



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 16 OF 2018**

**STATE.....PROSECUTOR**

**VERSUS**

**SAMUEL ASWAN OKOTI .....ACCUSED**

**JUDGMENT**

1. The accused person SAMUEL ASWAN OKOTI stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the charge as per Information dated 3<sup>rd</sup> August 2018 signed by Mr. David Okachi are that on the 6<sup>th</sup> Day of July 2018 at around 00.30hrs at Ujumbe Village, Asayi Sub County within North West Location in SIAYA County, the accused murdered CHARLES OTIENO WAIDA.
2. The accused pleaded not guilty to the charge when he appeared before Hon Justice W.M.,Musyoka at Kakamega on 8.8.18 and the hearing commenced in earnest on 23.10.2018 as scheduled on the first date when fixed for hearing and terminated on 28/10/2019.
3. The prosecution called a total of 8 witnesses who testified to establish a prima facie case against the accused person who was placed on his defence. He gave sworn testimony but did not call any witness.
4. PW1 Caroline Cheron Samoei testified that she was a resident of Nakuru. She recalled that on 6.7.2018 at 12.00 a.m. she was at a funeral with her elder brother in law Charles Otieno. At about midnight Charles, escorted her to go and sleep as she was to go back on duty the following day. As they proceeded home, two men whom she knew very well for 12 years as Ongili and Odhiambo followed them from behind calling Charles by name. She therefore recognized their voices as they approached and that she also saw them well using electric light from the funeral place nearby.
5. PW1 stated that her and Charles stood and the two men went and caught up with her and Charles her brother in law. The two men greeted them and that another young appeared and greeted Charles by force and they both fell down and Charles did not say anything. PW1 then heard Charles asking "*who is this hitting me*"? and Ongili and Odhiambo said "it is Omwami." She stated that she learnt that the person who forcefully greeted Charles had a knife and that when she checked, she saw Charles bleeding as he stood up. That he bled from the waist line right side and on the right eye upper side. She got scared and ran to go and call her mother in-law who was the mother to Charles on what had happened. She stated that the person who hit Charles wore a red T-shirt but she did not know him. The witness could not identify or recognize the accused in the dock.
6. On being cross examined by Ms. Akinyi Odhiambo Advocate for the accused person, PW1 stated that it was her two brother in-laws who uttered saying it was '*Omwami*' who was beating Charles.
7. PW2 **Maurice Omondi Onono** from Jimbe village, Asaya Sub location testified and recalled that on the 6.7.2018 at about 12.30 a.m., he had gone for overnight funeral vigil of one Anne Oger. The deceased Charles who was the brother to PW2 was escorting their sister in law Caroline Cheron PW1, to her house. PW2 stated that he called out to Charles when they had reached the gate and told him that they were to go to perform duties somewhere the following day so he should sleep early. PW2 was alone but that as he was speaking to Caroline and Charles, Jacob Odhiambo joined them as he stood with Caroline and Charles. That as they were still talking, Samuel Aswani emerged from the funeral and joined them as they faced each other.
8. According to PW2, Samuel went and greeted Charles and shook the latter's hand hard and that they thought that it was normal greeting as they knew each other for some time. They then fell down. He stated that it appeared as if Samuel had a knife so as they fell down, PW2 Saw blood come out of Charles and PW2 and his colleagues realized that Charles had been stabbed. He stated that Charles said '*I have been injured on my back*' and that Samuel ran away and when Charles lifted himself, PW2 and his colleagues saw a stab at the back upper waist, on the right side. He was also pricked on the forehead.
9. That they went and informed the father to Charles of what had transpired and that Charles' father advised them to go and inform the employer of the accused SAMUEL of what had happened. Further, that Charles mother asked them to look for a motor cyclist to take Charles

to Hospital but that before the motor cyclist arrived, Charles was already dead.

10. PW2 stated that Samuel had been in the village for nearly three years and that on the material night, he wore a red T-shirt, a cap and a black jean Trouser. He denied seeing the weapon Samuel used to stab Charles. He recognized and identified Samuel as the accused person in the dock. The following day he went and recorded his statement at Sirembe Police Station.

11. On being cross examined by Ms Akinyi Odhiambo Advocate for the accused person, PW2 stated that he did not see accused and the deceased fight that night. **He stated that when the two fell down, Samuel was lying down and Charles was on top of Samuel but that initially, Samuel was on top of Charles before Charles struggled and turned Samuel down. He stated further that they** only realized that the deceased was stabbed after Samuel had ran a way. He denied seeing the knife used to stab Charles and reiterated that Charles died before he could be taken to the hospital. He insisted that they checked and confirmed that the stab was a knife stab. He denied a suggestion by counsel for the accused that there were sticks and shrubs to hurt Charles. He also stated that there was some light from the funeral place and that it was not that dark.

12. On being reexamined by Mr. Okachi Senior Principal Prosecution Counsel, PW2 stated that there was not so much light but that the witness was with the accused and could positively identify him because at the gate he could see Samuel coming from the funeral place where there was light.

13. PW3 **George Otieno Anyinyo** from Asahi Sub location North West Gem Location Siaya County testified that he worked with the Ministry of interior and Coordination of National Government as an Assistant Chief of Asahi Sub location. He recalled that on 6.7.2018, he was at his home when he received a phone call at around 12.00 midnight from his area of jurisdiction informing him that a certain boy Charles Otieno Wanida had been stabbed with a knife by Samuel Aswani Ogoti. He proceeded to the scene and on arrival he found the deceased's body lying on the grass with blood oozing from his face and his back, with injuries on the face and that when police officers arrived and the body was turned, PW3 noted a stab on the back.

14. PW3 informed Sirende Police Post in charge who informed DCI Yala Police Station. He later met Fredrick Wakla and Benta Wakla the parents of the deceased and other people he stated that the police officers went to the scene at around 2a.m, from Yala Police Station. They questioned people present including the deceased's father and those who witnessed the incident. The body was removed from the scene and taken to Yala Sub District Mortuary.

15. He identified the accused in the dock and stated that he knew Aswani the accused because the latter was employed by Paul Omeno Lwanya who was one of PW3's customers and that when the accused was employed, he was taken to PW3's home for introduction. PW3 later recorded his statement at Sirembe Police Post.

16. On being cross examined by Miss Akinyi Odhiambo advocate for the accused person, PW3 stated that he had served as an Assistant Chief for 20 years. He clarified that the telephone call came from his village elder Nelson Molo Opiyo and that he went to the scene after receiving the call and viewed the deceased's body which had a knife stab. He denied being present when the incident took place. He stated that he had known the accused for one year from the time he was employed by a resident.

17. PW4 **Dr. Mbeki** a medical Officer at Yala sub county hospital testified that she had been in medical practice for 5 years and had a Bachelor of Medicine and General Surgery from Ulyanovsk State University in Russia. She testified that on 18.7.2018 at 2.45pm at Yala Sub-County Hospital she carried out an autopsy on the body of Charles Otieno Waida a male adult. On general observations of the body, it had no clothing, his apparent age was 36 years, he was of good nutrition, with a good physique and height was 5'6." On the postmortem changes, the body was stiff and well embalmed. Externally, there was a cut wound 3cm long, 1cm wide, 5cm deep below the left eye. There was blood on the face, there was also a cut wound below the left scapula, 3cm long, 1cm wide and 3cm deep. Internally, the Respiratory systems - lungs were discoloured with black tint bilaterally. The Cardiovascular system had no abnormalities detected. The digestive, Genito Urinary System, head, Nervous system, spinal Cord Column and Spinal Cord had no abnormalities detected.

18. As a result of my examination the doctor formed the opinion that the cause of death was Cardiorespiratory Distress Secondary to severe hemorrhage from the stab wounds caused by a sharp object.

19. He added that the body was identified to him by family members of the deceased he produced post mortem Report as PEX NO.1

20. On cross examination by Miss Odhiambo, the witness stated that she was not able to tell what kind of sharp object was used to stab the deceased.

21. **PW5** Jacob Odhiambo Omondi a domestic caretaker for one Chirchir in West Pokot testified that his home was in Ujimbi village. He recalled that on 5.7.2018 at 11. 00p.m or there about he was at a Funeral of Anne Ogiya a grandmother, in the company of Maurice and Charles Otieno Waida at about 11.20pm or thereabouts. That at the said material time, Charles was escorting his sister inlaw whose name he could not recall to her home.

22. He stated that as Charles and Morris were canvassing, '**Abantu**'- who used to work for PW5's neighbor -pointing at the accused in the dock, emerged from behind. That there was bright light from the gate at the funeral. That Abantu greeted Charles and both the accused and Charles fell down. That the greeting was very strong that both of them fell to the ground. He stated that Charles stood up and the witness shone light at him and blood on the eye. He asked Charles as to what had pierced him and that Charles told the witness that the accused had stabbed him with a knife. PW5 then stated that the accused ran a way and the in-law of Charles and Morris went to call the deceased's mother. That they tried to apply first aid on Charles but he was bleeding seriously on the eye and the backside. PW5 called a person with a vehicle to come and take Charles to the Hospital but the person refused and said he could not take the injured to the hospital until the police and his parents were present

23. He stated that the deceased's parents arrived and found him in bad state. He was crying and not able to talk. Later the police went and took him to the mortuary because he died at the scene of crime at about 12.00 am outside the gate. PW5 recorded his statement with the police. He identified the accused person as '**Abantu**' who he stated stabbed the deceased Charles.
24. In cross examination by counsel for the accused, the witness stated that he had known the accused person for about 6 months and that he, the witness had been working in Pokot for 2 months. He stated that on the material night the accused person wore a red jacket but that he did not capture well the colour of his trouser. He maintained that he was standing with the deceased at the material time of the incident, while Morris and Charles were talking. He stated that the accused passed him from behind and went ahead of the witness and went straight to where Charles was with Morris, a distance of about 3 steps. He also stated that they were very close to the gate to the gate funeral place, which was about 50metre away and that there was a security light bulb illuminating the gate up to where they were standing.
25. He stated that the deceased and '**Abantu**' started off with greetings of familiarity and that suddenly they fell down. Further, that after Charles fell down, the witness saw the Accused picking a knife from the ground and running away.
26. He maintained that he was telling the truth.
27. On reexamination by Mr Okachi, the witness reiterated his testimony in chief that the accused passed and went ahead of the witness where Charles and Morris were, about 3 meters from where the witness was, to greet Charles and Morris. He also stated that the knife that he saw the accused remove from the ground was sharp both sides- like Maasai sword and that the accused ran away with it.
28. PW6 **Owino Paul Evans Lwanya** from Ujimbe village, Asau Sub location, Siaya County testified and stated that he was a teacher at Nyamira primary school. He recalled that on 5.7.2018 at about 10.30pm he was in his house sleeping when someone called him by name and informed him that his workman had injured a person. He stated that they were two people and that they told the witness that they were going to look for help to escort the injured person to the hospital. He stated that one of the people was Moris Ongili, who told the witness that he had been with Ngeda the mother of the injured.
29. PW6 stated that Moris told him that 'Omwami' had injured somebody. Adding that w 'Omwami' was the nickname for Samuel Aswani Okoth, whom the witness had employed about one year earlier to take care of PW6's home. The witness further stated that upon receiving the information in question concerning his workman, he woke up and went to notify his family members of what he had heard. That after about 2 minutes, a group of people gathered at the home of PW6. When PW6 went to check in the house where his employee Samuel used to sleep, he found it locked. That the group of people who gathered at his home were baying for the blood of Samuel but he told them that he had found his door locked. The people insisted on breaking the door to locate Samuel. They broke the door and searched for Samuel but they did not find him in the house. The group told the witness to accompany them to the scene and he assigned someone from his family to care for his house.
30. At the scene, PW6 found many people and the body of Charles Wakla whom he had known for more than 20 years as a neighbor. Lying in a pool of blood. The accused person was never seen again until his arrest and the witness recorded his statement at Sirende Police Station the following day.
31. On cross examination by Miss Odhiambo, the witness stated that he had known the accused for about one year and that the accused was well behaved. He also stated that the accused and the deceased were good friends and that the deceased used to visit the accused person at the home of PW6.
32. PW7 Christopher Odera Oudo from Asai Sub location testified that he knew the deceased Charles Wakla as they were brothers. He identified the body of the deceased Charles to Doctor Mbeki at Yala Hospital for purposes of postmortem examination on 18.7.2018 at around 2pm .
33. **Pw 8 No. 232549 Inspector Eli John Njunguna Warui** attached at Gem CID Office as Deputy DCIO testified and stated that he was the investigating officer in this case. He stated that on 6/7/2018 at 0.1 hours, he was called by his Officer in Charge Chief Inspector Lama who informed him of the murder incident at Ijimbe Village and tasked him with the duty Officer CPL Koech & 2 others to proceeded to Siremba police post, where they picked other police officers and proceeded to the scene where they found a dead body and some people at the scene.
34. He interviewed some people and got witnesses who recorded their statements on what transpired the previous night, he learnt that the suspect had vanished. He stated that he did not find a murder weapon but that there was a pool of blood where the deceased lay. He observed injuries on the deceased's head- left eye and left back side. They collected the deceased's body to Yala Level 4 Mortuary. He charged the accused person identified in court] with the offence of murder after the accused presented himself in the company of his father at Butere Police Station. The murder weapon was not recovered.
35. On cross examination by Ms. Odhiambo, the witness stated that when he visited the scene of crime there was 'Matanga' light- meaning funeral lights, moonlight and that they also had torchlights. He reiterated that he found the deceased lying on his back. The rest of the responses were the information which he received from the witnesses who were in the company of the accused and the deceased when the incident took place that night and the events leading to the demise of the deceased Charles Wakla.
36. He also stated that the accused led the police to a farm where he claimed he had thrown the knife but they did not trace the knife.
37. At the close of the prosecution's case the accused was placed on his defence and he opted to give sworn testimony. He testified as DW1 and stated that he was Samuel Aswan Okot, aged 32 years. That he used to herd grade cows at Ujimbe village. He stated that he knew the deceased who was his friend. He stated that he knew why he was before court, facing a murder charge.

38. The accused person recalled that on 5/7/2018 at about 11.20 p.m. He was at a funeral of a person he could not recall. That he then decided to go to sleep and on his way out he met some people at the gate who were drunk. That he was also drunk. That the said people greeted the accused person and asked him where he was going and he told them that he was going to sleep. That the deceased Charles Otieno Wakla who was the accused person's friend was also present and that the people continued questioning the accused why he was going to sleep. That the deceased then started greeting the accused very hard using force and they both fell down. That the accused then realized that the deceased was beating him so he also started fighting and that they fought. According to the accused, the other by-standers thought it was a joke so they pulled the two apart and took the deceased to the house where the funeral was and found him bleeding. The accused denied having any weapon or a knife. He denied stabbing the deceased. He also denied telling the police officer that he stabbed the deceased or that he threw away the knife after stabbing the deceased.

39. On being cross examined by Mr. Okachi, the accused person stated that Charles was his friend and that they loved each other very much. He stated that he was not a resident of that place and that he had only gone there to look for employment as a herder of grade cows.

40. He maintained that on the material night, he fought with the deceased and that when the deceased was lifted and taken to the funeral place, he was bleeding. He denied knowing Caroline Cheronu Wacla by name but stated that he might know her physically. He admitted that she gave evidence in this court and that he saw her at the gate of the funeral on the said date of 5/7/2018.

41. He maintained that he was drunk and that the deceased and others at the gate were also drunk. He reiterated that the deceased greeted the accused hard and they both fell down then the deceased started hitting the accused so the accused also fought back and that when the other people picked up the deceased Charles they found that he was bleeding.

42. He maintained that nobody send him to go and kill the deceased. He stated that it was at night when they fought. Further, he stated that there was light at the home where there was funeral but the light was not bright. He could however see the people well and if anyone threw an object at the light, he could see.

43. The accused closed his case and his counsel filed written submissions urging this court to find that the prosecution has not proved the charge of murder against the accused beyond reasonable doubt and acquit the accused person.

#### **DETERMINATION**

44. I have considered the prosecution case and evidence against the accused person, the defence case and submissions filed by the defence counsel. In my humble view, the issues that flow for determination are whether the prosecution have established all the elements of murder beyond reasonable doubt to sustain a conviction. to prove the charge of murder, the prosecution must establish beyond reasonable doubt three key elements namely, the *death* of the deceased and the *cause* of that death; that the accused person is the one who *committed* the unlawful act that led to the death; and, lastly, that the accused committed the unlawful act with *malice aforethought*.

45. On whether there was evidence of death of the deceased Charles Otieno Waida, the Information reads that on 6<sup>th</sup> day of July 2018 at around 00.30-12.30 am at Ujimbe Village Asayi Sub location within Northwest Location Siaya County the accused person Samuel Aswan Okoti murdered Charles Otieno Waida.

46. Dr Mbeki testified as PW4 and produced a post-mortem report on the deceased person as PEX1. The body of the deceased was identified to her by Fredrick Waida Ondiege and Christopher Odera at YALA level 4 Hospital on 18<sup>th</sup> July 2018. On examining the body, he found stiff and well embalmed. It had a cut wound 3cm long and 1cm wide and 5cm deep below the left eye, there was blood on the face and a cut wound on the left scapular 3cm long 1cm wide and 3cm deep. He concluded that the cause of death was cardiorespiratory distress due to severe haemorrhage from the stab wounds. He signed death certificate No. 0757080 and signed the post-mortem form on 18/7/2018.

47. There is no other contrary view as to whether or not the deceased died and there is no dispute as to the cause of his death which is as per the postmortem report produced in evidence. Accordingly, I find and hold that the first element of murder was proved by the prosecution beyond reasonable doubt.

48. On whether it was proved beyond reasonable doubt that the death of the deceased Charles Otieno Waida was occasioned by the accused person, the accused person admitted being with the deceased on the material night and fighting with the deceased when the deceased greeted him hard and they fell down and he released that the deceased was beating him hence he fought back and the two were separated by the people who were present at the material time and place which was near a home where the duo had been attending a funeral and drinking together. He stated that the pother people thought that the two were joking so when they say them fight they separated them and that is when they saw the deceased bleeding and they took the deceased to the home where there was a funeral. He denied possessing any knife or other weapon and or stabbing the deceased with a knife. He stated that the deceased was his good friend and maintained that he did not kill him. He emphasized that he was drunk and so was his friend the deceased when they fought.

49. From the evidence adduced by PW1, who was in the company of PW2 and the deceased her brother in low who was escorting her home from the funeral, the deceased was greeted by a young man who emerged, greeted the deceased by force and they fell down. She saw the deceased bleeding from the waistline right side and on the right eye upper side. She ran to notify her mother in low of what she had witnessed. She stated that the person who hit Charles wore a red T-shirt but she could not identify him as she did not know him only that she heard Ongili and Odhiambo call him as 'Omwami.' She never saw any knife or weapon used by the assailant.

50. PW2's testimony was that on his way from the funeral, he was with PW1, the deceased and Jacob Odhiambo and as he stood with PW1 and Charles the deceased still conversing, Samuel Aswani the accused herein emerged from the funeral and he greeted Charles forcefully and then they both fell down and the witness saw blood coming from Charles and Charles said that he had been injured on his back. Samuel ran away. On checking they realized the deceased had been stabbed. They saw a stab at the back upper waist on the right side and that he was also pricked on his forehead. PW2 did not see the weapon used to injure the deceased. He stated that when they fell down, Charles lay on top

of the accused but as they struggled, the accused lay on the deceased. He stated that they only realized that the deceased had been stabbed after the accused had run away. He denied in cross examination the suggestion by the defence counsel that there could have been any sticks or shrubs at the scene which might have pricked the deceased. He maintained that the stab appeared to be that of a knife.

51. PW3 an Assistant Chief of the area where the incident took place only received a phone call on the incident and rushed to the scene where he found the deceased lying in a pool of blood with injury on the face and when the police arrived and turned his body they discovered that he had a stab on the back side.

52. **PW4 DR. Mbeki** formed the opinion that the cause of death of the deceased was cardiorespiratory distress secondary to severe hemorrhage caused by the stab wounds and that the wounds were caused by a sharp object.

53. PW5 stated that the accused came and greeted the deceased person and that the greeting was very strong and both of them suddenly fell to the ground. He states that they were all conversing (PW1, PW2, PW3 and the deceased) when the accused approached them. He further states that he saw the accused greet the deceased strongly as a result of which both fell down. That Charles stood up and PW5 lit the torch at the deceased and saw blood on his eye. He stated that the accused wore a red jacket on that.

54. PW6 testified that he was only informed that the accused person whom he had employed for about a year had injured someone. He further stated during the period the accused was his employee, he was well behaved and was a good friend to the deceased.

55. PW7 only identified the body of the deceased to the doctor who performed an autopsy.

56. PW8 the investigating officer testified on what the other witnesses had told him and what the said witnesses told this court. He stated that the accused surrendered himself to Butere Police Station in the company of his father and that he led the police to a place where he claimed he had thrown the knife which he used to stab the deceased but the weapon was never recovered.

57. In her submissions, counsel for the accused contended that whereas evidence adduced by the prosecution witnesses may on the face of it impute a criminal conduct on the accused, criminal law in its nature does not revolve around suspicion or belief but what one can prove beyond the shadow of doubt.

58. She submitted that running away can reasonably be inferred to human intuition of apprehension or consequences associated with mob justice especially following loss of life and as such, lack of causation between the accused and the alleged murder weapon render the entire evidence circumstantial and incapable of premising a conviction.

59. In the view of this court and from the evidence adduced by the prosecution witnesses, there is no dispute that the offence took place at night near the gate to the place where they had both been attending a funeral. It is also not in dispute that the PW1, PW2, PW3 were all present when the accused greeted the deceased strongly and they both fell down. From the said evidence of the prosecution, I find that none of the prosecution witnesses saw the accused stab the deceased who fell on the ground after which the witnesses learnt that the deceased had been injured when they saw blood on his face and he was bleeding from his right side of the waist at the backside. They examined him and saw stab wounds and the accused ran away. Although there was light from the funeral place nearby, there is no reliable evidence of any of the witnesses who were present seeing the murder weapon.

60. The doctor who performed an autopsy on the deceased's body saw deep cut wounds on the right side of the eye and left scapular which according to her, were caused by sharp object.

61. There was no other evidence to show that the deceased could have fallen on a sharp object or on sticks and shrubs that could have injured him.

62. The accused also testified that him and the deceased were together at the material time and place but claims that it is the deceased who greeted him using force and as a result both of them who were drunk fell down and he realized that the deceased was beating him so he also decided to fight back and that the bystanders who were also drunk thought it was a joke. So they pulled the two apart and took the deceased to the home where there was a funeral and found him bleeding. he denied having any weapon.

63. In my humble view, the injuries sustained by the deceased as stated by the doctor who conducted an autopsy on him could only have been inflicted by a sharp object. There was nothing to suggest that there could have been a sharp object planted on the ground where the deceased and accused fell thereby injuring the deceased. The only inference I make is that the accused was armed with a sharp object which he used to stab the deceased once the two were on the ground. There was firm evidence from the prosecution witnesses who were present that it was the accused who forcefully greeted the deceased leading to the deceased losing his balance and they both fell to the ground. The deceased was also heard crying saying the accused had injured him.

64. The accused in his defence wanted this court to believe that it was the deceased who forcefully greeted him and caused the fall. I had the opportunity to hear and see the witnesses as they testified and I am persuaded that they were telling the truth of what they saw that material night. They were clear that they never saw the murder weapon but were able to see how the two fell down and immediately they saw the deceased bleed from forehead and the waist back area.

65. In my humble view, this is not a case of mere or strong suspicion. It is a case where an accused person purported to greet the deceased using a lot of force and as they both fell down, the accused used the opportunity to stab the deceased using a sharp weapon and escaped. The deceased died at the scene due to heavy bleeding from the cut wounds. I warn myself of the fact that no witness stated that they saw the accused stab the deceased but I am persuaded that there was no possibility of any other person injuring the deceased other than the accused. The accused himself claimed that he fought with the deceased and that after they were separated, the deceased was carried to the funeral place and he was found to be bleeding. The accused was at the scene of the incident. PW5 saw the accused pick a knife which he described

as Maasai knife from the ground after the incident and he took off. There was sufficient circumstantial evidence linking the accused person to the offence.

66. In **Abanga alias Onyango v Rep C.A No. 32 of 1990 cited in HCCR. No. 26 of 2016 Republic v. Amos Musiebe Alias Jackson Ngonya** it was stated:

*i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

*ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused, and*

*iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.*

67. On the prosecution evidence taken as a whole, I am satisfied that the accused is the person who stabbed the deceased with a sharp object thereby inflicting fatal injuries on him on the night on 6/7/2018. The act of stabbing the deceased was an unlawful act on the part of the accused. Furthermore, the accused person escaped immediately after the act and later surrendered himself to the police at Butere Police Station, in the company of his father. Accordingly, *actus reus* is proved.

68. The murder weapon was never recovered. However, the fact that the murder weapon was never recovered does not vitiate the trial or render the prosecution's case worthless. In **Ekai v Re[public]1981] KLR 569** the court held:

***“That 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.”***

***See also Karani v R[2010] 1 KLR***

69. On whether there was malice aforethought, the evidence adduced by the prosecution witnesses does not explain why the accused person passed the other persons on the road and went straight to where the deceased was and greeted him with a lot of force whereupon they both fell and on checking the deceased was bleeding from the face and back side.

70. In **Republic v Hezrone Mainadoes not explain Wanga and Christopher Manyasia Lutomia in criminal case no 15 of 2014** it was held:

***“...mens rea, which is an ingredient under section 206 of the penal code, namely the carrying out of the unlawful act or omission is satisfied when there is evidence proving any of the circumstances set out under the said section. Regarding the establishment of malice aforethought where it is shown that the attack on the deceased was spontaneous with no evidence of there having been a prior plan to attack the deceased it cannot be said that the killing was with malice”[emphasis added].***

71. From the evidence it is clear that the accused and deceased were close friends. There is no evidence to show that the accused had a premeditated intention to kill the deceased. The accused himself stated that he fought with the deceased, although there is no explanation for the fight. He claimed that the two were drunk.

72. In my humble view, the evidence on record discloses the offence of unlawful killing of the deceased without malice aforethought. I am unable to find proof of murder. I acquit the accused of the offence of murder and in accordance with section 179 of the Criminal procedure Code I find the accused guilty of a lesser charge of manslaughter. I convict him accordingly, in accordance with section 215 of the Criminal Procedure Code.

**Dated, Signed and Delivered at Siaya this 10<sup>th</sup> Day of December, 2019**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Okachi Senior Principal Prosecution Counsel for the State

Mr. Oduol H/b for Ms. Akinyi for the accused person

CA: Brenda ad Modestar