



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 17 OF 2018[MURDER]

REPUBLIC.....PROSECUTOR

VERSUS

GABRIEL ONYANGO WERE.....ACCUSED

JUDGMENT

1. The accused person herein **GABRIEL ONYANGO WERE** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 18th day of August 2018 at Nyilima village within Siaya County he murdered his wife **Anne Achieng Arum**. The accused pleaded not guilty to the charge.

2. The prosecution called ten witnesses in support of their case whereas the accused testified on oath and called one witness.

Prosecution's Case

3. **PW1, Margaret Anyango Nyakwanga** testified that she was with the accused and the deceased on the night of 18.8.2018 as they were sleeping in the same house and further that they ate dinner and went to sleep and she noted that she did not hear any noise or scuffle during the night.

4. Mrs. Nyakwanga reiterated her statement in cross-examination and further stated that the deceased related well with other family members and further that on the material night, there were very many persons in the same house.

5. **PW2, Richard Omondi Were** testified that on the morning of 19/8/2018 at about 3.30am he woke up to wailing and screams coming from his late grandmother's homestead where there was a memorial funeral ceremony. He further testified that he proceeded to the homestead where upon inquiry he was told by one of the relatives that the accused had fought with the deceased and injured her and that she had been rushed to hospital but that she had died.

6. PW2 further testified that he sought his brother the accused herein and found him looking confused carrying his daughter after which they found a vehicle at 4.00 a.m. and proceeded to Odede Hospital where they found the deceased lying on a bed on her stomach dead with blood stains on her back, with an injury on the back.

7. In cross- examination, PW2 revealed that the deceased was his best friend but that he couldn't tell how the deceased related with other people in the family as he resides in Nairobi.

8. In re-examination, he testified that the Police found him in hospital and upon confirming that he was the accused's eldest brother, they directed him to get involved in the arrangements of transporting the deceased's body to the mortuary and further that he saw the Police recover the knife used to stab the deceased.

9. **PW3, Beatrice Dorcas Achieng** the sister to the late grandmother of the accused testified that on the night of 19.8.2018 she was in her house sleeping. In cross examination she testified that she did not hear or see anything.

10. **PW4 Agneta Ongony** was declared a refractory and later a hostile and worthless witness as she refused to testify on what she saw or heard on that material night despite recording a statement with the police placing herself at the scene where the incident allegedly took place on the material night.

11. **PW5, Dr. Okun Benjamin Ochieng** a doctor based at Siaya County Referral Hospital testified that he used to be at Madiany Sub-County Hospital as medical superintendent and further that on 20.8.2018 he carried out a postmortem on the body of the deceased who was identified to him by Arum Akumu and Richard Omondi.

12. He testified that his examination revealed that the bronchial artery was severed on the left upper arm and further that there was also massive haemorrhage around the axilla armpit about 500cm leading him to form the opinion that the cause of death was **Cardio respiratory arrest secondary to massive haemorrhage**. He further testified that the probable weapon used was a sharp object because the cut was deep and penetrating causing massive bleeding. He produced a Postmortem report on the deceased as an exhibit.

13. In cross-examination, Dr. Ochieng testified that there was no evidence of other cuts or linear marks or scratch marks or of a fight or any struggle and that the weapon used to cut the deceased must have been sharp and penetrating on the left posterior shoulder (**back area**) as it cut **major vessels of the heart** artery.

14. **PW6, Rose Ogweny**, a clinical Officer at Mama Anne's Community Health Centre testified that on 19.8.2018 at 3.00a.m. or thereabouts she attended to the deceased who was brought in by **Lenny Abiero** her next of kin.

15. She further testified that the deceased at that point could not walk, was restless and confused, was semiconscious, clothes were soaked in blood and she had a deep cut wound left posterior shoulder. Mrs. Ogweny further testified that the deceased was reported to have suffered domestic violence from her husband as the caretaker reported of a fight between the patient and her husband. She testified that the patient passed on at 3.15 a.m. she produced treatment notes for the deceased as exhibit.

16. In cross-examination Mrs. Ogweny testified that she did not see any sign of any physical struggle but that she saw a stab wound and noted the restlessness and confusion of the patient. She further testified that the person who brought the deceased was Lenny Obiero who gave her the history of the patient's illness namely assault by her husband.

17. **PW7, Paul Arum Akumu** testified that the deceased was her biological daughter. He testified that on 16.8.2018 at about 8.30 a.m. he received a call from the deceased who told him that she had been assaulted by her mother-in-law after which he advised her to go to the police and report and be issued with a P.3 form. He further testified that the deceased went to the police station and subsequently to the doctor.

18. Mr. Akumu further testified that on the 18.8.2018 at around 8.00 a.m. the deceased called him and when he picked the phone, her phone hung so they never spoke again. He proceeded to testify that on 19.8.2018 very early in the morning as he was preparing to go to work he received a call from the deceased's mother to the effect that the deceased had passed on.

19. He further testified that the following day he was taken to Madiany Hospital where he found the deceased in the mortuary and saw that she had a penetrating stab wound on the deceased. In cross-examination Mr. Akumu testified that he did not recognize the accused as the deceased's husband because he had not come to his home to introduce himself.

20. **PW8, No. 86640, CPL. Douglas Wamalwa**, the scenes of crime officer in this matter testified that on the 20th August, 2018 he was called at 10.00 a.m. and in the company of CPL Kimurgor of Aram Police Station visited an alleged scene of murder at Migoa Village, East Katwenga Sub location in Rarieda Sub-County where the investigating officer requested him to take photographs of the scene at the home of the accused and of the deceased in hospital. He produced photographs of the deceased as exhibits.

21. In cross-examination he stated that he was not the investigating officer so he could not take blood for examination.

22. **PW9, Polycarp Lutta Kweyu**, the Government Chemist based at Kisumu, testified that he received a request to analyze and determine if there was any genetic link among the following exhibits;

- a) **A kitchen knife with a Blue handle marked "A"**
- b) **A mobile phone "B" Itel Brand.**
- c) **Brazier "C1"**
- d) **Blouse "C2"**
- e) **Black Coat "C3"**
- f) **Blood sample from Anne Achieng (deceased) marked "D"**
- g) **Blood sample from Gabriel Onyango Were "Accused"**

23. Mr. Kweyu testified that after analysis he found that blood on all the exhibits forwarded to him matched that of the deceased Anne Achieng and that the DNA profile of the accused did not match any of the DNA profiles generated from the listed items.

24. In cross-examination Mr. Kweyu testified that none of the submitted items had the DNA of the Accused person.

25. **PW10, No.72631 Corporal Isaac Kimurgor** the Investigating Officer in this matter testified that on 19.8.2018 while he was at the Police Station, he was informed by his Officer Commanding Station Chief Inspector of Police Abdirahman Ger that they proceed to the Odede Hospital where the deceased was receiving first aid but she died. He further testified that he found her body was soaked in blood and they turned the body and photographed it and saw injuries on the left side of the body near the shoulder after which they took possession of the clothes which she was wearing.

26. Corporal Kimurgor further testified that they then proceeded to the scene of crime but they did not recover the weapon used to kill the deceased. He further testified that upon interrogation of the accused, the accused stated that he had a fight with the deceased who wanted to knife him, but he kicked her and she fell on the knife.

27. He further testified that the accused then took them to the house and showed them where the knife was which was clean but with hidden blood stains. In cross-examination Corporal Kimurgor testified that the accused person led them to recover the knife and that the accused had stated that he had cleaned the knife.

28. At the close of the prosecution case the court was satisfied that the prosecution had established a prima facie case against the accused person to warrant him be placed on his defence. The defence case is summarized below.

Defence Case

29. The accused testified as DW1 and stated that on the 18.8.2018 he was at his paternal grandmother's home where they had a memorial funeral ceremony for his grandmother however his wife, the deceased was not in the ceremony because she had fought with his step mother **Beatrice Dorcas Anyango** on a Monday the same week before the ceremony so she had gone away. He stated that the ceremony ended in the evening and she had not returned. He tried to find out where his wife was but he did not get feedback.

30. The accused further testified that after the ceremony he remained at home tethering animals in the homestead. That in the middle of the night, he felt someone stepping on his feet which were hanging on the bed. He testified that there was no light in the house and when he woke up, the person pushed him on the chest and he fell on the child who started crying.

31. The accused further testified that he kicked the person and the person ran away, while crying and he focused on caring for the baby who later slept and he also slept. He testified that he had not taken any alcohol.

32. He further testified that he woke up in the morning and went to milk cows and remained in the homestead then he saw Police Officers coming to his home and they arrested him without telling him the purpose for the arrest. He testified that he had not known that his wife had passed on.

33. The accused testified that he and his family never had any domestic quarrel or issue with the deceased. The accused denied showing the police where the Kitchen knife was.

34. In cross-examination, the accused reiterated his version of events regarding the material night of the 18/8/18. He denied throwing any fist against the attacker but stated that he kicked the assailant who fell down and took off.

35. The accused further reiterated that he loved the deceased and that they had never quarrelled or fought and also denied seeing any blood in the homestead or seeing the deceased with injuries on 19.8.2018 when he was taken to hospital by the police.

36. In re-examination the accused reiterated that he never saw the injuries on the deceased and that he knew that the deceased had 2 injuries which had healed.

37. **DW2, George Nyawanga Onyango**, the Senior Assistant Chief East Katwenga Sub-Location and Acting Chief, East Uyoma Location testified that he had known the accused since his birth and that he had never received any complaint against him.

38. He further testified that he also knew the deceased and accused were generally a happy couple blessed with one child, a girl. He further testified that the deceased's grand parents-in-law used to complain that she could disappear from home and that he used to resolve some disputes between her and other people.

39. He further testified that a week before her death, it was reported to him that the deceased had a quarrel with her husband's Aunt and she had beaten the aunt and had vanished from home. In cross-examination Mr. Onyango testified that the deceased and accused at times had been having differences.

Submissions

40. Counsel for the accused person filed written submissions urging the court to acquit the accused person for reasons that there was no eye witness to the incident and that the circumstantial evidence adduced was not watertight and or sufficient enough to prove the charge of murder against the accused person.

Determination

41. I have carefully considered all the evidence and considered all the exhibits produced in evidence against the accused and the defence proffered by the accused person and his witness. 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:

(a) **The death of the deceased occurred;**

(b) **That the death of the deceased was caused by an unlawful act or omission;**

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

(d) That the accused had malice aforethought.

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

43. **On whether there was death**, the death of the deceased was proved by the evidence of PW2, PW7 and PW10 who saw deceased persons' body with a deep stab on the left shoulder as well as PW6, Rose Ogweny, the Clinical Officer at Mama Anne's Community Health Centre who attended to the deceased when she was brought in the hospital and saw the deceased pass on despite efforts to resuscitate her.

44. PW5, Dr. Ochieng carried out a postmortem on the body of the deceased and concluded that the deceased's cause of death was **Cardio respiratory arrest secondary to massive haemorrhage**. 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 **Republic v Smith 1959 2 ALLER 193** where the court held *inter alia*:

"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."

45. Proof of death and cause is by way of medical or circumstantial evidence. This was the holding in **Benson Ngunyi Ndundu Versus Republic CACRA No. 171 of 1984**). From the evidence on record, including the postmortem report on the deceased's body, I am satisfied beyond reasonable doubt that the deceased died.

46. **On whether the death of the deceased was caused by an unlawful act or omission**. Article 26 (1) of the Constitution provides 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."

47. What appears to be the case is that not all homicides are unlawful. The case of **Republic Versus Guzambizi S/o Wesonga [1948] 15 EACA 65** enunciates that Death is excusable by law in circumstances of reasonable defence to self; property; as a result of accident or misadventure or in the protection of life or property of a third party.

48. In the instant case, the accused in his defence vehemently denied killing the deceased. He did not offer any of the defenses available in law. The deceased was found profusely bleeding from a stab wound on the shoulder and the cause of death was established to be due to massive hemorrhage. That evidence, in my humble view, clearly demonstrate that the deceased died as a result of an unlawful act as there is no justification or explanation given that she deserved to die by stabbing.

49. Accordingly, I find and hold that the prosecution has proved beyond reasonable doubt that the deceased's death was caused by an unlawful act.

50. **The next issue is whether the accused person caused the death of the deceased**. There was no eye witness called by the prosecution to the alleged murder of the deceased. What is available is circumstantial evidence surrounding the demise of the deceased. For the prosecution to sustain a conviction on circumstantial evidence, there are certain things that must be proved beyond reasonable doubt. Mere suspicion cannot sustain a conviction for murder, where there is no eye witness. In **Mwangi v Republic [1983] KLR 522** the Court of Appeal stated:

"An offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed..."

51. In **Kihungu v Republic [1984] KLR 648**, O'kubasu J stated, on circumstantial evidence:

"Circumstantial evidence is very often the best evidence and it cannot be impugned merely on the ground that it is circumstantial."

52. The principles applicable in considering circumstantial evidence are well settled. In **Mwangi v Republic (supra)** the Court of Appeal reiterated those principles when it stated:

"In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference..."

53. The issue for determination therefore is whether the inculpatory facts in this case prove beyond reasonable doubt that the accused person killed the deceased by an unlawful act and of malice aforethought.

54. The evidence by **PW1 Margaret Anyango Nyakwanga** who was the sister to the late grandmother of the accused person was that on the 18th August 2018 she was attending memorial service for her late sister **Truphena Agola** and that after the service they ate dinner and went to sleep. She stated that she learnt in the morning after that the accused had quarrelled with his wife. She stated that during the said memorial service and the material night, she was with the accused herein and his wife who is the deceased before going to sleep. She stated that they were all sleeping in the same house that night although she did not witness a scuffle or any noise hence she could not tell what happened between the accused and the deceased.

55. In cross examination she stated that the accused was a grandson to her late sister, whose memorial service they were celebrating that material day and that she met the deceased **Ann Achieng Arum** at the said memorial.

56. PW2 Richard Omondi Were the elder brother to the accused also testified that he was attending the memorial of his late grandmother on the 18th August 2018 and that he left for his house to sleep at 10.00pm until the morning of 19th August 2018 when at about 3.30am he heard wailing at the home stead of her later grandmother Truphena Agola. He went there and found many people mourning and on inquiry they told him that his younger brother Gabriel Onyango Were the accused herein had fought with his wife and that he had injured her and she had been rushed to the hospital but that she had died. He looked for Gabriel and found him carrying his young daughter outside their grandmother's house. That he appeared confused. The witness proceeded to the Odede Hospital where he was told the deceased had been rushed and found the deceased lying dead with blood stains on her back as she lay on her stomach and the nurse removed the covering from her body and he saw an injury on the deceased's back.

57. In cross examination, PW2 stated that the deceased Ann was present at the memorial ceremony.

58. In re-examination he stated that he saw the police recover a knife which was used to stab the deceased.

59. **PW3 Beatrice Dorcas Achieng** the Aunt to the accused person only heard people saying Ann was dead. She claimed that the deceased was not at the ceremony as she had left the home some days earlier and had not returned. The court notes that this is the witness whom the accused claimed had fought with his wife and that as a result his wife had left his home.

60. **PW4 Agneta Ongony** was a refractory witness who was later declared a hostile witness and who was later declared a worthless witness and discharged after she refused to give evidence on what she had seen and heard on the night of 18/8/2018. She was a sister to the grandmother to the accused.

61. **PW5 Dr Okun Benjamin Ochieng** the doctor who performed a post-mortem on the deceased's body, witnessed by PW2 found that the deceased had a deep penetrating stab wound on the left shoulder which led to cardiorespiratory arrest secondary to massive haemorrhage. He conclude that the weapon used to stab the deceased was a sharp object. He stated that there was no sign of a struggle or a fight.

62. PW6 Rose Ongweny a Clinical Officer at Mama Anne's Community Health Centre was on duty on the night morning of 19/8/2018 at about 3am when she received the deceased escorted by Lenny Abiero who gave a history of the deceased having been assaulted by her husband in a domestic row. She observed the deceased who had was semiconscious and her clothes were soaked in blood. She had a deep cut wound on the lefts shoulder. The witness attended to the deceased who succumbed at about 3.15 am. The patient could not talk or complete a sentence when she was taken to the Hospital. She was confused and had difficulties breathing. The witness produced treatment notes as exhibits. She did not observe any sign of physical struggle.

63. **PW7 Paul Arum Akumu** the father to the deceased testified that he worked in Nairobi and that on 16/8/2018 he received a phone call from the deceased who reported that she had been assaulted by a certain woman. She asked her father for money for fare for her to go home and he advised her to go to the police and report and to hospital for treatment. On 18/8/2028 at about 8 am the deceased called PW7 but the phone hung so they never spoke until the following morning when he learnt from his family members.

64. **PW8 CPL Douglas Wamalwa** a scenes of Crime Officer testified that on 20th August 2018 he was tasked to go to the scene of crime at the home of the accused where he lived with the deceased and to the Hospital where the deceased lay and he took photographs which he produced as exhibits.

65. Among the photographs that the witness took and produced as exhibits together with certificate of photographic print are the general view of the house where the deceased and accused lived, *blood stains on the door frame, blood stains on the floor of the house, blood spots outside the house where the deceased and accused lived, view of the injury on the deceased' left shoulder and facial or close up view of the deceased.*

66. **PW9 Polycarp Lutta Kweyu** a Government Chemist received exhibit memo and exhibits from PW10 to determine whether there was any genetic link between the exhibits recovered in connection with the death of the deceased and the deceased or the accused. The exhibits included clothing which the deceased is said to have worn at the time of her being assaulted, her telephone ITEL Black in colour blood sample from the deceased and the accused and a kitchen knife with a blue handle. He produced a report of his analysis which showed that all the exhibits received including the kitchen knife and clothing allegedly worn by the deceased had DNA that matched the DNA profile of the deceased Ann Achieng Arum and that none of the items had the DNA of the accused.

67. **PW10 CPL Isaac Kimurgor** investigated the case together with his boss Chief Inspector of Police Abdirahman Ger. Upon receipt of a murder report they proceeded to the Odede Hospital and led by the brother to the accused they found the deceased lying dead with a deep penetrating stab injury on her left shoulder and she was soaked in blood. They took possession of the clothes the deceased was wearing and he showed the court the blouse and black coat worn by the deceased which was cut at the left backside-shoulder area where the sharp object is said to have penetrated through. Photographs were taken and they proceeded to the home where the deceased is said to have lived with the accused. They were led by the accused person's brother. At the house the accused led them onto a house where he removed a knife which was clean but with some hidden blood stains. All the items recovered were sent to the Government Chemist for analysis as per the report

produced by PW7. PW10 produced all the recovered items as exhibits.

68. In his defence, the accused denied committing the offence and stated that he lived in harmony with his wife the deceased. He stated that on the 18/8/2018 and 19/8/2018 the deceased was away after **fighting with his step mother(aunt)** and that when the memorial ceremony for his late grandmother was being conducted she had not returned. He however stated that on the night in question when the offence is alleged to have been committed, he was at the said home of his late grandmother where he lived with the deceased and their two year old daughter and that as he slept he felt someone stepping on his leg so he kicked the person who ran away crying.

69. From the above analysis of the evidence adduced by the prosecution witnesses, it is clear that the accused person lives in his late grandmother's house and was living with the deceased Ann as husband and wife. They were blessed with a daughter aged about 2 years. Albeit the accused person in his defence denied that the deceased was at the said house and place on the material day and night during the memorial ceremony of his late grandmother, and contended that she had left the home some three days earlier following her fight with his stepmother, and he even denied seeing any injury on the deceased when he was taken to the hospital that morning of 19th August 2018 to see his wife, claiming that the injuries she had had healed, his own relatives PW1 and PW2 his late grandmother's sister and his elder brother respectively testified that the deceased was at the said home and attended the memorial ceremony of the accused person's late grandmother.

70. In addition, the evidence by the investigating officer who visited the said home of the accused person and evidence of the Scenes of Crime CPL Wamalwa supported by the photographs and sketch plan take of the said home is clear that there was blood all over the homestead right from the house at the door frame, the ground and in the grass that the witnesses went to sleep after the ceremony which ended in the early hours of the evening on 18/8/2018. The clothing which were recovered as being those which the deceased was wearing on the material night had blood stains which according to the Government Chemist, on analysis, matched the DNA profile of the deceased. Further, the upper clothing being a blouse and a coat worn by the deceased had cuts at exactly the place where the deceased had a deep penetrating cut on the left side of the shoulder that pierced into her chest. The recovered kitchen knife too which was found in the house where the accused lived with the deceased and which was recovered by the investigating officer upon arresting the accused, had blood stains which were analysed with the DNA of the deceased and the blood matched the DNA profile of the deceased.

71. The Clinical Officer who received the deceased at the hospital when she was taken there by one Lenny Abiero on a motor bicycle confirmed that the deceased was taken to hospital with a history of domestic violence by her husband. PW1 and PW2 did not see what happened as they had gone to sleep after the even but they also stated that they learnt that the accused and the deceased had fought that material night which fight led to the injury in question. When the deceased was taken to hospital that night, she was restless and confused, bleeding profusely from the stab wound. She could not speak or complete words.

72. From the conduct of PW4 whose evidence was rendered worthless, it is clear that the deceased was assaulted in the house where she was sleeping and where the accused lived with the deceased and in the presence of close relatives of the accused person and that the said relatives who saw exactly what happened were not willing to testify and tell the court what happened.

73. That explains the brief testimonies by PW1 and PW2 who did not even want to name those who told them that the accused and deceased fought that night. What therefore remains of the evidence of PW1 and PW2 is mere hearsay evidence.

74. Therefore, although none of the prosecution witnesses said that they saw the deceased being injured and therefore they could not tell who injured her, I am persuaded that on the strength of the above pieces of circumstantial evidence put together, the deceased was at the memorial ceremony of the accused person's late grandmother on the material day and night. I am equally persuaded that the deceased was injured at the said house where she lived with the accused person in his late grandmother's house. I am further persuaded that the kitchen knife which was produced as an exhibit is the knife or weapon which was used to stab the deceased and this was a single stab that penetrated deep into her left shoulder right into her chest causing massive bleeding.

75. I reiterate that although the accused claimed that the deceased was not at the said home and ceremony, it is clear that his own brother and grandmother saw her and these two witnesses were clear in their testimonies that the deceased was with the accused at the said ceremony. I find no reason why the two would lie against their own grandson and brother. In addition, albeit the accused claimed that someone stepped on his feet that night while he was asleep and that he kicked the person who ran away crying and that he never bothered to find out who it was, that evidence in my humble view, was made up to cover up the incident. The accused person avoided telling the court whether the alleged person was a woman or a man that stepped on him and cried on being kicked.

76. PW2 also testified that when he heard screams from the home where the accused lived and he went to find out what had happened, he found the accused person holding his daughter and looking very confused and restless.

77. The investigating officer's evidence was that the accused led them into the house where he retrieved the knife which was found to have blood that matched the DNA profile of the deceased. The accused person in his defence on oath denied in cross examination that the Kitchen knife produced as exhibit containing blood that matched the DNA profile of the deceased was found in his house where he lived with the deceased.

78. The father to the deceased was clear that his daughter had called him earlier claiming that she had been assaulted by a certain woman and that she needed fare to go home but he advised her to report to the police, get a P3 form and go for treatment. He sent her money and he even spoke to the doctor who was attending to her. Therefore if there were any injuries which the accused was claiming the deceased had but had healed, in my view, they could only be the injuries arising from her alleged fight with her stepmother inlow who also testified as PW3 but gave scanty evidence claiming that the deceased had left for her home.

79. What I gather from the evidence as a whole is that the deceased had a frosty relationship with her stepmother in low, which may have soured her relationship with the accused person leading to a quarrel and a fight that was witnessed in the night leading to the fatal injury being inflicted on the deceased. However, despite the fact that there were people present and who witnessed the incident, those witnesses however, never said anything useful to the court. They left this court with only circumstantial evidence and the question is whether the

circumstantial evidence available is strong enough to sustain a conviction for murder or at least manslaughter, a lesser charge against the accused person.

80. For the prosecution to sustain a conviction on circumstantial evidence, the Court of Appeal in the case of **Sawe v Republic [2003] e KLR** stated:

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

81. In **Navaneetha Krishnan v The State By Inspector Of Police – Supreme Court Of India, Criminal Appeal No. 434 OF 2013** it was held:

“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.”

82. From the authorities on circumstantial evidence the court has to consider 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 accused the conviction would be justified.

83. In the instant case PW2, Richard Omondi Were testified that on the morning of 19/8/2018 at about 3.30am he woke up to wailing and screams coming from his grandmother’s homestead where upon arrival he was told that the accused had fought with the deceased and injured her forcing the deceased to be rushed to the hospital where she later passed on. This witness never said who told him that the deceased had fought with the accused leading to the injury.

84. This evidence of PW2 was corroborated by PW6, Mrs. Ogweny, and a clinical Officer at Mama Anne’s Community Health Centre who testified to attending to the deceased on 19.8.2018 at 3.00a.m. When the deceased was brought in by one Lenny Abiero who gave the deceased’s history as assault by her husband. This Lenny Abiero was never called to testify and no reasons were given for his failure to be a witness in this case to explain how he managed to take the deceased from the scene to the hospital for treatment, considering the fact that when the deceased reached hospital she was in critical condition and could not even talk or stand, according to PW6.

85. Corporal Isaac Kimurgor the Investigating Officer in this matter testified that he interrogated the accused who stated that he had a fight with the deceased who wanted to knife him, but he kicked her and she fell on the knife. The investigating officer further testified that the accused then took them (investigating officer was with CIP Abdirahman) to the house and showed them where the knife was which was clean but with hidden blood stains. The Government Chemist on analyzing the blood stains found on this Kitchen Knife produced as exhibit and the DNA profile of the deceased Ann Achieng found that the DNA of the deceased matched that found on the kitchen knife. This evidence tends to be an extra judicial confession. The question is whether this evidence is admissible in law.

86. **Section 25** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* provides:

“A confession comprises words, or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

87. The conditions under which a confession is admissible is provided under **section 25A(1)** of the *Evidence Act* which provides:

“25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice. (Emphasis added)

88. **Section 25A (1)** of the Evidence Act recognizes that a confession or admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person, **unless** it is made before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector and a third party of the accused person’s choice.

89. The circumstances in this case fall within what is contemplated by **section 25A (1)** of the *Evidence Act* as PW 6 was the investigating officer in this matter and his rank is below that of Chief Inspector. Furthermore, as a confession, it was not taken when a third party of accused’s choice was present.

90. In addition **section 29** of the *Evidence Act* provides for situations where a confession may be made to police officers and that officer would have to be above the rank or equivalent to inspector. This would not apply to PW 6 who was at the material time a corporal and the investigating officer. The net effect of the provisions I have cited is that the evidence leading to the recovery of the alleged murder weapon is

inadmissible.

91. My reasoning on the issue of admissibility is fortified by the fact that the rule that previously rendered admissible facts discovered as a result of the confession was repealed by **Act No. 5 of 2003, Section 31** of the **Evidence Act** which provided that:

“Notwithstanding the provisions of section 26, 28 and 29, when any fact is deposited to as discovered in consequences of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

92. In his defence, the accused denied committing the offence and also denied that he led the police to the recovery of the murder weapon. He testified that on the material night he was attacked by an assailant whom he kicked and he then went back to sleep. He further testified that the following morning police officers went to his home and arrested him. The accused denied any knowledge of the deceased's passing and in cross-examination denied seeing any wounds on the deceased and stated that on the material night, the deceased had been away from home for some time. The accused denied showing the police where the Kitchen knife was. There is no reason why the police did not involve a Chief inspector of Police to document the process leading to the recovery of the murder weapon, and which they saw would lead to a confession, knowing very well that a Corporal cannot take a confession from an accused person.

93. DW2, the area Senior Assistant Chief testified that the deceased and accused were generally a happy couple blessed with one child, a girl. That they never had issues but that he used to resolve disputes between the deceased and other people. However, in cross-examination he stated that the deceased and accused had at times been having differences.

94. The knife which was subjected to forensic examination was found to have DNA profile of the deceased and so were all the clothing exhibits taken to the Government chemist and produced in evidence as exhibits. There is no reason why forensic examination was not done on the kitchen knife such as swabbing to establish whether the accused person's finger prints were to be found on the handle and to establish whether the kitchen knife had the DNA profile of the accused person. This evidence is lacking yet it was crucial in a case relying purely on circumstantial evidence. PW3 is the person who was said to have fought with the deceased some days earlier and yet she was never questioned. Instead she was treated as a prosecution witness yet her evidence was valueless and tended to merely support what the accused was saying that the deceased had left for her home. For those reasons, I find the circumstantial evidence lined up against the accused person not sufficiently watertight beyond reasonable doubt to sustain a conviction against the accused person herein.

95. It also emerged at the trial that the only persons who were present during that night were relatives of the accused and one of them PW4 refused to testify on what she saw despite being treated as a refractory and later a hostile witness. This witness was found to be assisting the accused person escape justice for reason that he was her grandson. Her evidence was therefore worthless.

96. In my humble view, albeit the evidence by the accused person in his sworn defence was not persuasive that he kicked someone that night and that the person went away crying as he went back to sleep, or that he never saw the injury on the body of the deceased or that the deceased was not present at the memorial ceremony on that material day and night, the law is clear that the accused person bears no burden of proving his innocence. The burden of proof throughout the trial lies with the prosecution to prove the guilt of the accused person beyond reasonable doubt. That burden does not shift to the accused person.

97. In the circumstances, I find that in as much as there is strong suspicion that the accused person could have been responsible for the death of the deceased Ann Achieng, that suspicion cannot sustain a conviction. The prosecution through the investigators ought to have done more than what they did. They should have called witnesses who saw the accused and the deceased fight that night as there was every indication that there were many people sleeping in the house of the deceased wherein the accused also lived, all attending a memorial ceremony for the late grandmother of the accused. The evidence of PW3 was very scanty and so was PW2 who were not willing to disclose the person who told them that the deceased and accused fought that night leading to the fatal injury being inflicted on the deceased by the accused. The alleged confession leading to recovery of the murder weapon was improperly taken and is in the circumstances inadmissible. I must reject it. Nothing is therefore left perfectly linking the accused with the death of the deceased.

98. Having so found that there is no watertight evidence that the deceased was killed by the accused person, I need not delve into whether or not there was malice aforethought.

99. For those reasons, I find and hold that the prosecution has not proved their case against the accused person GABRIEL ONYANGO WERE for the offence of murder beyond reasonable doubt as required by law. I return a verdict of **NOT GUILTY** against the accused person of the offence of Murder and I proceed to acquit him and discharge him from the Information of Murder. Accordingly, the accused person herein GABRIEL ONYANGO WERE is set free unless otherwise lawfully held.

Orders accordingly.

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

R.E. ABURILI

JUDGE