REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 66 OF 2016

LESIIT, J

REPUBLIC.....PROSECUTOR

VERSUS

SWK.....ACCUSED

JUDGMENT

1. The accused is charged with one count of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

> ***"On the 9th day of July, 2016 at about 0215hrs at Dandora phase II within Nairobi County, murdered SN"***

2. The accused was arraigned in court on 16th September, 2016 with a psychiatric report showing that he was not fit to stand trial. He was declared fit to stand trial on 14th November, 2017 a year later. He pleaded not guilty to the charge of murder**.** Hearing commenced with the prosecution calling a total of 7 witnesses.

3. The facts of the prosecution case are that the accused had a relationship with the deceased, and at the time of the incident they were both living as man and wife, together with PW1 a minor daughter to the deceased. It is not clear from the evidence how long they had lived together but PW4 said he discovered about the co-habitation three months before the incident.

4. PW1 testified that on the date in question, it was at night and the accused and the deceased were in bed as she sat on the same bed. PW1 stated that the deceased received a phone call and after she talked to the caller, the accused alleged that the deceased was talking to men, and that he started beating the deceased. PW1 testified that the accused then reached under the bed and picked a hammer which he used to hit the deceased on the head. He then took a knife from the bed and stabbed the deceased.

5. PW1 testified that after the attack on her mother, the accused turned against her, PW1, and hit her on the head with the same hammer, then stabbed her on the head with the same knife. PW1 said that the accused locked them in the house and went away. PW1 said that she was found inside the house by Nganga, PW4 who gave her milk then took her to Kenyatta Hospital where she was admitted for many days.

6. The other witness was PW4, an older brother to the deceased. He said that on the material day he was on duty collecting security charges from the housing court where he worked as a night watchman. He said that he lived on the same plot with the deceased, his house being the eight on the left side of the plot while the deceased house was the fourth on the left. He explained that the plot belonged to their mother. He said that he had lived there for five years while the deceased had lived there for only three months. PW4 testified that the deceased lived with PW1 and the accused on the single roomed house.

7. PW4 stated that between 7pm to 9pm, he was collecting security money from residents. He said that as he worked, his mother called him asking about the deceased saying she was not picking her calls. It was after 9pm when he went to the deceased house to find out why. He said that he found the house locked with a padlock from outside. He went to the window and when he lifted the curtains of the house window which was not locked, using a torch he saw PW1 seated on the bed leaning on the wall, with blood oozing from a deep wound on her head. PW4 said that he could smell blood inside the house.

8. PW4 testified that he called neigbours who came to assist him. He then broke the main door and entered the house where he found the deceased lying down on the bed in an awkward position. He said that he first carried his niece from the house to rescue her. After giving her milk, he took her to the police station where he was told to take her to hospital. He said that he crossed the road from the police station and took her to a nearby hospital where PW1's head was bandaged and bleeding stopped.

9. PW4 stated that he went back to the police who referred him to Kenyatta Hospital. He said that he called his older brother, PW3 who took their niece to hospital the same night. PW4 said that he accompanied police back to the scene where he switched on the lights to see clearly. He said that as he lifted the deceased by her upper body, as another man held her by the legs, he heard the deceased head making sounds as if it was cracking, and that it was shacking as if it had been crushed into small pieces held by the skin. He said that he noted that she had stab wounds on the neck and also signs of being strangled with a rope.

10. PW4 testified that after he carried the deceased to the police car, he was arrested and held in police cells for two days after which he was given a burial permit to bury his sister, the deceased. He said that after the burial he started looking for the accused, and that he saw him at Dandora bus terminus after two months. He called police and the accused was arrested for this offence. PW4 said that he knew the accused as a friend before he realized that he was living with his sister. He said that the accused had even gotten him a job. PW4 identified the latchet and padlock he broke at the scene as P. Exh. 2 and 1 respectively.

11. PW3 confirmed receiving news of deceased death at around 9pm same night from one, Stevo. When he eventually got the call from his brother PW4, he met him and took away their niece from him.

12. The pathologist who examined the deceased body described her injuries. He said that the deceased had a deep laceration on the right side of the head with an exposed fractured skull. She had another laceration on the forehead measuring 3cm long. PW5 also found several stab wounds, one externally on the right neck 4by 6cm long and deep; internally one penetrating injury to the left lung; a collapsed left lung and laceration on the blood vessels on the left lung. Also, internally PW5 saw a depressed skull fracture round and 4cm long, and bleeding over the brain.

13. PW5 explained that the injuries on the head were two lacerations caused by a blunt object. He testified that the injury to the neck was caused by a sharp object and that it was the cause of death due to the injuries to the blood vessels. He said that he did not see any defence injuries. The pathologist, PW5, Dr. Oduor Johansen, said that after his examination he formed the opinion that the cause of death was head and chest injury due to penetrating and blunt trauma. His report was P. Exh. 4.

14. The accused person was placed on his defence and he opted to give a sworn defence. The accused stated that he had been the boyfriend of the deceased for three months. He said that the deceased had a daughter, PW1, and explained that he moved in to live with the deceased in her house so that he could take care of PW1 as the deceased went home very late. He said that on the material day he prepared PW1 for school that morning and released PW1 to go to school at 6:30am. That at 7am, while he was still in the house the deceased returned home with PW1. The deceased said that PW1 was sick and needed to see a doctor and that it was the reason she had returned with her.

15. The accused said that for the first time the deceased was drunk and that she received a call from a man. He said he was near her and he heard the discussion between them where the caller told the deceased that he would like a repeat of their experience the night before. The accused said that is when the two of them started quarreling. The accused stated that when he asked the deceased what they were discussing with the caller, the deceased was harsh and that is when he slapped her. He said that the deceased picked a knife from the utensils and while struggling over the knife the deceased was accidentally stabbed. The accused also stated that in the process PW1 fell down on the metal bed and injured her head.

16. During cross examination by the learned prosecution counsel, the accused testified that he had mental illness when he was in primary STD 6 and STD 7 which later recurred after this incident.

17. I have carefully considered the entire evidence adduced by the prosecution and the defence. The burden in this case like in all criminal cases lies with the prosecution to prove its case against the accused beyond any reasonable doubt in respect of the charge of **murder** contrary to **section 203** of the **Penal code**.

18. The question which must be addressed is whether the three crucial elements of the offence of murder contrary to **Section 203** of the **Penal Code** have been proved beyond reasonable doubt. The ingredients for the offence of murder are well settled. The prosecution has to establish that the deceased died due to an unlawful act or omission on the part of the accused. Secondly, the prosecution must prove that at the time the accused committed the unlawful act or omission, he had formed the intention to cause death or grievous harm on the deceased. Thirdly that the prosecution must establish that the accused action caused the death of the deceased.

19. Malice aforethought is an integral ingredient to a charge of murder. **Section 206** of the **Penal Code** sets out the circumstances that constitute malice aforethought. It may be established by way of evidence when any of the following circumstances exist:

> ***"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.***
>
> ***(b) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.***
>
> ***(c) An intention to commit a felony; and***
>
> ***(d) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it."***

20. Both the prosecution and the defence indicated that they were not going to make any submissions in this case. However, on 19th September, 2019 counsel filed written submissions on behalf of the defence. I will consider them hereinafter. The prosecution filed no submissions. They may also be unaware that any submissions were filed by the defence.

21. Having considered the evidence adduced in this case and the written submissions filed in support of the accused case, I find that issues which are not in dispute and those which are disputed in this case are clear. Those which are not in dispute are:

a) That the accused and the deceased lived as husband and wife for three months before the incident.

b) That the deceased had a daughter living with the two of them from another relationship.

c) That a phone call either received or made by the deceased triggered an argument between her and the accused leading to the attack. The nature of the attack is disputed.

22. The issues for determination are as follows:

a) Whether the accused caused the injuries that led to the death of the deceased and whether the evidence of the eye witness, PW1 needs corroborative evidence and whether such was available.

b) Whether the incident took place in the morning or night of the day in question

c) Whether the investigations into this case were properly conducted.

d) Whether the weapons adduced in evidence were the murder weapons.

e) Whether the prosecution has established malice aforethought.

f) Whether the accused is entitled to any defence in this case.

23. In regard to whether the accused caused the injuries that led to the death of the deceased, this issue is connected to the second issue and therefore I will consider both together. The second issue was whether the evidence of the eye witness, PW1 needs corroborative evidence and whether such was available. Mrs. Nyamongo for the accused submitted that PW1 gave an unsworn statement for reason she was a child of 7 years who did not understand the meaning of an oath. Counsel urged that for that reason her evidence required corroboration. For that proposition counsel invoked the provisions of **section 124** of the **Evidence Act**. She also relied on the case she did not provide of **HARGAN VS THE KING (1919) 27 CLR 13.**

24. I have already set out the testimony of PW1, the daughter of the deceased. The testimony of PW1 was that the accused attacked her mother the deceased, accusing her of talking to men on her phone. She testified that the accused reached under the bed and took out a hammer with which he hit the deceased on the head severally. She said that the accused then reached out in the bed for a knife which he used to stab the deceased. PW1 testified that the accused turned against her with the same hammer and knife first hitting her on the head and thereafter stabbing her with a hammer and the knife respectively.

25. The **Oaths and Statutory Declarations Act,** under **section 19** provides as follows:

"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 **of the** Criminal Procedure Code **shall be deemed to be a deposition within the meaning of that Section."**

26. In the case of **Julius Kiunga M'rithia vs. Republic, [2011] eKLR,** the court held as follows as to the purpose of **section 19** of the **Oaths and Statutory Declarations Act**:

"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -

(1) whether the child understands the nature of an oath; or

(2) if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

27. In **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (unreported)the Court of Appeal stated:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80)."

28. The **Children Act**, under **section 2**, defines "**child of tender years" means a child under the age of ten years"** PW 1 was a child of 7 years according to the evidence of his uncles PW3 and 4. She was a child of tender age being under the age of 10 years. The court assessed her age as below 10 years of age going by her evidence that she was in class 2, and also from her apparent age from her appearance including facial look, my own assessment. That is the reason I decided to carry out a *voire dire* examination to determine three things; one, whether she understood the meaning of an oath; two, whether she was possessed of sufficient knowledge and intelligence to testify; and, whether she understood the duty to tell the truth.

29. The record is clear in regard to the results of that examination. Mrs. Nyamongo was very right that the court concluded that PW 1 could not be sworn because she did not understand the meaning of an oath. PW1 was intelligent enough to justify the court to receive her unsworn evidence, and further, the court was satisfied that she understood the duty to tell the truth.

30. Mrs. Nyamongo relied on **section 124** of the **Evidence Act**. **Section 124** of the **Evidence Act** regarding the evidence of children provides as follows:

> **"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

31. PW1 was testifying as an eye witness of the incident in which the deceased was fatally wounded. Even though she was herself seriously injured, this case was not about her injury. Apart from the accused, she was the only other person present at the time of the attack on the deceased. In the Court of Appeal case of **ONSERIO v. REP. [1985] KLR 618**, it was held:

> **"An accused can only be convicted on the evidence of a child of tender years if corroborated by other material evidence in support thereof implicating him as set out in section 124 of the Evidence Act."**

32. The requirement for corroboration of child evidence is still good law, subject to the exception under **section 124** of the **Evidence Act**, that is where it is a sexual offence and the only available evidence is that of the child victim. The exception does not apply here.

33. The evidence of PW8 the investigating officer in this case was that when he took the statement of PW1, she implicated the accused for the acts which led to the deceased death. PW1 was consistent in her narration of the events f the material day, both to the police and also in her evidence in court.

34. The most important aspect in the case is that the accused does not deny having had an altercation with the deceased on the day in question. He explained that the deceased took a knife from the utensils following which there was a struggle between them, and that as a result, the deceased was accidentally stabbed. The accused stated that PW1 was also hit by the metal bed when she fell over it. Technically the accused admits that the deceased was injured during their struggle to take control of the knife. That means that he does not dispute being present when the deceased suffered the injuries which led to her death. Could what he says be true?

35. The pathologists finding will help determine whether the deceased received an accidental stab as accused alleged, or was hit with a hammer several times and stabbed as PW1 stated in her evidence. PW5 Dr. Oduor who carried out the postmortem testified of the injuries he noted on the deceased. He said that the deceased had a deep laceration on the right side of the head exposing a fractured skull measuring 3cm long, the deceased also had a stab wound on the right neck measuring 4cm x 6cm long and deep respectively.

36. Internally the deceased's lungs were collapsed, there was bleeding on the left chest, penetrating injury on the left lung, laceration on blood vessels on the left lung. On the head there was depressed skull fracture measuring 4cm long and bleeding on the brain. PW5 testified that the lacerations on the head were caused by a blunt object while the penetrating injuries were caused by a sharp object. PW5 formed the opinion that the cause of death was head and chest injuries due to blunt and penetrating trauma.

37. The trauma suffered by the deceased was caused by two types of weapons, a sharp weapon and a blunt one. The two weapons recovered from the house first the hammer by the OCS, and the knife by the Investigating Officer, PW8 all fit the description of the weapons which caused the deceased death. The significance of the finding by the pathologist is that those findings are consistent with the evidence of PW1. I find that the evidence of PW1 received material corroboration of how the deceased met her death.

38. The flip side effect of PW5's pathological findings are that the accused lied about how the deceased was injuried and what kind of injuries she suffered. He talked of an accidental stab without being specific in regard to where she was injured and how. That is a lie because the pathologist found a stab wound on the right side of the neck which penetrated severing the blood vessel to the lungs and penetrating the left lung, and in addition there were lacerations, one deep laceration on the right side of the head exposing a fractured skull measuring 3cm long and a second laceration on the head with a depressed skull fracture measuring 4cm long and bleeding on the brain. These injuries speak for themselves. Two weapons were used, one sharp and one blunt. Injuries were severe and gave the deceased no chance of survival.

39. The other aspect of the case is that the defence did not suggest to the pathologist that the deceased suffered only injuries caused by a sharp object, and secondly that it was accidental. In that regard I find accused defence that the deceased was accidentally stabbed as they struggled over the knife was an afterthought.

40. All in all, I find that the evidence of PW1 that the deceased was attacked with a hammer and a knife received corroboration from the evidence of PW5. I also find that the accused admitted being present when the deceased got injured, which admission further confirms the evidence of PW1. That makes it unnecessary to deal with identification as the accused does not deny being present. In any event PW1 knew the accused very well and the lights were on and the family was ready to sleep having entered the bed to sleep for the night. There is no chance that PW1 did not have an opportunity to know who carried out the attack.

41. As to whether the incident took place in the morning or night of the day in question. It was the contention of Mrs. Nyamongo for the defence that the evidence of PW1 was unreliable because she testified that the incident had occurred at night when it took place during the morning hours. Mrs. Nyamongo tied this issue with that of the credibility of PW1 and faulted PW1's evidence accusing her of having been coached to say that she was hit by both a hammer and stabbed with a knife and locked up in the house.

42. Regarding the time of the incident, I do not find it of material importance whether the injury was at night or morning. That said I did consider the evidence of PW4. He said that their mother called him and asked him to check on the deceased because she was not answering her calls, and that she had called her ten times. PW4 said that the mother had called him as he collected monies from tenants where he worked between 7pm and 9pm. PW4 said that he went to his sister's place not very far from his work station after 9pm.

43. PW3, the older brother of the deceased said that on the material day at around 9pm, one Stevo, a neighbour to the deceased called him and told him that the deceased had committed suicide. The police officers who received the report from PW4, the first to report the incident to the police were not called as witnesses. Among them was the OCS. That notwithstanding, given the evidence of PW3 and 4, it is clear that the incident took place at night and not during the day or morning.

44. None of the issues raised by Mrs. Nyamongo about PW1 having been coached, or about exaggeration of injuries inflicted were put to PW1 during her cross examination, or to any other witness. There was no suggestion put to her that she was coached. It is on record that the witnesses in this case had proved difficult to obey witness summons and the court had to issue warrants of arrest before any of them came except PW1. I see no evidence that there was any coaching of PW1.

45. That said it is very strange that such a contention is made at this stage. In regard to injuries, those inflicted on the deceased were documented in the post mortem form and there is nothing on record to create any doubt that the deceased was not injured as documented.

46. As to the injuries suffered by PW1, the defence requested to cross examine the doctor who examined PW1 and wrote her P3 form, thus objecting to the production of the P3 form by PW7. The form was therefore merely marked but was never produced, as the prosecution closed their case before calling the maker. Therefore, court did not have the benefit of doctor's evidence on the injuries that PW1 suffered.

47. Even without the P3 form, the injury that PW1 suffered in this incident needed no medical description. PW1 was in court when she testified. She was there for all to see her. The healed scar was a deep depression on the top of her head, just above the eye. The injury was a deep depression on the head. There was evidence to confirm when she suffered the injury from the evidence of two uncles of PW1 that is PW3 and 4. They are the ones who rescued her and took her to Kenyatta Hospital respectively. I find that there is ample evidence to prove, and there is no doubt in the courts mind that the injury it saw for itself on the top of PW1's head was suffered during the incident.

48. As to the weapon which caused it, the depression was obviously caused by a blunt object, but in any event how it was caused is not material as it is not the matter before court. I am satisfied that PW1 was not coached as alleged, she was an intelligent young girl who gave her evidence with clarity and boldness. The areas of alleged coaching were all corroborated in the evidence adduced by other witnesses as stated and also in the accused statement in defence. I find that nothing turns on this issue.

49. As to whether the investigations into this case were properly conducted. It was Mrs. Nyamongo's contention that the investigations into this case were shoddy as certain lines of investigations were not followed. Mrs. Nyamongo raised issue with the fact that none of the neigbours where the deceased lived heard anything that night, nor were called to testify. She also urged that the initial report made to PW5 by PW3 was that the deceased committed suicide.

50. The investigating officer of this case was PW7, who at the time was the Deputy DCI and Acting In-charge, Dandora DCI office. He came into the case much later after the reports had been made. He said he read the OB of the material day, 9th July, 2016. He said that the information in the OB was a report of murder and that one suspect was in custody. He said that he took over the investigations and his first discovery was that the brother of the deceased, PW4 was the one in custody as a suspect. PW7 testified that when he interviewed the OCS about his arrest, the OCS told him that he did not believe the report given by PW4 and so he locked him up.

51. Mrs. Nyamongo was wrong about the initial report made in this case. There was a suspect in custody, it would be ridiculous that a suspect could have been arrested in a case of suicide. Secondly, PW3 did not give any report to the police, leave alone a report of suicide. Thirdly, PW5 was the pathologist, not a police officer. Fourthly, PW3 did not go for the post mortem of his deceased sister and therefore had no contact with PW5 in relation to this case. Fifthly, PW5 formed the opinion that the deceased was murdered. Lastly, it was PW3's evidence that the first call he received informing him of the deceased death was by one Stevo.

52. Stevo told him that the deceased had committed suicide. PW3 did not tell this information to the police and by the time he came into the case, a report had already been recorded and the body recovered from the scene by the police. Furthermore, Stevo was not a witness and was therefore not examined regarding how he came to the conclusion it was a suicide case.

53. Regarding the neighbours not hearing anything, PW7 said that as part of the investigations he visited the scene and that he found only one tenant whom he interviewed, and who told him he was on night duty and therefore not there when the incident occurred. PW7 testified that other tenants were unwilling to give any information into the matter.

54. Before I close on this issue, I must mention that the OCS, who was present at the beginning, arrested PW4, locked him up in cells and

folded his hands. It is PW7 who made a difference when he took over the investigations. Part of the reasons I make this observation is the clumsy manner in which the OCS handled the scene. He was the most senior officer to visit the scene soon after the matter was reported to the station. But what does he do, he recovered a hammer, left behind a knife which PW7 recovered a day or two later, then locked up the reportee! Not to mention he may have mishandled the exhibits because they yielded no DNA. PW6, the Government Chemist explained that mishandling of the blood in exhibits or samples is what causes them to degenerate. She said that even though she could not tell why no DNA was found, poor preservation of the exhibits was the culprit.

55. I find that PW7 the investigating officer in this case did his best and a good job of the investigations. He rescued PW4 who was treated as a suspect yet he had acted to save his niece and to have the offender arrested. The behavior of PW3, his other brother, first not to take PW1 to hospital until PW7 had to intervene and make a written request to Kenyatta National Hospital for her to be treated is telling. He kept her in his house and had it not been for PW7 who summoned him, she may not have lived to tell her story. Furthermore, PW3 did not bother to visit PW4 while in police custody, neither did he bother to find out why it was PW4 who was arrested for this case. It shows indifference on the part of the family of PW4 and the deceased. I find that PW7 did a sterling job and carried out the investigations in a befitting manner given the circumstances of the case.

56. In regard to whether the weapons adduced in evidence were the murder weapons, Mrs. Nyamongo submitted that the hammer and knife collected at the scene, P. Exhs. 9 and 6 respectively, had no link to the accused or the deceased.

57. The hammer was collected by the OCS the same day of incident. The knife was collected by PW7 a day or two after the incident. The Govt. Chemist found no DNA at all on both the hammer and the deceased blood sent as control sample. On the knife, PW6 found DNA of an unknown female origin.

58. Is that enough proof to say they were not connected to the murder? The important point is that the doctor's findings were that a blunt object and a knife were used in this attack. That finding is consistent with the exhibits recovered at the scene.

59. In ***EKAI V. REPUBLIC (1981) KLR 569*** it held:

> "**Failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon**."

60. *In* ***KARANI V. REPUBLIC (2010) 1 KLR 73*** the Court delivered itself as follows:

> ***"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."***

61. It is trite law that even where the murder weapon is not recovered or produced in evidence, it is not fatal to the prosecution case, on condition that the court is satisfied. In this case, I believe that from the evidence before this court, that the deceased was murdered with a blunt and sharp object. I believe that such weapons existed at the time of the offence, and that they are the two weapons produced in court as P. Exh. 6 and 9.

62. In regard to whether the prosecution has established malice aforethought. What constitutes malice aforethought is well set out under **section 206** of the **Penal Code**. I have quoted that section herein above. In summary malice aforethought is an intention to cause either death or grievous bodily harm. Malice aforethought is proved, not only when the accused purpose is to cause death or grievous bodily harm, but in addition when he carries out the killing with the knowledge that his acts will cause death, where the accused foresees that a death will result from his unlawful act but proceeds to execute his intention

63. There are other numerous cases which demonstrate the various elements of malice aforethought which can be established in a trial of an accused person. The principle among them being the nature of the weapons, the manner in which it was used including the number of times used, the relevant parts of the body targeted, the nature and gravity of the injuries inflicted and the conduct of the accused person after the fact.

64. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering malice aforethought observed as follows:

> **"When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code."**

65. **(**See Court of Appeal in the cases of **Ernest Abanu Bwire Abanga alias Onyango Vs. R, CA No. 32 of 1990, Godfrey Ngotho Mutiso Vs. R., 2008 EALR, Morris Aluoch Vs. R., CA No. 47 of 1996(UR)** and **R. Vs. Yakobo Ojamuko s/o Nambio (1944) 1 EACA 97**.)

66. The burden lies with the prosecution to prove that the accused with malice aforethought caused the death of the deceased. The prosecution relies on the testimony of PW1, PW4 and PW5. PW1 testified that the accused person picked a quarrel with the deceased, accusing her of talking to other men. He then bent over the bed, picked a hammer from under the bed and hit the deceased with it. He then drew a knife from the bed and stabbed the deceased with it. He then attacked her, PW1 in a similar way and then locked them inside the

house and left.

67. PW4's evidence was that he found the deceased already dead with severe injuries on her head and neck. He described what he saw of the injuries as cracked and depressed head and stab wounds on the neck. He also found PW1 with a depressed head which was also oozing blood from the wound. He spent weeks looking for the accused which he eventually managed and was assisted to have him arrested by PW7.

68. **PW5 Dr. Oduor** testified to the injuries he found on the body of the deceased at postmortem. He said that the deceased had a deep laceration on the right side of the head exposing a fractured skull measuring 3cm long, a depressed skull fracture measuring 4cm long and bleeding on the brain, a stab wound on the right neck measuring 4cm x 6cm long and deep respectively, and internally the lungs were collapsed with bleeding on the left chest due to a penetrating injury on the left lung and laceration of blood vessels on the left lung.

69. The choice of a hammer and a knife, and the target of the head, neck and chest of the deceased, together with the repeated striking of the head with the hammer, and the deep stabbing of the deceased neck to the chest caused serious bodily harm. The accused ought to have known that hitting the deceased on the head repeatedly with a hammer, and stabbing her deeply on the neck to chest with a knife was likely to cause her death. The manner at which the accused attacked the deceased, and the choice of weapon and the areas of the body targeted all establish that the accused had formed the necessary intention to cause either grievous harm or the death of the deceased.

70. The accused conduct after this attack of locking his victims in the house from outside and fleeing from the scene all show that the accused had malice and was indifferent whether his acts of attack on both PW1 and the deceased would cause death or not. I find that malice aforethought was proved within the meaning of **section 206 (a)** and **(b)** of the **Penal Code.**

71. The last issue to determine is whether the accused is entitled to any defence in this case. Mrs. Nyamongo in her written submissions urged that the court to find that the relationship between the accused and the deceased was toxic as they had no time for each other as lovers, and that it was not going anywhere. Counsel urged that the accused had built up pressure as a result of that relationship, and counsel urged the court to find that the accused had been left to care for the deceased child as she worked night hours.

72. The accused admitted he was present and was an active party in a struggle with the deceased when she was injured. The accused having admitted being present when the deceased got injured had a statutory obligation to explain how she got injured under **sections 111 (1)** and **119** of the **Penal Code**. The question is whether his explanation is plausible and reasonable.

73. In the Court of Appeal case of **ERNEST ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR),** the Court of Appeal observed:

> "In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, **the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that**:
>
> The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".

74. The accused defence was that the deceased was stabbed accidentally as he and the deceased struggled to control the knife the deceased had picked from other utensils. That defence was a lie, as demonstrated in this judgment herein above. The deceased had suffered a hammered head with depressed skull on one side and depressed skull on the other, and in addition a deep stab wound on the head penetrating through blood vessels and chest to the lungs. The weapons used were two. Accused explanation that it was accidental stabbing was clearly false and cannot stand.

75. The submissions of Mrs. Nyamongo that the accused had built up pressure due to the working hours of the deceased was not pleaded by the accused in his defence. Her submission is tantamount to adducing evidence at submission stage. What the accused pleaded was that the deceased had received a call from another man. That was an attempt to justify accused attack on the deceased. The deceased was an adult woman. How can receiving a call from a man or anyone for that matter be an excuse to attack the deceased leading to her death? That justification is not a defence known in law. It cannot stand.

76. Accused defence may have been a veiled defence of self. In the case of **Uganda v Mbutuhi 1975 HCB 225** the court held that in accordance to the defence of self, certain elements must be satisfied, that is:

> ***"One: There must be an attack on the accused.***
>
> ***Two: That the accused must as a result of the attack, have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm.***
>
> ***Three: That the accused must have believed it necessary to the use of force to repel the attack made upon him.***
>
> ***Four: That the force used by the accused must be such force as the accused believed, on reasonable grounds to have been necessary to prevent or resist the attack. Justifiable homicide or use of deadly force therefore against another human being is limited to reasonable and necessary circumstances to protect life or property under imminent danger."***

77. That is why the defence of self defence is a defence of necessity, so long as there is apparent danger to the person claiming it. In **R v**

Joseph Chege Njora the Court of Appeal held:

> ***"A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting an attack and no greater force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immense danger or peril arising from a sudden and serious attack by his action."***

78. In the case of **PALMER VS REGINAM (1971) 1 ALL ER 1077 at page 1088** it was stated thus:

> **"It is both good law and sense that if a man is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular acts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some reaction…**
>
> **If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes it's raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."**

79. The accused defence was not that he was averting an attack against his person, but that he was struggling to take control of the knife the deceased had armed herself with. That defence would have been considered had the deceased received injuries consistent with a defence. In this case, the deceased had suffered depressions, lacerations and stab wounds on various parts of her body. Even if the accused believed he was acting in self defence, which I am satisfied that he was not, his actions went overboard. He hit the deceased repeatedly on the head with a hammer and stabbed her on the neck with a knife.

80. During cross examination of the accused by the prosecution, the accused said that he had mental illness as a child. He said that he recovered fully until after the incident in question when he relapsed.

81. The record of the proceedings of this case shows that the accused was found not fit to stand trial. On the 16th September, 2016 when he was arraigned in court, he was brought with a psychiatric report showing that he was not fit to stand trial. He was declared fit to stand trial on 14th November 2017 a year later.

82. **Under section 11** Of the **Penal Code, "Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."** Defence of insanity was not pleaded by the accused in his defence, neither was it suggested during cross examination of witnesses. The accused was very clear he developed mental problems as a direct result of this incident. Whether raised by the accused or not, I do not find any evidence to suggest that the accused was suffering from any mental illness at the time of this incident. I find that he was in the right frame of mind to know to flee from the scene after the incident. Nothing to the contrary has been proved.

83. All in all, I find that the accused cannot benefit from any statutory defence, and that no defence can stand in the circumstances of this case. The accused defence is rejected in total.

84. I have come to the conclusion after analyzing and evaluating the entire evidence adduced in this case, together with submissions by the defence, and the applicable law that the prosecution has proved against the accused the charge of **murder** contrary to **section 203** of the **Penal Code**. As a result, I reject the accused defence and find the accused guilty of the offence of **murder** contrary to **section 203** of the Penal Code and do convict him accordingly under **section 322** of the **Criminal Procedure Code**.

DELIVERED AT NAIROBI THIS 3rd DAY OF OCTOBER, 2019.

LESIIT, J.

JUDGE