emmanuel Pamba.

51. **PW16 No. 79178 P.C. Benjamin Ekonoi**, based at Umala Police Post testified that on **29.8.2019 at about 8 a.m.** he was manning the

front office when Assistant Chief of Umala Sub-Location, Mr. Tobias Ochieng Odiedo called him and informed him that there was a murder in his sub-Location at Nyasere B – village, about 2 km from Umala Centre. P.C. Ekonoi and his colleague P.C. Cheruiyot proceeded to the scene and found two bodies lying dead and he informed OCS Kogelo Police Station CIP James Kago who went to the scene accompanied by the in charge of Crime Siaya and after processing the scene, the body of Pamela Adhiambo about 60 years old and one juvenile boy Ouma Ondeng were removed to the mortuary at Siaya County Referral. P.C. Ekonoi further testified that the deceased, Pamela, had cut wounds on her stomach and both cheeks while Ouma had cut wounds on the stomach and both knees.

52. In cross examination, P.C. Ekonoi stated that the Assistant Chief called him on 29.8.2019 around 8 a.m. and that when he arrived at the scene he did not find the assailants. In re-examination he stated that the Assistant Chief called him after the incident and he went to the scene.

53. **PW17, Polycarp Lutta Kweyu** working at Kisumu Government Chemist Department for 8 years testified that he was qualified with a Master of Science degree in Medicinal Chemistry from Jomo Kenyatta University of Agriculture and Technology. He recalled that on the 20.9.2019 he received various exhibits from one CPL Ochudo D.C.I. Siaya accompanying an exhibit memo:

(1) A yellow Oxygen O₂ branded helmet in a Khaki envelope marked “A” (MFI 8)

(2) A yellow O₂ branded helmet in a khaki envelope marked B (MFI 9).

(3) Blood sample of Pamela Adhiambo indicated as deceased.

(4) Blood sample of LO indicted as deceased.

(5) 2 bottle of blood sample of Emanuel Otieno Pamba.

54. He stated that the exhibits were all submitted by an Exhibit Police Memo form dated 20.9.2019 (MFI P.10) requesting to ascertain the origin of the blood stains and generate DNA profiles if any; using chemical methods.

55. After analysis the Government chemist analyst determined as follows:

a. The yellow helmets items A and B were moderately and slightly stained with human blood respectively and they generated DNA profiles as per the back of his report. They found DNA profiles from the helmets “A” and “B” matched the DNA profile of LO the deceased.

b. The witness then prepared the report on 16.1.2020, signed it and sealed it.

56. He produced the Report as P Ex.13.

57. In cross examination by Mr. Oduol Advocate for the accused person, Mr. Kweyu testified that he received the items and instructions to determine whether there was any human blood in Exhibits “A” and “B”, whether there was any DNA profiles in the said Exhibits “A” and “B” and whether there was any similarity in the DNA profiles if any on exhibits marked “A” and “B” and “C” and “D” called blood) and E1 and E2 (accused blood) and that he found that blood on the Helmets “A” and “B” generated DNA profile of the deceased LO.

58. **PW18, No. 66783 CPL Simon Likonyi** attached to Crime Scene Investigations at Siaya County testified and recalled that on the 10.12.2019 at about 1000 hours while at the office in Siaya he received a CD disk containing photographs allegedly taken at the scene of murder at Umala area of Siaya County on the night of 30th August 2019 where two people were allegedly murdered. The CD was given to him by O.C. Crime Siaya, Inspector Kibor, accompanied by a letter dated 10.12.2019 requesting the witness to print enlarged exposures and to certify them to be used as exhibits in a murder case.

59. He stated that after printing the photographs, he saw the photos of a female adult lying in a house in a pool of blood; and a body of a boy lying in a pool of blood with deep cuts all over his body and that he certified that the photographs were produced under his supervision. The witness produced the following as exhibits:

a. 1st – 4th photographs showing a closer view of the deceased female adult Pamela Ogolla Adhiambo produced as PEx 14(a), (b), (c) and (d).

b. Photographs 5 – 9 showing closer views of the deceased LO Lying in a pool of blood with cut wound injuries on the body produced as PEx 15 a, b, c, d, e.

c. The letter dated 10.12.2009 from OC Crime produced as PEx 16.

d. An exhibit Memo requesting the witness to produce the photographs and attaching the C.D produced as P Ex. 17

e. Certificate of photographic Evidence produced as PEx 18.

60. **PW 19 No. 237371 Inspector Hilary Kibor** the Officer in Charge Crime, Siaya Police Station testified that on 30.8.2019 at around 8 p.m. he received a call from Assistant Chief Umala Sub-Location informing him of a murder incident. He testified that he rushed to the scene where he found a crowd of about 50 people and two Police Officers from Umala Police Post.

61. Inspector Kibor further testified that he found two people dead, one a boy of about 15 years outside a small house while inside the house was a body of an older lady both with visible injuries and each in a pool of blood. He further testified that he secured the scene and informed his superiors and the OCS Kogelo who also went to the scene and the Scene of crime personnel were informed of the incident after which he took out his phone and took photographs of the crime scene as it was about to rain which he later gave to the scenes of crime personnel to print and certify after which the investigators took over. He identified the photographs which he took with his phone, which were produced by PW18 –P Exhibits 14 and 15. He also stated that on 19.9.2019 he wrote an order for DNA sampling for the suspect and handed it over to the investigating officer. He produced the order dated 19.9.2019 as PEx 19 and identified the accused in the dock.

62. In cross-Examination by Mr. Oduol Advocate for the Accused, Inspector Kibor testified that the accused accepted that the blood be taken from him and DNA samples also be taken from him.

63. **PW20, No. 232925 Chief Inspector James Kago** the Officer Commanding Kogelo Police Station testified that on 30.8.2019 at about 9.30 pm whilst on patrol within Kogelo Police Station jurisdiction, he received a telephone call from P.C. Benjamin Ekonoi, PW16 the Officer in charge Umala Police Post to the effect that he had received a call from the Assistant Chief Umala Sub-Location that in the said Location Nyasiro Village, people had been murdered.

64. He further testified that he and his team then proceeded to Umala and met officers from Umala Police Post and other officers from Siaya Police Station led by Inspector Kibor where they found two people lying dead. He testified that the Assistant Chief and residents of the area told him that the deceased Pamela Adhiambo was lying inside her house in a pool of blood with cut injuries on the cheek and abdomen and that the second body was of LOO and that it was lying outside the house with cut injuries on the left knee, abdomen and right elbow.

65. Inspector Kago further testified that they searched in and out of the house to locate the murder weapon but they never recovered it. He further testified that the officer he was with Inspector Kibor used his phone to photograph the two bodies after which they removed the two bodies to Siaya Referral Hospital Mortuary and investigations were taken over by Directorate of Criminal Investigations.(DCI).

66. **PW21 No. 58242 SEARGENT JOE NZIVE** the Investigating Officer in this case based at Siaya DCI took oath and recalled that on 4.9.2019 at 2 p.m., he was at the Office when a group of people led by Esikulu Assistant Chief one Stephen Ouma went and sought audience with them. That he was instructed by D.C.I.O. to listen to them. He stated that the said group told him that they had an issue concerning a murder case reportedly at Umala. He testified that this case was previously investigated by CPL Ochido. That he recorded a statement from which he gathered that when the group wanted to come go to Siaya, they wanted to board the motorcycle of Emmanuel Pamba the accused herein and that in the process, they noticed both helmets having blood stains. The witness stated that he involved the D.C.I.O. who instructed him and CPL Omuse together with CPL Ochido to proceed to Busia immediately and get the helmets for further Investigations.

67. He stated that they met the Assistant Chief Stephen Ouma (PW2) who informed them that he knew the suspect who was working at Burieny Primary School as a Cleaner. Together, they proceeded to the said Burieny Primary School and immediately the Accused person saw them, he jumped over the fence leaving behind a motor cycle Registration No. KMEW 503H Boxer Red in Colour. That they took possession of the Motorcycle and took it with them. The witness identified the Motorcycle which was in court. (Pexh 10 produced by PW14 John Murimi Njagi.)PW21 further testified that PW2 led them to the suspect (accused person's) house in Mundika town where they found his second wife Maurice Nabwire. That on arrival they told her the reason for their visit being to pick helmets of Otieno Pamba Emmanuel (the accused herein) which they collected and took them to the Police station for further investigations. PW21 identified the two helmets yellow in colour as the ones they recovered from the house of the accused and his second wife adding that the said wife of the accused told them that the two helmets belonged to the suspect accused person herein. They then prepared an inventory form on 4.9.2019 and they all signed, thus, PW21, Maurice Nabwire (wife to the accused), Stephen Asige-PW2 and CPL Joseph Tuwaure Officer Commanding Police Post at Esikulu. PW21 then produced the 2 helmets plus the inventory that he prepared as exhibits P. **Ex 20 (a) and (b) inventory dated 4.9.2019 produced as P. Ex 20(c) respectively.**

68. Further testimony by PW21 was that after recovering the exhibits, they took them for safe keeping at the Police Station and that later, CPL Fredrick Ochido took blood samples form the two murder victims and from the Accused person who was taken to hospital after his arrest. PW21 identified the blood sample Form for the Accused and a note from Siaya County Referral Hospital which were taken to the Government Chemist for comparison with the blood found on the two helmets. He added that CPL Ochido also prepared a Memo Form to escort the said samples and exhibits to the Government Chemist (MFI 10 which PW21 produced as exhibit P. **Ex No. 21 (Memo Form dated 20.9.2019).** He also produced the **Blood Extraction Form for Accused person dated 19.9.2019 as P. Ex 22(a)** and a pink **Hospital Card as P. Ex 22 (b).**

69. PW21 further testified that they also received data records from Safaricom showing that the Accused was in the vicinity of the murder on the material night of 30.8.2019 at 8 p.m. Further, that in the course of their investigations, they also obtained tracking record (P. Ex11 (a)) of the motorcycle **Reg. No. KMEW 504 H Boxer** from John Njagi (PW14) the Manager, **Watu Credit, Western Region** who had loaned out the motorcycle to the Accused in July 2019, which showed that the motorcycle was on 30.8.2019 parked at Umala area for about 45 minutes.

70. PW21 further testified that on 9.10.2019 they proceeded to Busia Lands Office investigating land parcel **No. Bukhayo/Bugenyi/10560.** That they were supplied with documents by the Land Registrar, Busia, which documents were produced as exhibits by PW12 **Winfred Nyandoro Nyaberi,** the Registrar of Lands, and Busia County. The documents included Land Title Deed issued in the name of the Accused Emmanuel Otieno Pamba and later cancelled.

71. That they further proceeded to Busia Police Station after receiving information that the deceased Pamela had reported being threatened by the Accused person and she had recorded a statement with the police concerning those threats. They found the statement (PEx 12) for the deceased Pamela Adhiambo Ogola (as recorded by Mr. Kinyua, (PW 15).

72. He further stated that they also recorded statements from Mr. Wandera (PW1) who was assisting the deceased Pamela Adhiambo Ogola with succession proceedings of the land in Succession Cause No. 81/2018 filed at Busia Chief Magistrate's Court, it was alleged that the

Accused person herein was to get one of the shares of the land while the deceased Pamela was to get another share. The witness produced Petition documents in succession cause No. 81/2018 at Chief Magistrate's Court Busia as P. Ex 23. He also produced as exhibits the documents which PW1 handed over to him showing that the Accused obtained a title deed of the land while succession proceedings were pending in Court so Pamela Adhiambo filed objection in Court-PEx 24. **The documents are-Summons for amendment of the Petition dated 15.5.2019.**

73. PW21 further testified that they later went back to the to the Assistant Chief who supplied them with a death Certificate and burial permit for the late Richard Oduor Ondeng which was taken to him by the deceased Pamela and the Accused Emanuel Otieno Pamba. He produced the Death Certificate entry number 0031600708 as **P Ex 25(a)** and Burial Permit as **P. Ex 25(b)**.

74. Further, PW21 the investigating officer testified that they received a report from the Government Chemist produced by (PW17) to the effect that the two helmets had blood of the deceased Ouma and therefore with all that evidence collected he concluded his investigations that the Accused herein was at the Murder Scene at about 8 p.m. on 30.8.2019 as shown by the tracking devices, the blood of the deceased LO and that the motive for the murder was the inheritance of the land **No. Bukhayo/Bugenyi/10560**. The witness then identified the accused person in court. He stated further that he discovered in the course of his investigations that the deceased LO was the son to Richard Oduor Ondeng the deceased while the deceased victim, Pamela, was a sister to Richard Oduor Ondeng (Owner of the land) and that the Accused was a distant relative and that his close family members reside in Uganda.

75. On being cross examined by Mr. Oduol counsel for the accused person, PW 21 stated that CPL Ochido collected blood samples from the two deceased persons after the doctor extracted the same. He stated that the Accused was escorted to hospital by the Police Officer, CPL Ochido. Further, that the two Helmets were recovered from Mundika Town residence of the second wife of the Accused person Exhibit Memo requested the verifications. He reiterated that he was with CPL Ochido and CPL Omuse when they recovered the two helmets from the Accused Person's house at Mundika.

76. At the close of the prosecution's case, the accused person opted not to adduce any evidence and neither did he wish to call any witness. He closed his defence with his advocate indicating that he had no submissions to make. The court then reserved the case for judgment delivery but recalled the parties to address the court under section 311 of the Criminal Procedure Code.

ADDRESS UNDER SECTION 311 OF THE CRIMINAL PROCEDURE CODE

77. According to Mr Okachi Senior Principal Prosecution Counsel, the accused herein Emmanuel Otieno Pamba was no stranger to the deceased Pamela Adhiambo. That they had a contractual relationship of master and servant. The deceased had employed the accused as a caretaker of her land. That she authorized the accused to assist her to carry out Succession proceedings in respect of parcel of land which Pamela was entitled to.

78. Counsel submitted that the accused abused his duty as an Administrator by selling part of the said land without the deceased's consent and when the deceased learnt of this, she nullified the process. That the accused had gone ahead to register the land in his own name as if he was the absolute owner which made the deceased to revoke the process using the Land's office. He submitted that the decision and action by the deceased did not go well with the accused who hatched a plot to eliminate Pamela, the owner of the land, and that the accused achieved his intention and in the process he also murdered the second deceased L who was a possible heir of Pamela.

79. He further submitted that PW4 knew the accused as a motorcycle rider as he had met the accused at Pamela's home five years earlier. Counsel submitted that the evidence on record is that on the day the two deceased persons were found, the accused had been traced at the scene of crime via his telephone number 0700361530 as per the Safaricom data records and the motorcycle Reg. No. KMEW504H Boxer which was found in the area where the bodies of the two deceased persons were found in a pool of blood, as per the tracking records produced by PW14.

80. Mr Okachi submitted that the watertight evidence adduced by the Prosecution witnesses is uncontroverted that the accused planned and executed the murder of the two deceased persons. He urged the court to find a conviction against the accused for the offence of murder as charged.

81. In response, Mr Oduol Advocate for the accused submitted that the Prosecution's case entirely lies on circumstantial evidence. That that being the case, the court should first and foremost affirm that the burden of proof lies entirely on the prosecution and does not shift to the accused person. That in the instant case, the evidence fell below the standard of proof of beyond reasonable doubt and that the same is full of suspicion which, however strong, cannot form the basis of inferring guilt against the accused person.

82. Counsel took issue with the manner of collection and preservation of DNA evidence and submitted that placing of the motorcycle at the scene of crime had weaker links. He urged the court to critically examine that evidence and find that the evidence was not watertight and that it is therefore unsafe for the court to rely on the evidence adduced to convict the accused.

83. In a brief rejoinder, Mr Okachi submitted that on the issue of collection of DNA samples and analysis, it is the suspect who led the Investigating Officer to where he had kept two helmets. That the helmets were professionally handled by the Investigating Officer who handed them to the Government analyst. That the blood of the deceased LO was on one of the helmets and the accused has not explained how his helmet came into contact with the blood of the deceased.

84. Counsel conceded that the Prosecution's case is founded on purely circumstantial evidence which is powerful evidence and that Circumstantial evidence is not synonymous with suspicion and that the two words cannot be used interchangeably. He maintained in his submissions that circumstantial evidence was very strong against the accused who did not even raise an alibi defence. That there are exhibits produced linking the accused to the offence and the said evidence was verified.

85. Mr. Okachi urged the court not to be deviated from the strong circumstantial evidence that placed the accused at the scene of the murder yet the accused chose to say nothing concerning the same. Counsel urge the court to find the accused guilty of the offence of murder and convict him accordingly.

ANALYSIS AND DETERMINATION

86. I have carefully considered all the evidence adduced by the 20 prosecution witnesses, the exhibits produced in evidence and submissions by the prosecution and the defence counsel under section 311 of the Criminal Procedure Code.

87. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as follows:-

- (a) The death of the deceased occurred;*
- (b) The death of the deceased was caused by an unlawful act or omission.*
- (c) That the accused committed the unlawful act or omission which caused the death of the deceased; and*
- (c) That the accused had malice aforethought.*

88. The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code. This definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted. The prosecution must prove death of a human being has occurred, the act or omission causing that death and the unlawfulness of that act or omission, the person that unlawfully acted or omitted to act and the intention (malice aforethought) of the person who so acted or omitted to act. Malice aforethought has been defined under Section 206 of the Penal Code in the following manner:

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

- 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.”*

89. **On whether there was proof of death, I must first resolve some discrepancy between the evidence of PW16 and all other prosecution witnesses who testified on the date of the alleged murder of the two deceased persons.** the evidence of PW16 was that he received a call on 29/8/2019 at 8am concerning the murder of the deceased and he went to the scene. However, PW20 and all other witnesses testified that the incident took place on 30/8/2019 at about 8pm and PW20 even testified that it was PW16 CPL Ekonoi who called him at about 9.30 pm on 30/8/2019 and told him of the information he had just received concerning the double murders at Umala Village. I observed PW 16 testify and I noted that he was not stable. He appeared confused as to the date of the alleged murder in question but that confusion in my view does not shake the overwhelming evidence on record by all other prosecution witnesses including PW19 who received a call from the Chief of Umala on the night of 30/8/2019 and rushed to scene and found about 50 people and 2 police officers from Umala Police Post. This leaves this court with a finding of fact from the evidence adduced as a whole that the alleged murder occurred on 30/8/2019 at about 8pm and not 29/8/2019 at 8am.

90. Having resolved the apparent inconsistency in the date in issue, the first issue is whether there was proof of death. Several witnesses established that indeed the two people Pamela Adhiambo and LO died on the 30/8/2019. This was established by the PW6, 7, 8, 11, 11, 16, 19 and 20 who saw the two deceased persons' bodies lying with various deep cuts and lying in pools of blood. PW5 Dr. Gabriel Juma carried out the post mortem on the deceased persons bodies and he concluded that the first deceased, Pamela Adhiambo Ogola died due to hemorrhagic shock due to sharp chest trauma (penetrating) with cardiac *tamperant* and respiratory compromise (*not breathing well because of stab wound in the heart*) whereas the 2nd deceased, LOO died due to hemorrhage shock due to sharp abdominal trauma with laceration of mesenteric vessels.

91. **The second ingredient is whether the death of the deceased was unlawfully caused:** Article 26 (1) of the constitution stipulates that

“Every person has the right to life. It is also stated in subsection (3) that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law.”

92. From these provisions, not all homicides are unlawful. As the principle in the case of **Republic Versus Guzambizi S/o Wesonga 1948 15EACA 65** articulates, death is excusable by law in circumstances of reasonable defence to self, property, as a result of accident or misadventure or in protection of life or property of a third party.

93. In the instant case, the two deceased persons were found lying dead in a pools of blood and their bodies had multiple deep cuts all over. There is nothing on record from the evidence so far adduced that would suggest that the deceased persons deserved to die. Accordingly, I find and hold that the death of the deceased persons subject of this trial was caused by unlawful acts or omissions.

94. In proving the cause of death section 213 of the penal code provides acts and circumstances which an inference as to death can be inferred by way of evidence to prove the cause of death. This was the holding in the case of **Republic Versus Smith 1959 2AL ER 193** where the court held *inter alia* that:

“If the victim’s death is traceable to the injury inflicted by the accused it will avail him nothing to show that the deceased’s death might have been prevented by proper care or treatment”. That is why in our courts it is firmly established that proof of death and cause is by way of medical or circumstantial evidence.” (See also **Benson Ngunyi Ndundu Versus Republic CACRA No. 171 of 1984**).

95. **The next issue is whether it was the accused person unlawfully caused the death of the two deceased persons.** There was no eye witness called by the prosecution to the alleged murder of the deceased. The prosecution relied on circumstantial evidence to build up their prima facie case against the accused person. The defence did not offer any defence ad that is his constitutional right to remain silent and not to give any incriminating evidence as guaranteed under Article 50(2) of the Constitution. Mr Oduol Counsel for the accused person submitted that the circumstantial evidence relied on was mere suspicion and that however strong the suspicion is, cannot sustain a conviction. Further, that the manner of collection and preservation of DNA evidence and placing of the motorcycle at the scene of crime had weaker links.

96. Mr Okachi for the prosecution conceded that the prosecution wholly rely on the circumstantial evidence which was strong enough and proved the charges facing the accused person beyond reasonable doubt. He denied that circumstantial evidence is the same as suspicion.

97. I agree that there was no eye witness to the alleged murder of the two deceased persons Pamela Adhiambo Ogola and her nephew LO. The prosecution entirely relied on circumstantial evidence to build up their case against the accused person.

98. Addressing the issue of the manner in which DNA samples were taken from the accused person, I must point out that from the evidence on record, the accused person’s DNA was not linked to any of the exhibits taken to the Government Chemist as analysed and therefore I find no prejudice caused to him. In addition, it is the DNA sample taken from the deceased LO that matched the blood which was found in the two helmets which were recovered from the house of the accused person at Mundika in Busia County. The motorcycle **KMEW503H** which was recovered from the accused person when it was traced to where he was working as a cleaner at Burieny Primary school by PW21 following a tip off by some people who wanted to board it to Siaya town but noticed that the Helmets were blood stained, had no blood and it was not until the lenders, Watu Credit tracked it to Siaya CID Offices that it became relevant as far as this case is concerned. The inventory of how the two helmets were recovered from he accused person’s house at Mundika was produced in evidence as Pex 20(c).

99. The case of **KIPKERING Arap KOSKEI & ANOR’ (1949) 16 EACA pg135** espoused the use of circumstantial evidence as follows

“Such evidence is sometimes compared to a chain with its links as a rope with several strands, each link or strand must be carefully tested and if in the end it does not lead to the irresistible conclusion of the accused’s guilt, the whole chain or rope must be rejected. If it passes the test however, it be as good as any direct evidence.”

100. The question is whether the circumstances in this case lead to the irresistible conclusion that accused was behind the unlawful killing of the two deceased persons Pamela Adhiambo Ogola, LOO on the night of 30.8.2019 at about 8pm, to the exclusion of any other reasonable hypothesis. In other words, do the circumstances point inculpably to the guilt of the accused person and to one else, so as to draw the conclusion that “this was not an accident, but a deliberate scheme by the accused to kill the two deceased persons because the deceased Pamela Adhiambo Ogola had prevented him from retaining land which she was entitled to inherit from her kin at Mundika after his registration of the same was found to be irregular and revoked by the Land Registrar Busia County?

101. In **ABANGA ALIAS ONYANGO v REP CR. A NO. 32 OF 1990 (UR)** the Court of Appeal set out the applicable principles in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“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.”

102. The burden of proof always lies on the prosecution throughout the trial and that burden never shifts even if the accused person exercises his right to remain silent like was the case in the instant case. The prosecution has a duty to prove the guilt of the accused person beyond reasonable doubt.

103. To establish whether the evidence as adduced by the twenty prosecution witnesses meets the standard of proof required in criminal trial, I must evaluate the evidence in its entirety and determine whether it measured up to the standard of proof of beyond reasonable doubt.

104. Borrowing the words of Nyakundi J in **Republic v Ismail Hussein Ibrahim [2018] e KLR** where the learned judge extensively cited other relevant to this concept of proof beyond reasonable doubt, the learned judge stated:

“In Kenya, the doctrine on Criminal justice is that an accused person under Article 50 (2) (a) of the constitution has the

presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proved by the state beyond reasonable doubt. That burden of proof is well settled that it's the state that bears the responsibility at all times. The well-established jurisprudence on this doctrine that the deceased guilt rests on the prosecution to prove the charge beyond reasonable doubt can be traced way back to the cases of *Woolmington Versus DPP* 1935 A C 462 and also *Miller Versus Minister of Pensions* 1942 A C. Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as follows:

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

Further in the superior court within the common law jurisdiction Lord Oputa of the Supreme Court of Nigeria in the case of *Bakare Versus State* 1985 2NWLR adopted the statement as follows at page 465:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases the Federal Court of United States in the case of *United States V Smith*, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing in *Re Winship*, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:

“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”

105. In the instant case there was no eye witness to the incident. For the prosecution to sustain a conviction on circumstantial evidence, the Court of Appeal in the case of *Sawe V Republic* [2003] eKLR 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 shift to the party accused.”

106. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must therefore satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof, for, sometimes, unconsciously, it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “*may be true*” and “*must be true*” and the same divides conjectures from sure conclusions, see *Navaneetha Krishnan v The State by Inspector of Police – Supreme Court of India, Criminal Appeal No. 434 OF 2013*.

107. From the line of authorities on circumstantial evidence the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the , then the conviction would be justified.

108. In the instant case **PW1, Fredrick Wandera Ongweko** testified that the deceased Pamela Adhiambo Ogola sometime in February 2018 in the company of the accused herein sought his help in carrying out succession proceedings of three parcels of land namely, Parcel no Bukhayo/Bugengi/10560, Parcel no. Bukhayo/Bugengi/11919 registered and Parcel no. Bukhayo/Bugengi/11921. Mr. Ongweko also testified that the accused subsequently approached him saying that he wanted to sell Parcel No. Bukhayo/Bugengi/10560 to which Mr. Ongweko responded that succession was not complete so the accused could not sell the land.

109. Mr. Ongweko further testified that after a few days, the deceased, Pamela Adhiambo Ogola went and told him that the accused had sold 2 acres from parcel No. Bukhayo/Bugengi/10560 forcing him to confront the accused but the accused refused to accept the mistake forcing Mr. Ongweko to engage the then Land Registrar Mr. Chepkwesi who revoked the registration.

110. Fredrick Wandera Ongweko further testified that the deceased told him that the accused was threatening to kill her so he referred her to the Police to report the threats and that subsequently the deceased went to him and informed him that since she was the heir, he should remove the name of the accused from succession cause No. 81/2018 which was done.

111. This first witness further testified that the accused was served with revocation documents on 17.6.2019 by a Court Process server after which he came to learn that the deceased and his son had been killed by the accused person herein.

112. He further testified that the accused was very furious when he heard that the deceased had sought for revocation of the grant and that subsequently the deceased would call him from time to time expressing her fears that the accused was threatening her with death to the point that the deceased got scared of going to Busia.

113. In cross examination, PW1, reaffirmed that it was the accused that threatened the deceased and further that the deceased used to report to him from time to time so he advised her to report to the Police which the deceased informed him that she had done. He also testified that he filed succession cause Number 81/2018 with Emmanuel Otieno Pamba as the administrator. Pamela Adhiambo as the witness.

114. PW12, Winfred Nyandoro Nyaberi, the Registrar of Lands, Busia County corroborated this version of events when he testified that the records at the Busia Lands Registry revealed that the accused was at one time registered as proprietor of Land Parcel No. Bukhayo/Bugengi/10560 which registration was found to be irregular hence it was reversed and the accused deregistered as the documents that he used to register as proprietor were found to be fraudulent.

115. Mr. Nyaberi further testified that the deceased, Pamela told him that the accused was threatening to kill her so he referred her to the Police to report the threats and that subsequently, the deceased went to him and informed him that since she was the heir, he should remove the name of the accused from succession No. 81/2018 which was done.

116. PW15, P.C. Francis Kinyua corroborated Mr. Ongweko testimony when he testified that on the 26.9.2018 at around 11.31 while at the Crime Office Busia the deceased Pamela Ogola in the company of another gentleman made a report to the effect that the accused had done succession on her land without her knowledge and further that the accused had threatened to cut her into pieces because she was just a woman.

117. Mr. Ongweko also testified that when the accused was served with revocation documents on 17.6.2019 by a Court Process server he became furious and that the deceased Pamela, would call him from time to time informing him that the accused was threatening her with death to the point that she got afraid of coming to Busia. Mr. Ongweko was firm and reiterated his claims in cross-examination.

118. **PW4, Josiah Madambode Ondagi** testified that the accused approached him seeking advice on how to do succession over the aforementioned parcels of land to which he advised him. Mr. Ondagi further testified that the deceased, Pamela, thereafter also approached him inquiring whether the accused had sought his help in commencing succession proceedings to which PW4 confirmed and told her she was the right person to institute the Succession proceedings and that he introduced her to Mr. Ongweko, PW1. Mr. Ondagi further testified that he later met the accused at the market who told him that he had used a short cut and obtained title over the aforementioned parcel of land.

119. **PW13, James Makobi**, a Law Enforcement Liaison Officer with Safaricom Limited testified that as per the call data records, on 30.8.2019, the subscriber of phone number 0700361530, the accused herein was operating from Mundika, he went to Umala and returned to Mundika. In cross examination, Mr. Makobi testified that the records also reveal movement of the phone as the location is cell based depending on traffic, albeit the call data records did not show the content of the calls as the law does not allow the company to show the contents of communication. The witness produced the said call data as an exhibit together with the certificate of electronic evidence.

120. **PW14, John Murimi Njagi's** testimony corroborated Mr. Makobi's testimony to the effect that the tracking history of the motor cycle Registration number KMEW 503H co-owned by the accused and Watu Credit Microfinance, which motor cycle was in the possession the accused on the 30.8.2019 showed that the motor cycle was operating between Mundika and Umala from 3 p.m. to 11 p.m. on the material day and night. He produced the motorcycle and tracking data and certificate of electronic evidence as an exhibit.

121. **PW17, Polycarp Lutta Kweyu** who worked at Kisumu Government Chemist Department testified that on the 20.9.2019 he received various exhibits including two motorcycle helmets as well as blood samples from both the deceased persons as well as the accused from one CPL Ochudo D.C.I. Siaya which he analysed and concluded that the blood stains on the helmets forwarded matched the DNA profile of LO one of the deceased. The said helmets were recovered from the accused person's house in Mundika and there was no contrary evidence that they were recovered from his house.

122. PW21 the investigating officer testified how PW2 went to Siaya Police station accompanied by some group of people with information that when they were about to board a motorcycle belonging to the accused person at Mundika, they discovered that the two helmets were blood stained and so they decided to volunteer to furnish information to PW2 who led them to Siaya Police Station because they had heard about the death of the deceased persons herein and thought the information they had could assist the police in their investigations. The witness in the company of PW2 and other police officers proceeded to Mundika where they traced the accused person who on seeing them he took off leaving behind his motorcycle which was taken possession of and taken to Siaya Police Station for safe custody and investigations continued. On the same day that the police recovered the motorcycle which was identified by PW14 as being co-owned with Watu Credit, the witness also recovered two yellow Helmets at a house in Mundika which was believed to be the accused person's house where he lived with his second wife. The said helmets were subjected to forensic examination by the Government Chemist analyst who found that they contained the DNA profile of the deceased in Count two of the Information, LO. It is this witness who also proceeded to Busia Lands registry and recovered a statement of a complaint lodged by the victim in Count One, Pamela Adhiambo Ogola, against the accused herein to the effect that the accused had threatened to kill her because she had caused revocation of his registration of Land Parcel No. Bukhayo Bugengi/10560 in the accused person's name.

123. PW21 also recovered and produced the documents linking the accused person to the succession process and registration of the disputed

land and death certificate and burial certificate for the deceased Richard Ondeng who was the brother to Pamela and registered owner of the land in question.

124. The evidence of all the 21 prosecution witnesses as summarized by PW21 clearly create an unbroken chain that irresistibly points to none other than the accused person hatching a plan to eliminate the deceased Pamela and any of her possible heirs of the land Parcel No. Bukhayo Bugengi/10560 that he had irregularly caused to be transferred in his name.

125. All these pieces of evidence irresistibly point to the accused Emmanuel Otieno Pamba and no other person to be the person that was in contact with the deceased persons on the material night when they were found lying in a pool of blood and with multiple injuries on their bodies.

126. The next issue is whether there was malice afterthought. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. What can be deduced from section 206 (a) to (e) is that malice aforethought can be either direct or indirect depending on the facts of each case at the trial. In the case of **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that:

“an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack. “

127. Malice aforethought is defined under section 206 of the Penal Code. Under section 206 it shall be deemed to be established by evidence proving any one or more of the following circumstances:

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

b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

c. An intention to commit a felony.”

128. In the ***Ogelo v Republic [2004] 2KLR 14*** the appellant chased the deceased and another. He caught up with the deceased and stabbed him with a knife on the chest. The deceased died of the stab wounds. The court held inter alia that by dint of section 206 (1), there was an intention to cause death or grievous harm and that malice aforethought is deemed to have been established by evidence presented by the prosecution.

129. Malice aforethought can also be inferred from the manner of killing. See the case of ***Ernest Bwire Abanga Onyango v Republic [1990] Cr. Appeal No. 32 of 1990***. The principle here as enunciated under section 206 and the authorities is the fact of establishing by evidence that the accused conceived the criminal mind before converting that in the mind into acts of omission to commit the murder.

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

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

131. This was also anchored in the case of ***Nzuki v Republic [1993] KLR 191*** where the court stated as follows:

“Malice aforethought is a term of art and emphasized that:

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i. The intention to cause death.

ii. The intention to cause grievous bodily harm.

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with intention to expose a potential victim to that risk as the result of those acts, it does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of those cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert homicide into a crime of murder. (See also *Hyman v DPP [1975] EA 55*.)”

132. In the instant case PW1, Mr. Ongweko testified that the deceased, Pamela told him that the accused was threatening to kill her. PW15, P.C. Francis Kinyua corroborated Mr. Ongweko's testimony when he testified that on the 26.9.2018 at around 11.31 am while at the Crime Office Busia the deceased Pamela Ogola in the company of another gentleman made a report to the effect that the accused had done succession on her land without her knowledge and further that the accused had threatened to cut her into pieces because she was just a woman. This witness who recorded statement from the deceased produced the said statement showing threats emanating from the accused person herein.

133. PW2,6,7,11,16 ,19 & 20 all testified to the nature of injuries that they witnessed on the bodies of the deceased specifically cuts to various parts of the deceased persons bodies. The nature of the injuries as witnessed by the aforementioned witnesses was corroborated by Dr. Juma who carried out the post mortem on the bodies of the two deceased persons. These injuries were so severe that the person who inflicted them on the deceased persons knew, certainly that the victims would not survive to tell any tale.

134. Having considered all the above, it is my considered opinion that the circumstantial evidence herein taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability the crime herein was committed by the accused and none else. I further find and hold that the accused person had malice aforethought when he committed the said offences of murder.

135. The evidence adduced by prosecution witnesses which was beyond reasonable doubt and which was not shaken even in cross examination demonstrate that the accused violently and aggressively planned, armed himself, got onto his motorcycle not knowing that it was being tracked by the seller, carried his mobile phone along not knowing that the same could also be tracked by the Mobile service provider, Safaricom, attacked the two deceased persons LO and Pamela Ogola at their home. The accused proceeded to perpetrate his attack against of the intended target of his attack, Pamela Ogola because of his insatiable thirst to snatch her of her inheritance of land. The evidence of PW13, James Makobi, the Safaricom liaisons officer as well as that of Mr. Njagi from Watu Credit Microfinance perfectly place the accused person at the deceased's Pamela Ogola residence at the time the murder of the two deceased persons, Pamela Adhiambo and LO occurred on the material night.

136. In my considered view, considering the evidence herein as a whole, the accused had formed the necessary intention to cause death or grievous harm to the deceased. The various threats that the accused had made to the deceased Pamela leading her to report to the police crystallised when the accused person hacked a plan to finally eliminate her and any other person on sight especially the deceased LO who was another possible heir to the land in question.

137. Iam persuaded that the prosecution has discharged the burden of proof of the guilt of the accused person Emmanuel Otieno Pamba beyond reasonable doubt for the offence of double murder contrary to Section 203 as read with Section 204 of the Penal Code.

138. I find the accused person **Emmanuel Otieno Pamba GUILTY** on each of the two counts of Murder, of the murder of the deceased **Pamela Adhiambo Ogola** and **LOO** as charged. I convict him accordingly pursuant to section 203 as read with section 204 of the Penal Code.

Orders accordingly.

Dated, signed and Delivered at Siaya this 4th Day of May 2020 via skype.

R.E. ABURILI

JUDGE