REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 55 OF 2015[MURDER]

(CORAM: HON. R.E. ABURILI - J)

REPUBLIC.....PROSECUTION

VERSUS

WOO.....ACCUSED

JUDGMENT

1. The accused herein **WOO** is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code and the particulars as per Information dated 28th December 2012 signed by R. Meroka Prosecution Counsel are that on the 24th day of December, 2012 at Kagilo Sub location in Gem District within Siaya County he murdered **BOO**.

2. The accused person pleaded not guilty to the charge. The case was initially registered in Kisumu High Court and only returned to this court after establishment of the High Court in 2015. However, the hearing and determination of this matter has taken that much long period of time for reasons that the accused was found to be suffering from a mental condition which necessitated his being confined in Mathari Hospital, Nairobi for treatment and only when a Certificate of mental fitness was availed to court that this hearing was conducted with expedition.

3. The prosecution's case was as follows: **PW1 PAO** gave sworn evidence and testified that on 24.12.2012 she went to her farm at about 7:30 am but she was later called (at around 10.am) by Mary Awino who informed her that she was needed at home.That the witness went to her homestead and found one of her children lying down and the other children were there. She testified that there were many people gathered at her house. That the child who was lying down was BOO and that she found him dead and upon observing him, she saw that he had been stabbed at the neck and that he was cut in the throat. That she left the body with the accused who was the deceased's brother and that the Chief and Assistant Chief came and picked the body of the deceased using a Land cruiser and took him to Yala Mortuary and that later she was called to identify the body of the deceased to the doctors. She identified the post-mortem report and the same was marked as MFI 1.

4. In cross examination by counsel for the accused, PW1 stated that the accused was her son and had mental problems and further that he (accused) was found at the market place after the incident and he hid the bloodied clothes elsewhere so he was found with no blood and further that she was not present during the murder of her son and that the deceased and the accused had not quarrelled on the day the deceased was killed.

5. **PW2 (JOM)** gave sworn evidence and testified that on 24.12.2012 at 8.00 am, he left his home at 7.45 am for work at [particulars withheld] Secondary School. That he left behind the accused and the deceased. He testified that the accused was 20 years old and the deceased was aged 22 years and they were the only children at home as their mother had gone to the farm before he left. That while at work, his sister AG called him and told him that she had gone to his (PW2's) home and found B (deceased) had been slaughtered and that people were mourning at his homestead. That he went home and found his son B dead slaughtered in the neck and that he never found the panga (weapon used) but the Chief told him that he found the panga with blood.

6. In cross examination by counsel for the accused, PW2 stated that the accused was his son and that when he left the house, the deceased was unwell and that he had always been unwell. He further testified that he saw the body of the deceased and confirmed that it was him. Further that when he left his home, the two boys were okay and that they did not have any ill feelings towards one another. He further testified that the deceased was suffering from epilepsy and that he did not see the accused kill the brother.

7. **PW3 (RICHARD ATITO ORONGO)** testified on oath and stated that he was a farmer and that in 2012 he was the Senior Chief-Central Gem location but had since retired. He recalled that on 24.12.2012 at about 11.00am he received a report from people while at Nyangweso Market that a boy had murdered his brother at the home of JO. That he took a motorbike and rushed to the scene and on arrival he witnessed a body lying in a pool of blood in front of a kitchen and the body was for BOO and that he saw the injuries on the neck. That the deceased had been cut with a panga on the neck. (He was slaughtered.) the witness then called the OCS Yala Police Station and informed him and he then searched the house of JO and found a straight panga which was used to kill the deceased and the said panga was in the

bedroom of J and had blood stains. That the police went to the scene and took the body as JO and his brother W went to Nyangweso Market and collected W (the accused) and locked him up at Yala whereas the deceased was taken to the morgue.

8. In cross examination by counsel for the accused, PW3 stated that he searched and found the panga in the house of J and that he was with other people when he recovered the panga and that the accused was not at home but he met the accused at Nyangweso AP's camp and his clothes were blood stained.

9. **PW4 NO. 68022 CPL SIMEON KOECH** from Yala Police Station was not the initial Investigating Officer in this case which was being investigated by CPL JOAB ETYANG who was on transfer to Bungoma County. The witness had in his possession the statement by CPL Etyang and stated that he was conversant with the handwriting of CPL Etyang. He testified that the said CPL Etyang investigated a murder case against the accused herein WO upon receiving a report on 24.12.2012 from Chief Central Gem one Richard Atito Orondo of a murder incident in Kakilo sub-location. That the CPL Etyang went to the scene in a Land cruiser driven by PC Driver Ombura and found members of the public in the said village and a body lying in a pool of blood with a deep cut on the neck slightly above the throat.

10. He testified that the police officers were informed that it was the deceased's younger brother who was responsible for the murder and that the area chief and the public recovered a panga used by the accused WOO to kill the deceased. That the accused was arrested by the public who handed him to Nyangweso AP Camp and handed to officers who went to the scene and escorted him to Yala Police Station after which the body of the deceased was moved to Yala Hospital mortuary awaiting post-mortem and which post-mortem was done on the deceased's body on 28.12.2012 at 3 pm by Dr. Awino, MOH Yala Level 4 Hospital.

11. In cross examination by counsel for the accused, he testified that he was not the Investigating Officer in this case and that he did not know what happened to the accused after he took a plea. Further that the accused was said to have killed his own brother and the motive for killing was not established. He further testified that the accused was not found at the scene of crime but a panga was used to kill the deceased.

12. The prosecution then closed its case and counsel for the accused made oral submissions on a no case to answer. Vide a ruling of 14.10.2019, this court found the accused person to have a case to answer and placed him on his defence. He opted to give sworn testimony and called one witness.

13. In his sworn testimony, the accused testified that he knew the deceased who was his elder brother and he (deceased) was 22 years old and the accused 20 years. He stated that on 24.12.2012, his parents left him sleeping in his brother's (EOO)'s house and that he heard someone knocking on the door and when he opened the door, he saw EOO who asked him what had happened and he responded that he did not know because he was asleep. That he came out of the house and he (EOO) asked the accused as to what had happened to B (deceased) and he responded to E that he ought to tell him (what had happened to B). That when he got out, he saw B lying down outside E's house and there was blood outside the said house. That there was blood but he did not know what had happened to his brother the deceased. He stated further that the deceased had no enemies in the village as he used to help people and that he (accused) was a friend to the deceased as they were blood brothers. He further testified that he was angry when he saw his brother B on the floor bleeding. Further that he used to suffer from epilepsy and he was taking medicine. That he did not know how B (deceased) died and that he did not kill B.

14. In cross examination by Mr. Okachi Senior Principal Prosecution Counsel for the Prosecution, the accused stated that he knew P PW1 who was his mother and that on the material day, she left the accused sleeping at Eric's house and that from B's house to his mother's house was about 30 metres. That he did not hear the voice of B (deceased) but if he (deceased) shouted, he (accused) would have heard him. Further that he only heard of a panga when his parents came to court.

15. On being asked by the court the accused stated that it was true that in April 2012 he was at Siaya Hospital where they only gave him tablets and he went back home.

SUBMISSIONS

16. Mr Ariho counsel for the accused person filed written submissions framing the following issues for determination:

1. Whether the prosecution has proved its case beyond reasonable doubt?

2. Whether the Accused person's has a defence of insanity?

3. Whether the accuse person has any remedies?

17. ***On Whether the prosecution has proved its case beyond reasonable doubt? Counsel submitted that*** the burden of proof in criminal matters is for the prosecution to prove its case beyond reasonable doubt. He set out the ingredients of murder being found at sections 203 and 206 of the Penal Code and submitted that among the witnesses that the prosecution called, none adduced evidence to the effect that the accused person indeed had an intention to kill the deceased who was his brother. Further, that there was no eye witness and that for circumstantial evidence to stand, the chain of events must be corroborative and supportive of each other to sustain the charge of murder.

18. He submitted that in the instant case, the chain of evidence did not corroborate. That there was a murder weapon (a blood stained panga) that was allegedly recovered at the scene of crime but that the said panga was never produced as an exhibit and that there was no forensic report to link the murder weapon to the accused person that was produced in court.

19. He reiterated that the ingredients of murder were not proved by the prosecution, relying on **Republic v James Ogwang Alicho & another [2018] eKLR** where the learned Judge held,:

"With the above principles in mind, I now proceed to determine whether the prosecution has proved its case against the two accused beyond all reasonable doubt, the first issue being whether the ingredients of the offence of murder as set out under Section 203 of the Penal Code have been proved. I find that the prosecution has not proved the ingredients of the offence of murder as set out under Sections 203 and 206 of the Penal code. Although all the six witnesses confirmed that the deceased died there is no medical evidence on record to confirm the fact and cause of death. The doctor who performed the post mortem examination on the body of the deceased was not called to testify and therefore it cannot be concluded that the deceased died from the injuries inflicted upon him, during the night of the attack.

Having made the above findings, I have no choice but to conclude that the two accused are not guilty of the murder of Livingston Ambolola Shiliebo and to acquit each one of them accordingly under section 322(1) of the Criminal Procedure Code. Unless there is any other reason to hold the accused in custody, they are to be released therefrom forthwith."

20. ***On Whether the Accused person's has a defence of insanity? It was submitted that*** Dw2 a medical doctor adduced evidence to the effect that the accused person WOO aged 23 at the time of examination was a known psychiatric patient being treated in their mental health clinic since 2012. That he suffers from complex seizures which is part of mental illness. That currently he is mentally unstable his illness requires him to take medication daily. Dw2 produced a medical note being a medical report dated 12th November 2015 and produced the same as ***Dexht-1.***

21. It was submitted that the accused person was a patient of Siaya County Referral Hospital from 2012 and therefore he was a person who had a mental illness which could have incapacitated his judgment. That PW1 and PW2 stated that both the deceased (B) and the accused person (W) had a mental illness. It was therefore submitted that at the time the offence allegedly happened, the accused person did not have the capacity to know what could have happened on the material day and that if at all the accused was to be found at the scene and to have caused the demise of his brother, then he was insane. Reliance was placed on section **12** of the ***Penal Code*** which provides:

12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission.

22. Further reliance was placed on **Republic v S O M [2017] e KLR w**here the court held:

"14. There is sufficient evidence that the accused suffered from a mental illness as was clearly outlined by PW 2. The other family members confirmed as much. Considering the accused's behaviour before and after the violent incident, the medical history and medical reports produced during the proceedings, I find that on the balance of probabilities that the accused was suffering from a disease of the mind at the time he committed the felonious act.

16. However, this is not the end of the matter as I have doubt as to the constitutionality of these provisions particularly in light of the recent Supreme Court decision in Francis Karioko Muruatetu and Another v Republic SCK Petition No. 15 and 16 of the 2015 (UR) where the court held that it is the judicial duty to impose a sentence that meets the facts and circumstances of the case. This suggests that a law the leaves the length of the sentence to another authority violates the fundamental rights and freedoms of the accused."

23. ***On Whether the Plaintiff has any remedies? Counsel for the accused person submitted that*** the prosecution had failed to prove its case beyond reasonable doubt and prayed that the accused person be set at liberty

DETERMINATION

24. I have considered the evidence presented before the court both by the prosecution and the defence and in my opinion, the main issue for determination is ***whether the prosecution proved the case against the accused to the required standard and which standard has been held to be that of beyond any reasonable doubt***.

25. Section 203 of the Penal Code provides that:

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

26. In ***Anthony Ndegwa Ngarivs Republic [2014] eKLR*** the Court of Appeal sitting in Nyeri held:

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

27. In the instant case therefore, the question that I must answer is whether the prosecution proved:

a. ***That there was the death of the deceased and the cause of the said death***

b. ***That the death was caused by unlawful acts or omission***

c. ***That the accused committed the unlawful act which caused the death of the deceased***

d. ***That the accused had malice afore thought***

e. ***Conclusion/ what orders the court ought to make***

28. **On whether there was proof of death and the cause of the said death, i**t is not in dispute that the deceased herein died. The death of the deceased was proved by the evidence of PW1 who testified that when she went back home after being called, she found the deceased lying down dead and upon observing him, she saw that he had been stabbed at the neck and that he was cut in the throat and that the Chief and Assistant Chief came and picked the body of the deceased using a Land cruiser and took him to Yala Mortuary. Her testimony was corroborated by the evidence of PW2 who testified that when he went home (after being called by his sister Akinyi Gaudencia), he found his son Barrack dead and he has been slaughtered in the neck. PW3 (the Chief) on the other hand testified that when he arrived at the scene, he saw the deceased's body lying in a pool of blood in front of a kitchen and that he saw injuries on the neck and that the deceased had been cut with a panga on the neck. He further testified that the police came and took the body to the morgue.

29. Albeit the doctor who performed an autopsy on the deceased's body was not called to testify, it is clear from the evidence of the above witnesses, that there was indeed death of the deceased person. There was no way the deceased could have been taken to the morgue if he was not dead.

30. On what was the cause of death of the deceased, besides proof of death of the deceased, the prosecution is expected to establish the cause of death of the deceased.

31. Generally and ordinarily, a pathologist or a medical Doctor should have been called to testify as to the cause of death of the deceased after conducting a post-mortem on the deceased's body. However, in the instant case, I note that the prosecution despite having had the post mortem form identified by PW1 and marked as PMFI 1, the same was not produced in evidence as the doctor who conducted the autopsy on the deceased's body did not testify and make his findings known. Neither did the investigating officer seek leave of court to produce the post mortem report on behalf of the maker thereof.

32. The question therefore is whether the prosecution can be said to have proved what the cause of death of the deceased was or whether he died as a result of the injuries suffered as stated by the witnesses who testified and stated that the deceased was slaughtered on the neck.

33. In **Chengo Nickson Katama versus Republic (2015) eKLR, the Court of Appeal sitting in Mombasa (Makhandia, Ouko, & M'inoti, JJ.A) while dealing with the issue of failure to produce medical evidence on the cause of the death held:**

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

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

> ***"The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.***
>
> ***Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class.***
>
> ***To return to Cheya. It is plain to us that the decision must be confined to what must have been an exceptional situation, a great deal of which is not given in the judgment, that the judgment is misleading, and we would be lacking in candour if we were to conceal our unhappiness about the decision…."(emphasis added)***

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

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

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

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

37. In my humble view, therefore even in the absence of medical evidence as to the cause of the death of the deceased, the evidence of PW1, PW2 and PW3 is all consistent as to the appearance of the body of the deceased at the time they went to the scene. Their evidence was to the effect that the deceased was lying down and he had been cut on the neck/ slaughtered on the neck and there was blood (he was lying in a pool of blood). This evidence in my opinion suggests that the deceased must have died out of the injuries inflicted on his neck. This conclusion can safely be arrived at even in the absence of the evidence by a medical doctor. The deceased died at the spot where he appear to have been slaughtered and as such, there was nothing to lead to doubts as to whether it was the injuries on the neck which would have caused the death or something else. I therefore find that the death of the deceased was as a result of the injuries he sustained on the neck.

38. **On whether the death of the deceased was caused by an unlawful act or omissions and whose unlawful act or omission it was, as stated above, there is no doubt that** the death of the deceased was caused by the injuries he sustained on the neck which according to PW1,2, and 3, the deceased had his neck sliced as if slaughtered.

39. There was no eye witness who saw the deceased being assaulted. However, the injuries seen on the body of the deceased and described by PW1,2, and 3 cannot in any way be self-inflicted. They must have been inflicted by a third party. The act cannot be said to be lawful in any way. There was no justification for the said act. Article 26 (1) of the Constitution of Kenya 2010 guarantees every person the right to life. Under Sub-article 3, a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law.

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

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

41. The evidence before court irresistibly points to an unlawful act that led to the death of the deceased.

42. **On whether the prosecution have proved beyond reasonable doubt that it was the accused person herein who committed the unlawful act which caused the death of the deceased,** from the evidence tendered before court it is clear that none of the prosecution witnesses saw the accused person or any other person assault or cut the neck or rather slaughter the deceased. The accused in his defence testified that he was woken up by one E who asked him as to what had happened to the deceased but a question which he had no answer to, as he had not witnessed the same. Accordingly, I find no direct evidence to prove that the accused indeed caused the death of the deceased.

43. **The question therefore is whether there was circumstantial evidence linking the accused person with the death or murder of the deceased.** The conditions for circumstantial evidence to sustain a conviction in any criminal trial were laid down in **Abanga alias Onyango –vs- Republic CR. App NO. 32 of 1990(UR)** where the Court of Appeal held:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***

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

> ***"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."***

45. In the instant case, PW1 testified that she left early in the morning for the farm and left the accused and the deceased sleeping. Further in cross examination she testified that the accused was found at the market place after the incident and he hid the bloodied clothes elsewhere so he was found with no blood. PW3 testified in cross examination that the accused was not at home but he met the accused at Nyangweso AP's

camp and his clothes were stained.

46. In my humble view, this evidence on the status of the clothes the accused was wearing (whether they had blood stains or not) was contradictory. Further, if the accused person was found wearing bloodstained clothes or if as was stated by PW1 the accused had hidden the blood stained clothes, then where are those clothes and why were they said clothes not recovered during investigations and subjected to forensic examination to determine whether thy belonged to the accused and or whether the said clothes had any DNA profile of the deceased.

47. It was upon the prosecution to prove their case against the accused person beyond reasonable doubt and that burden does not shift to the accused person to exonerate himself. In my humble view, the evidence adduced by the prosecution witnesses fell short of linking the accused person herein with the death of his brother.

48. What appears the investigators and the prosecution relied on to arrest the accused and arraign him was the strong suspicion that because the accused was left sleeping with his brother, the fact that his brother was later found slaughtered, the accused should tell the court the person who slaughtered his brother.

49. In addition, despite the area Chief having testified to the effect that he indeed collected the panga which was allegedly used by the accused to commit the offence and which panga was blood stained, the said panga was never produced in court and neither was it submitted to the government chemist for forensic analysis.

50. Failure by the prosecution and the investigating officer to collect and to collate evidence linking the accused person to the offence as charged leaves this court with no other finding other than that the prosecution has not proved its case against the accused person beyond reasonable doubt. For avoidance of doubt, there is no evidence whether direct or circumstantial connecting the accused person with the death of the deceased person. This is what **section 111 (1)** of the Evidence Act (Cap 80 of the Laws of Kenya) demands (as was held in **Miller vs. Ministry of Pensions, [1947] 2 All ER 372)).**

51. Where the prosecution fails to prove the guilt of the accused person beyond reasonable doubt that the accused is the person who with malice aforethought killed the deceased, **then the accused person is by law entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

52. The accused person in his sworn statement of defence denied committing the offence and there was no contrary evidence that he committed the offence, not even that of unlawfully killing his brother. Therefore, in the absence of any evidence that suggests that the accused person could be held culpable for manslaughter, this court must return a verdict of NOT GUILTY. This is because mere suspicion however strong that the accused was left at home sleeping with the deceased and whereas there would have been chances that the deceased was assaulted by the accused, there are also very high chances that another person who was not the accused, could have assaulted the deceased and left him for dead. As authoritatively observed by the Court of Appeal in **P.O.N. v Republic [2019] eKLR** (Ouko, (P), Gatembu & Murgor, JJ.A):

> ***"*****.....no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not...."***

53. From my analysis of the prosecution and defence evidence tendered, albeit the prosecution proved that indeed the deceased died as a result of the injuries he sustained on his neck and which injuries were caused by an unlawful act, I find no evidence adduced by the prosecution to prove beyond reasonable doubt that the accused herein is the person who in fact caused the death of the deceased.

54. Therefore, the prosecution having failed to prove the fact that the accused person caused the death of the deceased, it would be an act in futility and an academic exercise to consider the issue of presence or otherwise of malice aforethought.

55. In the end, I find the accused person WOO **NOT GUILTY** of the charge of Murder and I acquit him of the offence of murder and discharge him under section 324(3) from the Information dated 28th December 2012.

56. Therefore, unless otherwise lawfully held, the accused person **WOO** is hereby set at liberty forthwith.

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

R.E. ABURILI

JUDGE