



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI

[Coram: A. C. Mrima, J]

CRIMINAL CASE NO. 6 OF 2019

REPUBLIC.....PROSECUTOR

-VERSUS-

1. EVANS OTIENO ADUOL

2. KEVIN ODONGO ADUOL.....ACCUSED

JUDGMENT

Introduction:

1. The accused persons herein, **Evans Otieno Aduol** and *Kevin Odongo Aduol* were jointly charged with the murder of one Harrison Onyango Otieno (hereinafter referred to as '**the deceased**').
2. The particulars of the information were that the accused persons 'on the 12th day of April 2019 at Rinya village in Uriri Sub-County in Migori County within the Republic of Kenya, jointly murdered Harrison Onyango Otieno.'
3. The accused persons denied the information and were tried. The accused persons were brothers.

The Prosecution's case:

4. The prosecution called four witnesses in support of its case. PW1 was *Jesca Buguza Egunza* (hereinafter referred to as '**Jesca**'). A younger brother to the deceased testified as PW2. He was *Kilion Ochieng Nyagigo* (hereinafter referred to as '**Kilion**'). PW3 was *No. 76880 Corp. Weldon Kipyegon* attached at the Uriri DCI offices. He was the Investigating Officer. I will hereinafter refer to him as '**Corp. Weldon**'. *Dr. Awinda Victor Omolloh* (hereinafter referred to as '**the Doctor**') who conducted the post mortem examination on the deceased's body testified as PW4.
5. The prosecution's case was that the accused persons murdered the deceased. Kilion testified that *Benjamin Otieno* (not a witness) was his father who was also the father of the deceased. The father hailed from Rinya village in Uriri Sub-County of Migori County where he owned a parcel of land and had settled his family thereat. The deceased had however acquired his own parcel of land at Kambogo area where he established his home. Kilion lived at the family homestead which bordered the accused persons land on one side.
6. The accused persons were hence immediate neighbours to the family of Benjamin Otieno. Kilion had known the accused persons quite well for over 26 years.
7. Kilion further testified that on 12/04/2019 at around 11:00am as he was at their home in Rinya the deceased arrived by use of a motor cycle. The deceased was accompanied by another man who was unknown to Kilion. The deceased introduced the person as a purchaser who he was to buy the deceased's share of his father's land.
8. The deceased, Kilion and the other person proceeded to the house of the mother of the deceased and Kilion. They met their mother. The deceased introduced the person to their mother. He further informed the mother and Kilion that he, the deceased, had agreed to sell his share of his father's land to the person at a price of Kshs. 250,000/= and that he had by then already received a down payment of Kshs. 100,000/= . The deceased further informed the family that he wanted to carve out his said portion and was waiting for a Surveyor who was on the way to their home.

9. It was Kilion's testimony that the Surveyor arrived at around 01:00pm. Kilion knew the Surveyor as *Oresi* of 0719 597 900. The exercise began. The subject portion was on the lower part of the land. As they continued Evans Otieno Aduol, the first accused person (hereinafter referred to as '**Evans**'), went to the farm. Evans met them. They had by then been joined by the wife to the buyer. Evans shouted that the land the buyer was purchasing did not belong to the deceased but it instead belonged to his family. According to Kilion, Evans went further and confronted the wife of the buyer. Kilion approached Evans to cool him down. The deceased asked Kilion to leave Evans alone. The deceased then chased away Evans who ran towards the upper part of the land while still protesting. The survey exercise went on to completion.

10. Kilion further testified that at completion the deceased informed him that he was going to the upper part of their land to find out why Evans was still shouting. The deceased left.

11. After a short while Kilion heard someone screaming to Evans. The person, whom Kilion neither saw nor recognized the voice, told Evans that the deceased was following him. Later the same voice screamed to Kilion urging him to rush to where the deceased had gone to as the accused persons herein were killing the deceased. Kilion ran towards the direction the deceased had taken.

12. When Kilion reached where the deceased was, he found him lying motionless on the ground. There was no one at the scene. Kilion carefully observed his brother. He was severely injured and was bleeding profusely. He had 3 deep cuts. Kilion called the name of the deceased three times but there was no response. The cuts were on the head, neck and back. Kilion was sure his brother was dead.

13. Kilion saw a jacket lying about 5 metres from where the body of the deceased was. It was yellow in colour. Kilion recognized it as similar to the one which Evans wore when he first confronted them. He collected the jacket which he later handed over to the police immediately they arrived at the scene.

14. Many villagers ran to the scene. Kilion called the Area Assistant Chief one *Gabriel Omollo Osoo* (not a witness) and informed him of the occurrence. The Chief advised Kilion to report the matter at the Kambogo Administration Police Camp. Kilion called his other brother, *Ismael Otieno* (not a witness) and asked him to report the matter as he had been directed by the Chief.

15. After around 20 to 30 minutes Ismael arrived at the scene with two police officers from the Police Camp. The police took over the scene. The officers then called and informed Uriri Police Station accordingly. After a while police officers from Uriri Police Station arrived. Jesca was with the police.

16. Kilion knew Jesca as well. Jesca had bought a portion of Kilion father's land. She was therefore their neighbour.

17. Jesca also knew the accused persons. They were her neighbours on one side of her land. Jesca knew the accused persons since she bought her land from Kilion's father in 1997.

18. Jesca recalled that she was at her home on 12/04/2019 at around 12:30 pm. She saw the accused persons pass near her home armed with pangas. They walked downstream. Jessica testified that she saw the accused persons so well and even recalled that Evans was dressed in a green Tee Shirt and a yellow jacket. Kevin Odongo Aduol, the second accused person (hereinafter referred to as '**Kevin**') wore an orange Tee Shirt.

19. Evans and Kevin did not talk to Jesca. She intently watched the accused persons who walked to the edge of her farm and stood. That was at the boundary of Jesca's farm and that of Kilion's father. They started clearing it.

20. Shortly afterwards, and as the accused persons were still working at the boundary, Jesca saw the deceased, whom he also knew as one of the sons of the one she bought her farm from, walk towards where the accused persons were working. The deceased was from the direction of their home. The deceased reached where the accused persons were and stopped. He was not armed.

21. According to Jesca the accused persons and the deceased were about 50 metres from where she was. She clearly saw them as she had only planted maize in her farm which were still at a tender stage. She could also hear what they were talking about.

22. The deceased asked the accused persons why they were clearing the boundary and cutting down the sisal plants which marked the border and yet the boundary dispute was still in Court. The accused persons did not respond. Suddenly, Evans attacked the deceased. He cut him with the panga he had on the neck. The deceased fell instantly. Evans cut the deceased again on the back. Jesca screamed.

23. Kevin heard Jesca screaming and pursued her while armed. Jesca ran away towards the Kaminolewe Centre. When she reached at the Centre Jesca found a place and sat. She then saw a police vehicle and stopped it. The vehicle stopped. Jesca informed the police what she had seen at her farm. She boarded the vehicle which was infact heading to the scene.

24. After a short while the police and Jesca met the accused persons who were walking towards the Centre. Jesca noted that the accused persons had changed the clothes they wore as they attacked the deceased. Jesca informed the police of the accused persons.

25. As the vehicle approached where the accused persons were, the accused persons stopped it. The vehicle stopped. The accused persons talked to the police and they boarded the vehicle on the rear. Jesca sat at the front of the vehicle.

26. The vehicle moved further ahead and they met the Assistant Chief one *Gabriel Omollo* (not a witness) and a village elder one *Julius Kungu* (not a witness) who also stopped the vehicle. The vehicle stopped and the Chief talked to the police. The Chief and the elder also boarded the vehicle.

27. The vehicle moved and stopped at a distance. One police officer, the Chief, the elder and Jesca alighted from the vehicle and walked to the scene. The accused persons did not alight. The vehicle went back with two officers and the accused persons.
28. Reaching at the scene, there were many people. Some were wailing and mourning. Jesca saw the body of the deceased and observed it. It had 3 deep cuts on the head, the neck and at the back. There was a lot of blood on the ground. The police photographed the scene. Jesca identified 5 photographs as among those taken at the scene by the police. Jesca also witnessed Kilion hand over a yellow jacket to the police. She readily recognized it as similar to the one which was worn by Evans as the accused persons passed near her home.
29. The police collected the body of the deceased and left. Jesca recorded her statement with the police later. She was not however aware of any case between the deceased and the accused persons which was by then in Court.
30. Jesca had not differed with the accused persons for the period of 22 years she had lived with the accused persons as her neighbours and had no grudge with any of them. Jesca however left her farm after the incident.
31. Corp. Weldon was in his office on 12/04/2019. At around 03:00pm he was instructed by the DCIO to proceed to a scene at Rinya village where one Harrison Onyango had been killed.
32. Corp. Weldon obliged. He was accompanied by 3 other police officers. They used a police vehicle. Corp. Weldon reiterated how they met Jesca, the accused persons, the Chief and the elder on their way to the scene. The testimony of Corp. Weldon indeed reiterated what Jesca mainly stated. Corp. Weldon clarified that when they were stopped by Jesca she was so frightened and could not talk properly. He had to first calm her down before she told him of the ordeal she had witnessed at the scene.
33. Corp. Weldon stated that when they were stopped by the accused persons, it was the accused persons who told them that they had killed the deceased and that is why the police asked the accused persons to board the vehicle.
34. It was Corp. Weldon's further testimony that they made a decision not to go to the scene in the company of the accused persons for security concerns and that is why the accused persons were instead taken to the station first. The vehicle later returned to the scene.
35. The scene was in a farm. The bush had been freshly cleared. The deceased lay in a pool of blood. Corp. Weldon observed him carefully. He saw 3 deep cuts on the head, neck and the back. There were so many people at the scene.
36. Corp. Weldon further stated that Kilion approached him at the scene and handed over a yellow jacket to him. Kilion told him that it belonged to Evans who had left it at the scene after the ordeal. Corp. Weldon took custody of the jacket as an exhibit. He also drew a rough sketch plan of the scene and took photographs. They collected the body and left.
37. The body of the deceased was taken to Migori County Referral and Teaching Hospital (MCRTH) mortuary for preservation and further police action.
38. Corp. Weldon continued with the investigations. He recorded statements from witnesses as well as the accused persons. He then escorted the accused persons for mental assessment at the MCRTH on 18/04/2019. They were both certified fit to stand trial.
39. On 19/04/2019 Corp. Weldon organized for and witnessed a post mortem examination on the body of the deceased. The examination was conducted by the Doctor.
40. The photographs were processed on Corp. Weldon's instructions. On completion of the investigations Corp. Weldon forwarded the police file to the Office of the Director of Public Prosecutions for advice. On receipt of the nod to charge the accused persons, Corp. Weldon arraigned them before Court where they took plea on 03/05/2019.
41. Corp. Weldon produced the photographs, the certificate thereto, the yellow jacket, the sketch map and the mental assessment reports as exhibits.
42. In the course of the investigations Corp. Weldon learnt of a longstanding land dispute between the families of the deceased and the accused persons. He further learnt that at one point the deceased was a complainant in a criminal case against the accused persons and Kilion was a witness. The accused persons were acquitted under **Section 215** of the **Criminal Procedure Code**.
43. The Doctor handled the autopsy. That was on 19/04/2019 at the MCRTH mortuary. The body of the deceased was identified by Kilion and Ismail Otieno who were both brothers of the deceased.
44. There were 3 deep cuts on the body. One of the cuts was at the posterior aspect of the neck, another cut was at the temporal aspect of the head and the other cut was at the back lumbar region. The cuts had sharp edges indicative of sharp force trauma.
45. The Doctor formed the opinion that the cause of the death of the deceased was the open head injury secondary to sharp force trauma to the head. The Doctor filled in a Post Mortem Report and signed it. He produced it as an exhibit.
46. The prosecution's case was closed on the foregone evidence. By a ruling of this Court the accused persons were both placed on their respective defences.

The Defences:

47. The accused persons gave unsworn defences. None called any witness.

48. Evans recalled that on 12/04/2019 he accompanied Kevin to their farm next to River Oyani. Each had a hoe/jembe. They also had a rope. They were to plant maize. As they walked to the farm they passed Jesca's home but they did not see anyone there.

49. Evans and Kevin planted the maize in their farm until around 11:00am they heard a sound of a motor cycle moving into their farm. Evans left planting and went towards the direction of motor cycle. He wanted to find out what was happening. He then saw 5 people in their farm. They were 2 women and 3 men. Evans only recognized Kilion and the deceased. He then saw one of the men he did not recognize take measurements on the ground. The deceased began putting beacons.

50. Intent on finding out what was going on Evans walked to where the people were. He asked them why they were there. One of them told him that they were buying a piece of land. Evans told the buyers not to buy that land as it did not belong to Kilion and/or the deceased. He then left to where Kevin was. He informed him of what was happening. They decided to report the matter but first they were to return to their home and change their clothes. As they left the farm the deceased appeared and asked them why they were chasing away the buyers. By then some people had started running towards the farm.

51. Kevin and Evans went home and changed clothes. They then left to report the matter. Nearing the Dong Koki Centre, they saw a police vehicle. They stopped it and reported the matter to the police officers who were in the vehicle. They were then asked to board the vehicle and they obliged. They saw Jesca in the vehicle but she later alighted. They were instead taken to a police station and placed in custody.

52. Evans stated that there was a land dispute between their family and that of the deceased. As a result, Evans was charged in *Migori Chief Magistrates Criminal Case No. 410 of 2017* where Kilion was a witness. He was acquitted.

53. Evans was surprised with the charge preferred against him as he knew nothing about it.

54. Kevin basically reiterated the evidence of Evans. He however, unlike Evans, stated that there were two motor cycles that were rode into their farm.

55. The accused persons closed their cases.

The Submissions:

56. The defence Counsel, *Mr. Singei*, filed written submissions. He also highlighted them. Counsel submitted that the information was not proved in law. It was further submitted that on account of all necessary elements required to fortify single witness evidence, the evidence of Jesca did not pass the test. The persuasive decision in **Donald Atemia Sipendi vs. Republic (2019) eKLR** was referred to.

57. Counsel further submitted on the standard of proof. Referring to **Article 50(2) of the Constitution** and the decisions in **Woolmington vs. DPP (1935) AC 462, Bakare vs. State 1985 2NWLR, United States vs. Smith 267 F. 3d 1154, 1161 (D.C. Cir. 2001)** Counsel submitted that the evidence raised several reasonable doubts and as such did not attain the standard of proof.

58. Citing **David Ojeabao vs. Federal Republic of Nigeria (2014) LPELR-22555 (CA), John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 (1934) 1 EACA 13, Philip Nzaka Watu vs. Republic (2016) eKLR, Dickson Elia Nsamba Shapwat & Another vs. The Republic, C. App. No. 92 of 2007, Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, (2003) UGCA 6, Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi)** the accused persons argued that the evidence had unreconciled discrepancies that rendered it unbelievable.

59. The accused persons also argued that key witnesses were not called to testify. They relied on **Bukenya & Others vs. Uganda (1972) EA 549.**

60. Further submissions were made to the effect that malice aforethought was not proved.

61. The Defence Counsel prayed that the information be dismissed and the accused persons be set at liberty.

62. Mr. Kimanthi for the Prosecution submitted that the information was firmly proved. Counsel took the Court through the evidence in demonstrating the elements of the information. He prayed that the accused persons be found guilty as charged.

Analysis and Determination:

63. It is on the foregone evidence and submissions that this Court is called upon to render itself on the information. I have carefully considered the evidence on record as well as the exhibits.

64. As the accused persons are charged with the offence of murder, the prosecution must prove the following three ingredients: -

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

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

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

I will consider each of the ingredients separately.

a. Proof of the fact and the cause of death of the deceased:

65. It is not in dispute that the deceased in this matter died. That position was confirmed by all the prosecution witnesses. The first limb is hence answered in the affirmative.

66. As to the cause of the death of the deceased, the Doctor produced a Post Mortem Report which he personally filled after conducting the post mortem examination. The Doctor opined the possible cause of death of the deceased was the open head injury secondary to sharp force trauma to the head. As there was no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons:

67. Jesca was the only identifying witness. She testified that she knew the accused persons well. The accused persons also confirmed knowing Jesca. They were neighbours. Jesca further testified that he saw the accused persons pass near her home on the way to what turned out to be the scene of crime. Whereas the accused persons denied seeing Jesca at her home they confirmed that they truly passed near Jesca's home but there was no one. Further, Jesca stated that the accused persons were armed with pangas, but the accused persons stated that they only had jembes and a rope.

68. There were some issues which were not in dispute. They included the fact that the accused persons worked on the farm which was past Jesca's home on the material day, that the accused persons met the deceased at the scene, that the deceased and the accused persons talked and that there was a standing land dispute between the families of the deceased and the accused persons.

69. The point of departure was that whereas the prosecution asserted that the accused persons attacked and killed the deceased, the accused persons denied as much.

70. There is no doubt the accused persons were placed at the scene. There is also no doubt that the deceased was killed at the scene.

71. Given that the accused persons have denied the information, this Court is under a legal duty to weigh the evidence of Jesca, being the only identifying witness, with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested.

72. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under: -

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

73. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition must be absolutely watertight to justify conviction.

74. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

75. Courts have upheld convictions based on identification evidence by a single witness even in instances where the crime was committed at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

76. Again the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

77. In Anil Phukan vs. State of Assam (1993) AIR 1462 the Court held as follows:

A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

78. Section 124 of the Evidence Act, Cap. 80 of the Laws of Kenya vouches for corroboration of evidence in criminal cases save in sexual offences. But what is corroboration?

79. The Black’s Law Dictionary 10th Edition Thomson Reuters defines ‘corroboration’ at page 421 as the ‘...confirmation or support by additional evidence or authority...’

80. The Court of Appeal in Karanja & Another vs. Republic (1990) eKLR said as follows on corroboration: -

.... Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime....

81. Corroboration is hence any further evidence that tends to support a factual proposition already put forth by some initial evidence. Corroboration is not limited to only eye-witnesses accounts. Corroboration may be by any other material evidence properly produced before Court.

82. Courts have even held that there can be a conviction based on the uncorroborated evidence of a single identifying witness. The Court of Appeal of Uganda in Obwana & Others vs. Uganda (2009)2 EA 333 in dealing with the issue of conviction in the absence of corroboration presented itself thus:

.....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.

83. Having looked at the law, I will now ascertain whether the evidence of Jesca, to the effect that the accused persons attacked and killed the deceased, was in any way corroborated.

84. Kilion stated that Evans appeared at the time the survey was on-going and protested. Evans even shouted at them. The deceased chased away Evans. After completion of the survey the deceased went to find out why Evans was opposed to the process and even shouting at them. By then Evans was at the upper part of the land about 50 metres from the home of Jesca. After a short while Kilion heard someone screaming to Evans. The person, whom Kilion neither saw nor recognized the voice, told Evans that the deceased was following him. Later the same voice screamed to Kilion urging him to rush to where the deceased had gone to as the accused persons were killing the deceased. Kilion ran towards the direction the deceased had taken. Kilion found the deceased already injured and lying on the ground. The accused persons were not at the scene.

85. Kilion’s evidence therefore corroborated Jesca’s testimony to the effect that the deceased went to where the accused persons were. That was at the boundary between Jesca’s farm and that of the father of the deceased. That was the scene of crime.

86. Jesca also testified that he saw Evans cut the deceased with a panga on the neck and the deceased fell instantly. Evans cut the deceased again on the back. That evidence was corroborated by the Doctor who conducted the post mortem examination. Just like Jesca, the Doctor confirmed that the deceased had a cut on the neck and at the back. Further, according to Jesca the injuries were caused by a panga. On his part, the Doctor confirmed that the injuries had sharp edges indicative of sharp force trauma. A panga is a sharp object capable of causing such injuries.

87. Further, Jesca testified that when she saw Evans cut the deceased she screamed and Kevin pursued him while armed with a panga. Jesca ran to the Centre and sat at place. She then she saw a police vehicle and stopped it. Corp. Weldon stated that when he met Jesca at the Centre she was traumatized, shaking and could not even talk. He had to first engage her before she recollected herself and narrated what she had witnessed. To that extent the evidence of Corp. Weldon corroborated the fact that Jesca must have witnessed such a traumatizing incident.

Watching someone cut with a panga on the head and back can be such an act.

88. There was also the issue of the yellow jacket. Jesca stated that Evans wore the jacket as he passed near her home to the farm. Kilion vouched such in two aspects. One, he saw Evans dressed in the jacket when Evans first confronted them during the survey exercise. Two, he found the jacket next to the body of the deceased at the scene. It was at the scene where Jesca said that Evans cut the deceased. The accused persons admitted that they changed the clothes which they wore before they proceeded to the Centre as they headed to the police. Jesca was hence truthful that Evans wore the yellow jacket at the scene.

89. The foregone discussion yields the fact that the evidence of Jesca was variously corroborated by Kilion, Corp. Weldon and the Doctor.

90. The accused persons denied committing the offence. While they admitted being at the farm and having seen Kilion, the deceased and other people taking measurements on the farm they did nothing other than leaving the farm and heading to report the matter to the police.

91. The accused persons raised the issue of a longstanding land dispute between their family and that of the deceased. At one time Evans was charged in Court. He was however acquitted. Matters related to land are very emotive. Naturally, one is bound to react when a disputed piece of land is acted upon otherwise by the adverse party. Just like the way the deceased approached the accused persons and asked them why they were interfering with the boundary, it is very likely that the accused persons had to find out what was happening on the farm when they saw people in the company of the deceased and Kilion taking measurements with a view of disposing the parcel.

92. The incident occurred during the day. It was around midday. Jesca knew the accused persons well. She had not differed with them either.

93. Jesca testified before me. I carefully observed her in Court. She was straight-forward, consistent and answered all questions with ease. I did not find her demeanor wanting. I hence believed her testimony.

94. By placing the evidence of the prosecution on one hand and the defence evidence on the other hand, I am persuaded by the evidence of the prosecution. I find it rather difficult to believe that the accused persons acted in the manner they alluded. To me the defences did not cast any reasonable doubts on the prosecution's case.

95. By taking the totality of the evidence and in consideration the settled legal principles applicable in this case, including warning myself of the dangers of relying on evidence of a single identifying witness, I find that Jesca was a truthful witness and it is safe to rely on her evidence.

96. Jesca did not see Kevin cut the deceased. No one ever saw Kevin attack the deceased. There is however evidence that Kevin was in the company of Evans. That was by Jesca. Corp. Weldon also met the accused persons together. The accused persons themselves so confirmed.

97. Kevin was hence present when Evans attacked the deceased. It was Kevin who pursued Jesca when Jesca raised alarm. Kevin was therefore in party with Evans in executing the crime.

98. I fortify the position in **Section 21** of the **Penal Code, Cap. 63** of the Laws of Kenya. The provision states as follows: -

21. Joint offenders in prosecution of common purpose:

When two or more persons two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

99. The Court of Appeal of Eastern Africa in the **R. vs. Tabulayenka s/o Kirya (1943) EACA 51** observed that 'the common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.'

100. Kevin was at the scene of crime. He did not successfully disassociate himself from the events at the scene that led to the killing of the deceased. He infact took part in chasing away Jesca who had witnessed what had happened.

101. I find that common intention was established in this case. Evans and Kevin actively participated in the killing of the deceased. The two were joint offenders in prosecution of a common purpose.

102. The accused persons also raised the issue of discrepancies in the evidence. The Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR** discussed the issue of discrepancies as under: -

As regards contradictions in the prosecution's case, other than the fact that the appellants did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example Joseph Maina Mwangi v. Republic, CR, APPNo. 73 of 1993, Kimeu v. Republic (2002)1 KAR 757 and Willis Ochieng Odero v. Republic [2006]Eklr. In John Nyaga Njuki & 4 Others v. Republic, Cr. App. No. 160 of 200, this Court expressed itself as follows on the issue:

In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the

evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case.

103. Having carefully gone through the evidence, I am satisfied that there were no discrepancies of the nature that would have created any reasonable doubt or vitiated the prosecution's case.

104. It was also submitted by the defence that some key witnesses were not called to testify. The witnesses however were not stated. Further, it was not demonstrated how their evidence, or lack of it, adversely affected the prosecution's case.

105. In **Daniel Kipyegon Ng'eno vs. Republic (2018) eKLR** the High Court dealt with the aspect of failure to call witnesses in some length. This is what the Court stated: -

38. Section 143 of the Evidence Act (12) provides as follows:-

“No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact”

39. In Julius Kalewa Mutunga vs Republic (13) the Court of Appeal held as follows:-

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

40. The Court of Appeal reiterated the above position in the case Alex Licholo vs Republic.[14] Perhaps the leading authority on this issue is the case of Bukenya & Others vs Uganda [15] cited by the appellants counsel where the East African Court of Appeal held that:-

i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent

ii. the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

41. Even though counsel for the appellant relied on the above case, he did not proceed to mention that in the same vein in the same case the court was categorical that the prosecution is not expected to call a superfluity of witness. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

42. What should be made clear is that the famous rule in Jones vs Dunkel [16] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned.

43. The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference [17]

106. As said, the submission holds no water.

107. I am therefore persuaded that the prosecution proved that the accused persons committed a crime beyond any reasonable doubt. In the words *Lord Denning* in **Miller vs. Minister of Pensions (1947) 2ALL ER 372: -**

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

108. The second ingredient is also answered in the affirmative.

(c) Whether the unlawful acts were committed with malice afterthought:

109. The starting point is the law. **Section 206** of the Penal Code defines '*malice aforethought*' as follows:

206. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.**

110. The Court of Appeal has also dealt with this aspect on several occasions. In **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

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 the 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 in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's 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 a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55.

111. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of a bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the conviction of murder with manslaughter observed: -

There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.

112. The Court of Appeal in **Republic vs. Tubere s/o Ochen (1945) 12 EACA 63** set out the parameters for determining the presence of malice aforethought. The elements include: -

- i. The nature of the weapon used;**
- ii. The manner in which the weapon was used;**
- iii. The part of the body targeted;**
- iv. The nature of the injuries inflicted either a single stab/wound or multiple injuries.**

v. The conduct of the accused before, during and after the incident.

113. In this case there was evidence that Evans confronted the deceased and the others during the survey exercise. He protested and asked the buyers not to buy the land. It was the deceased who chased Evans away. Evans left and started working at the boundary with Kevin. The deceased followed the accused persons where they were. He confronted them by asking them why they were working on the farm despite pendency of a suit. In a spontaneous reaction Evans attacked the deceased and killed him.

114. I am not convinced that the accused persons planned to attack and kill the deceased. Had that been the case then Evans would have done so during the survey exercise. Further, I am not certain if the crime would still have been committed had the deceased not confronted the accused persons when they were working at the farm.

115. In those circumstances I find no evidence of malice aforethought and the third ingredient fails.

116. A fortiori, the foregone analysis does not therefore support a conviction in respect of the information of murder against Evans Otieno Aduol and Kevin Odongo Aduol. Each of the accused persons is hereby found not guilty of the murder of Harrison Onyango Otieno and they are hereby acquitted.

117. However, from the evidence the deceased lost his life as a result of the actions of the accused persons, but of course without any malice aforethought.

118. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya this Court finds Evans Otieno Aduol and Kevin Odongo Aduol **guilty** of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

119. These are the orders of this Court.

SIGNED BY:

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT MIGORI THIS 15TH DAY OF OCTOBER, 2020

S. J. CHITEMBWE

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. B. Singei, Counsel for the accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.