REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 15 OF 2015

REPUBLIC……...……..…….....PROSECUTOR

Versus

IBRAHIM OMULO OWENGA…….....ACCUSED

JUDGEMENT

IBRAHIM OMULO OWENGA hereinafter referred as the accused was put on trial under section 203 of the Penal Code Cap 63 of the Laws of Kenya for the alleged offence of his wife murder. The particulars of the charge are that on the 19th day of June 2013 at Olosoit Sub-Location, Loitokitok Sub-County the accused unlawfully murdered **GRACE WANJIKU MUKULIMA** hereinafter referred s the deceased. The accused pleaded not guilty to the charge. He was represented at the trial by learned counsel Mr. Nyaata while the prosecution was conducted by Mr. Akula, the Senior Prosecution Counsel.

In order to bring home the guilty of the accused person under section 203 of the Penal Code. the prosecution examined thirteen (13) witnesses who set out to proof the following:

(1) The death of the deceased.

(2) That the death was unlawful.

(3) That in committing the offence, the accused had malice aforethought.

(4) **That the accused in court directly or indirectly participated in causing the death of the deceased**.

PROSECUTION EVIDENCE:

PW1 MIRAJI HEMED SHEMDOE testified that on the fateful day of 19/6/2013 while at his house the deceased went to complain about a domestic disagreement with the accused which required some kind of intervention. PW1 further testified that he decided to leave the deceased behind as he went to look for the accused so that they can talk over the issue which the deceased complained of between them. In his testimony the accused agreed that they walk together to his house with a view to solve the dispute. On arrival in the house, that did not happen as the accused pulled the deceased from the floor where she was lying to the outside of the house. According to PW1 testimony in a surprise more he saw the accused remove a panga from under his ampit and used it to beat the deceased severerally. This turn of events as per the evidence of PW1 prompted him to rush to the neighbours PW2 Issa Issan, PW3 Immanuel Koisenke, PW7 Ruth Gitonga to come to the assistance of the deceased by restraining the accused from causing further harm. PW1 further testified that the accused on noticing their presence he took flight from the scene to a nearby forest. According to PW1 he stated that in company of other neighbours they

pursued the accused to effect arrest but they were not successful.

In a little while it was the testimony of PW1, PW2, PW3 and PW7 that the accused surfaced again armed with a panga demanding that the deceased be taken back to his house. According to the statement before court by PW1, PW2, PW3 and PW7 they assisted to move the deceased who had difficulty in walking from PW1 house to that of the accused where they lived together as husband and wife. It was further the evidence of PW1, PW2, PW3 and PW7 that on arrival at the accused house deceased continued to plead with the accused whom he referred to as Baba Tony not to beat her again. PW1, PW2, PW3 and PW7 testified that on arrival at PW1 house the accused was armed with a panga and moving around the compound as the deceased leaned next to the wall of the house. The witnesses PW1, PW2, PW3 and PW7 further stated that a telephone call to the Police Station Ndara to respond to the incident failed to materialize as the duty officer claimed there was no personnel to visit the scene. From the testimony of PW1, PW2, PW3 and PW7 on arrival at the house they left accused person with the deceased with only a word of caution caution that he restrains himself from further beating the deceased. PW1, PW2, PW3 and PW7 in their testimony further deposed that the deceased suffered injuries inflicted by the accused person on the night of 19/6/2013 using the panga in his possession. It is on record from the evidence of PW1, PW2, PW3 and PW7 that though the deceased had sustained physical harm they all left her in their house where they cohabit with the deceased. In a suprise turn of events the following day PW1, PW2, PW3 and PW7 were to learn that their neighbour Grace Wanjiku Mukulima the deceased was no more.

PW4 PETER LEMAYAN the landlord gave evidence that the accused had rented his house where he stayed with the deceased. According to PW4 he was aware that the deceased had a relationship and was a wife/girlfriend to the accused. It was further PW4 testimony to this court that he was made aware from the neighbours that the deceased had passed away.

The following day on the 20/6/2013 PW12 AP Sgt. Mohammed testified that he received a report regarding the deceased from one person by the name of William. It is the testimony of PW12 that he made arrangements to visit the scene of the alleged murder where on arrival he found already members of the public present. PW12 testified that the house was locked form outside. In absence of the keys, PW4 stated that they broke into the house and gaining entry saw the body of a female adult on the bed. On a quick search PW4 also noticed that besides the body was a blood stained panga. PW4 told this court that he look action of informing his superiors who made arrangements for the scenes of crime officer to visit once the necessary police action had been taken regarding preservation of the scene arrangements were made to remove the deceased body to Loitokitok District Mortuary.

According to PW12 they had a suspect in mind a search and arrest was mounted and on 21/6/2013 the accused was apprehended in respect of the murder of the deceased. PW12 was further shown the panga marked as exhibit 1 which he positively identified as the one he found next to the deceased body.

The body of the deceased was identified by PW6 Daniel Kihoro on 24/6/2013 when the postmortem was being conducted by PW5 Dr. Stephen Mwongela. According to PW5 postmortem report exhibit 2, the deceased sustained multiple injuries to the scalp, cut wound measuring 6cm by 3cm by 4cm deep, multiple face, scalp and mouth bruises, bruises to the neck and cervical spine fractures, puncture wound to right elbow 2cm by 1cm, degloving injury to the back/flanks. The wounds according to PW5 were caused by cut/blunt force trauma object.

PW8 LEONARD KIMANI gave evidence that on 20/6/2013 the accused who is his neighbour had gone there to borrow a thousand shillings (1000) to use as transport to go some place he did not disclose at the time. PW8 however stated that he did not have the one thousand to lend the accused in honor of his request. According to PW8 testimony he returned back at 1.00 pm from running errands only to be told that the accused wife was dead. PW8 further stated that he walked to the accused home where he stayed with the deceased as a wife only to be confronted with her body with multiple injuries to the neck and other parts of the body. Thereafter PW8 testified that he kept vigil with other members of the public to await the police and removal of the body of the deceased from the scene.

PW9 OPONDO told this court that on 17/6/2013 he passed through the accused's house where he also

found the wife, deceased in this case. In the testimony of PW9 the accused uttered the following words, ***"leo nitaua (today I will kill)".*** On further inquiry whom the accused wanted to kill, he replied, ***"I will kill Wasamba"*** *which is a tribe from Tanzania who cause trouble to his wife*. According to PW9 he did not bother with the threat he took his alcohol which was sold by the accused and left the home. It occurred to him that on 19/6/2013 he received information that the accused had murdered his wife. He was later asked to record the statement with the police.

The scenes of crime personnel were contacted and PW11 IP John Mburu received a flash disk from IP Kibet PW13 which contained a film of the photographs taken at the scene of murder in Loitokitok. PW11 further told this court that he processed and developed the film and a bundle of eleven (11) photos processed were done under his supervision and direction. The eleven (11) photographs were admitted in evidence as a bundle as exhibit 3(a) (1-11) while the certificate produced as exhibit 3 (b). The photographs documented the scene and captured the nature of injuries suffered by the accused.

The evidence of Dr. Joseph Kagunda PW10 the specialist in human genetics at the government chemist laboratory gave evidence on the analysis done in respect of blood sample labelled as exhibit A as of the deceased, a panga wrapped in a khaki paper marked as exhibit B and a piece of white cloth marked as exhibit C. In his testimony PW10 stated that the DNA analysis generated from the panga exhibit B and the cloth exhibit C matched the blood sample of the deceased. The report dated 28/10/2014 was produced in evidence as exhibit 4(a) and the memo forwarding the sample as exhibit 4(b).

The wheel of justice started to run to bring the culprits to account when PW13 IP Kibet took over the investigations of the matter. PW13 told this court that he visited the scene where he confirmed that the deceased and accused person stayed together as husband and wife. PW13 further told this court that he recorded statements from the neighbours PW1, PW2, PW3, PW4 and PW7. It also emerged that the accused and deceased were involved in illicit changaa brewing. According to the testimony of PW13 the neighbours made attempt to quell the fight between the accused and the deceased but were overpowered. PW13 further testified that his visit to the scene confirmed that the deceased had bleeded profusely till death. The body PW13 saw had panga marks. On arresting the accused and interrogation he alluded to the fact that he beat his wife for having an affair with other men. PW13 sent the body of the deceased for postmortem. He also sent the flash disk containing the film of the scene to Nairobi CID headquarters for processing of photos. The panga positively identified and recovered at the scene was produced as exhibit 1 in support of the charge. PW13 stated that armed with witnesses statements and expert reports he preferred a charge of murder against the accused.

At the close of the prosecution case the accused was placed on his defence under section 306 (2) of the Criminal Procedure Code. The accused gave a sworn statement admitting that he lived together as man and wife with the deceased. The accused further admitted that he was among the changaa brewers at Loitokitok who set a welfare meeting on 19/6/2013. Besides changaa business the accused told this court that he is involved in farming and other businesses. The accused further testified that on the material day he swallowed quite a bit of changaa drink one too before he left for his house. On arrival at home the accused stated that he found the deceased seated with one man by the name Baba Ayo. The said Baba Ayo had come to their home to buy some changaa.

It was the accused testimony that as they sat there with the wife and some other people streaming to the home to inquire of changaa there arose a minor dispute with the deceased. The dispute involved inaction on the part of the deceased not to put on the lights. Secondly, the accused narrated that he used to hide some changaa without the knowledge of the deceased. On this day he went to check the position of that changaa only to find the container and changaa missing. When the accused came back to the house the deceased was nowhere to be seen. The accused further stated that since it was night time, he decided to go and search for her whereabouts at the shopping centre. That is when he armed himself with a panga as a security weapon to continue the search of the deceased following her foot prints. That is when PW1 informed him that the deceased had been found with a gallon of changaa and is at the moment in PW1's house. The accused further told this court that since the deceased was so drunk he sought assistance from PW1, PW7 to have them carry the deceased from PW1's house to their house which was within the neighbourhood. According to the accused he later went about his errands until when one Opiyo informed

him that the police were looking for him in connection with the death of the deceased. That is when he directed Mr. Opiyo to report the matter to the police. In the testimony of the accused he denied the offence that the beating he administered to the deceased were the ones which caused her death. The accused further denied that he used the panga to inflict the deceased with the physical injuries.

Mr. Nyaata, learned counsel for the accused submitted that the prosecution has failed to establish the charge of murder beyond reasonable doubt against the accused person. Mr. Nyaata further submitted that evidence by the prosecution witnesses proved the death of the deceased but fell short in proving the death was unlawful and the accused had malice aforethought. According to Mr. Nyaata's submissions there was no eye witness to the events leading up to the death of the deceased. That therefore left the case by the prosecution hanging unto circumstantial evidence. Mr. Nyaata submitted that the evidence by the prosecution witnesses did not satisfy the criteria on circumstantial evidence as laid down in the case of ***Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990***. Mr. Nyaata further contended that the defence by the accused person indicates that on the material day he had taken a lot of changaa. Learned counsel urged this court to find that the level of intoxication by the accused must have impaired his judgement. He relied on the case of ***Republic v Victor Shioso Khali [2013] eKLR*** for the proposition on the defence of intoxication and provocation to warrant this court to find that the offence of murder has not been proved beyond reasonable doubt. Mr. Nyaata finally submitted that evidence by the prosecution is weak and full of contradictions and inconsistencies capable of being relied upon by this court to enter a verdict of guilty and convict the accused. In support of this submission Mr. Nyaata cited the case of ***Republic v Andrew Mueche Omwenga [2009] eKLR***. Mr. Nyaata contention therefore was that the court should find the offence of murder not proved and acquit the accused person accordingly.

On the part of the state Mr. Akula the senior prosecution counsel submitted that all the thirteen witnesses fully support the ingredients of the offence under section 203 of the Penal Code beyond reasonable doubt. The following authorities were cited to support the submissions by the learned senior prosecution counsel; ***Republic v Jared O. Osumba [2015] eKLR*** on the proposition regarding circumstantial evidence to infer malice aforethought. ***Libambula v Republic [2003] KLR 683*** on relevance of motive on a charge of murder and what constitutes motive to be drawn from the facts of each case. Mr. Akula argued that the defence of accused did not dislodge the probative value of the witnesses who tendered the evidence on behalf of the prosecution. The learned counsel contended that the credibility of the prosecution witnesses was never challenged. In the premises the accused defence stands no chance to overturn the case for the prosecution that he killed the deceased through unlawful acts of assault. The deceased died and in killing the deceased the accused had malice aforethought. Mr. Akula finally contended that the prosecution has discharged the burden of proof of beyond reasonable doubt for this court to enter a verdict of guilty and convict the accused.

It is against this background this court must proceed to consider whether the elements of the charge of murder have been proved beyond reasonable doubt against the accused person. It is trite law that the burden of proof of the criminal offence remains upon the prosecution throughout the entire trial and never shifts to the accused save in statutory exceptional cases i.e. cases involving doctrine of recent possession but still the legal burden never shift to the accused. This legal proposition on the burden of proof in criminal cases is well illustrated in accordance to the principles in the cases of ***Woolmington v DPP [1935] AC 462***, ***Miller v Minister of Pensions [1947] ALL ER 372 at 373*** stated as follows on what constitutes the standard of proof of beyond reasonable doubt:

> **"That degree is well settled. It needs not reach certainly, 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 in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

In the Court of Appeal of Kenya in the case of ***Republic v Derrick Waswa Kuloba [2005] eKLR*** the court stated interalia:

“.....The burden of the prosecution is to establish its case beyond reasonable doubt.”

This legal proposition is in compliance with the provisions of section 107 of the Evidence Act Cap 80 of the Laws of Kenya which provides that:

> **“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts he asserts, must prove those facts exist.”**

In this case the prosecution must discharge that burden through the witnesses who were examined in chief and later cross examined by the defence counsel to prove the existence of facts of the offence of murder.

In the latter case Lord Denning stated as follows on what constitutes the standard of proof of beyond reasonable doubt.

> **“It is of course necessary at this stage to proceed and analyse the ingredients of the offence visa viz the evidence in its entirety to establish the discharge of that burden of proof requirement under the law.”**

1. The death of the deceased

According to the testimony of PW1 Miraj Hemed on 19/6/2013 or on about 9 pm and thereafter when the deceased left his house she was alive. This was confirmed by PW2, PW3 and PW7. The deceased person was confirmed dead the following day on 20/6/2013. The postmortem conducted by PW5 Dr. Mutiso also confirmed the death of the deceased. The postmortem report was admitted in evidence as exhibit 2. The accused person who stayed with the deceased in the same house also alluded to the fact of the deceased death in his defence. There is therefore both direct and circumstantial evidence which runs through the thirteen (13) witnesses to prove beyond reasonable doubt that Grace Wanjiku Mukulima is dead.

2. The second ingredient is for the prosecution to proof that the death of the deceased was unlawful

Under this ingredient the prosecution is required to proof that the death of the deceased was caused by unlawful omission or commission of the accused person. The unlawful acts can arise where an accused person assaults the deceased inflicting harm. In our jurisdiction, death is only excusable if it is for advancement of criminal justice as a punishment, in defence of property or person acting in self defence. In the case of ***Guzambizi S/O Wesonga v Republic [1948] EACA 65*** the Court of Appeal for Eastern Africa stated as follows:

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

The prosecution case on this ingredient involved the testimony of PW9 Leonard Osuga who visited the home of the deceased at 1800 hrs. The deceased had just been from custody was in good health. PW1 Miraj Hemed, PW2 Issa Issan, PW3 Emmanuel and PW7 Ruffy all gave both direct and circumstantial evidence touching on the assault of the deceased by the accused person while armed with a panga.

Dr. Stephen Mutiso PW5 who saw the deceased body and examined it at the mortuary confirmed multiple skeletal and tissue injuries suffered by the deceased to the scalp, neck, spinal cord and the face. PW12 Sgt Mohammed who received the report of the murder visited the scene in the early hours on 20/6/2013 where he found the door locked form outside. PW12 forcibly gained entry into the house and discovered the deceased naked body with visible injuries and blood stained panga next to it. The DNA analysis conducted by PW10 Dr. Kimani of the government chemist confirmed that the blood stains in the panga matched those of the deceased. The inference to the drawn therefore, the panga came into contact with the deceased body. The accused admitted assaulting the deceased save that he did not use the panga exhibit in court on behalf of the prosecution.

As submitted by Mr. Akula, the senior prosecution counsel, there is a nexus between the accused unlawful acts of causing harm and the fatal injuries on the deceased. There is positive and unrebutted evidence that the accused had the opportunity to continue beating the deceased when PW1, PW2, PW3 and PW7 agreed to his request to assist in escorting her to their home from PW1's house. The injuries to which the deceased succumbed to death were occasioned by none other but the accused person. All along there has been no *iota* of evidence that accused and the deceased had a fight. What is crystal clear is the fact of the accused being armed with a panga which he used to inflict the physical injuries. The injuries proved fatal as nothing was done to mitigate the harm occasioned. I am therefore satisfied the death of the deceased is not excusable. It did not occur in defence of self on the part of the accused or any of the exceptions provided for under the law. The prosecution has therefore proved the ingredient beyond reasonable doubt.

3. The ingredient on malice aforethought

This finding leads me to the third ingredient to be determined whether the accused in killing the deceased did it with malice aforethought. It is a general principle of criminal law that for one to be held criminally liable the two ingredients of *mens rea* and *actus reus* must be proved to exist by the prosecution. (See the case of ***Emma d/o Mwaluko v Republic [1976] LRT 197***.) The *mens rea* required in the offence of murder under section 203 of the Penal Code is malice aforethought. According to ***Shampol Singh v Republic [1960] EA 779*** the state of mind conceived by an accused person to commit unlawful acts which result in the death of another or an intention to cause grievious harm of another when an accused person has conceived the intention and moves to execute it coupled with some deed to commit the offence the *actus reaus* comes into being.

In the case of ***Republic v Garu Ayub [1924 – 1926] WKLR*** the court observed that the *actus reus* for the offence is an act or omission which endangers the life of another.

The provisions of section 206 of the Penal Code lays down the circumstances under which this court can infer by way of evidence that malice aforethought exist and has been proved beyond reasonable doubt by the prosecution. These are:

> ***(a) An intention to cause the death of another; or***
>
> ***(b) To do grievious harm to any person, whether that person is the person actually killed or not.***
>
> ***(c) Knowledge that the act or omission will probably cause death or grievious harm to some person whether that person is the person actually killed or not attempt such knowledge is accompanied by indifference whether death or grievious bodily harm is caused or not or by a wish that it may not be caused.***
>
> ***(d) An intention to commit a felony…***
>
> ***(e) ……."***

Malice aforethought has been a subject of court discussion and interpretation. The Court of Appeal in the case of ***Isaak Kimathi Kawachobi v Republic Cr. Appeal No. 96 of 2007 UR at Nyeri*** the court expressed itself on the issue in terms of section 206 of the Penal Code as follows:

> **"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill where implied malice is established when it is shown that he intended to cause grievious bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example rape, robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievious bodily harm, he is aid to have constructive malice aforethought."**

In ***Republic v Tubere S/O Ochen [1945] 12 EACA*** the predecessor of the Court of Appeal stated that in

determining a charge of murder whether malice aforethought does exist the court has to consider that:

> **"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case say, if a spear or knife than from the use of a stick."**

It was further restated in the case of ***Raphael Mbuvi Kimasi v Republic [2014] eKLR*** where **Visram, Gatembu** and **Odek** SJA held as follows:

> **"Our analysis of the facts of this case shows that the conduct of the appellant does not necessarily come within paragraph (b) of section 206 of the Penal Code as to what constitutes malice aforethought."**

In the case of ***Nzuki v Republic [1993] KLR 171*** this court stated that malice aforethought is a term of art and emphasized that:

> **"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 grievious bodily harm.**
>
> **(iii) Where the accused knows that there is a serious risk that death or grievious 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 and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievious 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 ***Hyma v Director of Public Prosecutions [1975] AC 55***.

In ***Nzuki v Republic (Supra)*** the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What however, was unnerving is that there was no evidence as to there having been any exchange of words between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and stabbed him. The court observed that the prosecution is not obliged to prove motive, but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case.

The court in substituting Nzuki's charge of murder with manslaughter observed:

> **"There was a complete absence of motive and there was absolutely nothing on the 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 grievious 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 done so, we are uncertain whether malice aforethought was proved against the**

appellant beyond 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."

The senior prosecution counsel Mr. Akula in this case submitted to this court that the action by accused person constituted malice aforethought. Mr. Akula invited the court to draw the inference from the testimony of PW1, PW9 and PW19. Mr. Akula further contended that the accused murdered the deceased over a dispute on illicit changaa. Mr. Akula placed reliance in the case of ***Republic v Jared O. Osumba (Supra)*** on the proposition regarding the nature of the multiple injuries on the sensitive part of the body, the excessive force according to Mr. Akula which was not justified and the conduct of the accused after the incident.

In reply Mr. Nyaata learned counsel for the accused reiterated that malice aforethought where the accused planned to cause death or grievious harm has not been proved beyond reasonable doubt. Mr. Nyaata contended that the court should take into account that the deceased before the act had drunk a lot of changaa. He picked a quarrel with the deceased while intoxicated and for that matter his offence cannot therefore fall under section 203 of the Penal Code and the circumstances provided for in section 206 of the Penal Code on malice aforethought.

In applying the above principles to the evidence to the present case I am of the following conceded view:

According to PW9 Leonard Osuga on or about 17/6/2013 while in company of the accused he heard him issue a threat ***to kill Wasamba being a reference to a tribe in Tanzania causing trouble to his wife.*** The witness PW9 never pursued the conversation on that issue any further only to reflect it on 19/6/2013 when he learnt of the deceased death. The accused on this fateful day did carry his threat of killing Wasamba but against his wife the deceased. The conduct of the accused can be said to gall under what the law describes as transferred malice. This is traceable to the intention expressed by the accused to PW9 on the 17/6/2013 where two catchy words came up – the Wasamba tribe - and his wife who later became the deceased two days later. See the case of ***Republic v Mgambo bin Kwenyema [1934] EACA 169*** and ***Republic v S/O Kakyebuka S/O Nyagara [1945] 12 EACA 77:***

"The law is very clear that malice aforethought is deemed to be established by proof of intention to cause the death of another whether such person is the person actually killed or not."

See Commentary by **Musyoka J** in his book on Criminal Law at pg 313 paragraph 2.

It is evident that the accused did not challenge the prosecution evidence by PW9 regarding the intention to kill Wasamba and linking it with his wife. According to PW1 the deceased had gone to his house to complain about a misunderstanding between them. When the accused followed her he was armed with a panga. The panga positively identified by PW1, PW2, PW3, PW7, PW13 is a lethal weapon which accused used to inflict a harm against the deceased.

In the rejoinder to that piece of evidence on possession of the panga and using it to inflict the injuries, the deceased did not controvert the credible and cogent evidence by the prosecution witnesses. The statement of defence by accused that he was armed with a different panga not the one before court was of no substance. He never produced the alternative panga as defence exhibit before this court. There is no evidence that the misunderstanding between the accused and the deceased were violent until he emerged armed with a panga directed at his wife (deceased).

It emerged from the testimony of PW5 Dr. Mutiso who performed the postmortem the accused inflicted the injuries on the head, cervical spine fractures, the spinal code was severed, bruises and lacerations to the right elbow, face and mouth. It is not in dispute that the spinal column, the spinal cord and the head are vulnerable parts of the body of a human being. According to the pathologist the cause of death was due to cervical spine fracture secondary to multiple traumatic cut/due to blunt force trauma injuries. According to PW12 and PW13 the accused locked the deceased in their house leaving the corpse unattended. When PW12 and PW13 broke into the house to gain entry the body of the deceased was on

the bed lying on a pool of blood. The photographs taken of the scene further confirmed that the deceased was not beaten in order to live to see another day but succumb to death. The accused in this case made no attempts to take the deceased to seek medication attention and examination. That conduct before, during and after occasioning grievious harm is a clear manifestation of malice aforethought on the part of the accused to act in attributable interalia to the missing changaa he had hidden in a location not disclosed to the deceased. He however later discovered it was not there and the deceased became the first suspect.

In ***Republic v Nzuki case*** the Court of Appeal outlined the circumstances to guide the court to infer malice aforethought. This case in my view malice aforethought is traceable to the 17/6/2013 when accused harboured the intention to kill. In the statement shared with PW9 he aimed at killing Wasamba tribe who were a nuisance to his wife but ended up actually killing the wife instead of the Wamasamba. In my further consideration PW1, PW2, PW3, PW7 pleaded with the accused not to continue assaulting the deceased. It is on record that the deceased herself repeatedly asked the accused not to assault her but all that apparently fell in deaf ears. In the case of ***Karani & 3 Others v Republic [1991] KLR 62***2, **Gachelu**, **Corkar** & **Omolo** JJA held that malice aforethought can be delved from the nature of the injuries caused and the weapon used.

In the instant case it is not in dispute that murder weapon, the panga was recovered beside the body of the deceased at the scene of crime. The blood stains where examined by the government analyst who matched them with the blood sample of the deceased. According to the direct and circumstantial evidence by PW1, PW2, PW3, PW7, PW12, PW13 the accused was the one who had armed himself with the panga. The panga admitted in evidence as an exhibit was the one accused used to inflict the injuries as confirmed by the medical doctor PW5 and the government analyst.

This court finds that the persistent injuries were not accidental or at the spur of the moment but ones which accused premeditated and ensured the deceased aged 28 years life was brought to an abrupt end. In my conceded view the accused intended to cause serious injury to the body of the deceased at the time he made the attack. I also find from the evidence adduced the accused had the requisite intent to cause death. I was unable to satisfy myself that the defence of self and provocation was available to the accused in committing the unlawful acts of causing serious harm to the deceased. The murder weapon in this case was a panga which is deadly weapon when used against a human being. The prosecution evidence shows that this panga in possession of the accused was used severally to inflict serious injuries to the deceased.

Turning to the facts of this case in the persuasive authority in ***Stapleton v The Queen [1952] 86 CLR 365*** on criminal responsibility and intoxication the court observed interalia:

> **"……that the evidence regarding drink does not prove either one of the two things which I have just mentioned – neither incapacity to form an intent nor a decrease in the mental standard to make him irresponsible but merely shows that his mind was so much affected by liquor that he move easily gave away to his patsans. If that is the view you take, the ordinary presumption prevails that a man intends the natural consequences of his acts, and in that case, if you think the natural inference is that he intended to kill or inflict a serious injury the accused is guilty of murder."**

The defence in this case indirectly made an attempt to introduce the defence of intoxication as one under section 13 of the Penal Code. The Court of Appeal in the case of ***Moses Murithi Ikamali v Republic Cr. Appeal No. 75 of 2014*** adopting the passage in the case of ***A.G for N. Ireland v Gallagher [1963] AC 349*** stated as follows on the defence of intoxication:

> **"If a man whilst same and sober, forms an intention to kill and makes preparation for it, knowing it is wrong thing to do, and then gets himself remain so as to give himself Dutch courage to do the killing and whilst drunk carries out his intention he cannot rely on his self induced drunkenness as a defence to a charge of murder, not even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of intent to kill so also when he is a psychopath, he cannot by drinking rely on his self – induced defect of reason as a defence of insanity. The wickedness of his mind before he**

got drunk is enough to condemn him, coupled with the act which he intended to do and did do."

Going by the legal principle on the defence of intoxication the accused on this cannot avail himself of the defence as the evidence all along shows that he was aware of the alleged circumstances of the offence. There is credible evidence that the neighbours tried to dissuade him from causing harm to his wife but he could hear none of those pleas. In my evaluations of the prosecution case the accused inflicted grievious harm consciously and voluntarily. The onus was on the accused to demonstrate that the circumstances were that his judgement was impaired to exonerate himself from any criminal liability. That foundational evidence was never placed before this court to accord the accused that benefit of doubt in his favour. In regard to the evidence in totality all facts point to the criminal responsibility on the murder of the deceased.

Can one therefore deviate from drawing an inference that the multiple injuries were accidental? Why did the accused continue assaulting the deceased with a panga if the intention was not to kill the deceased or cause grievious harm? Why could a man arm himself with a panga, and repeatedly beat his wife who is unarmed and her plea for mercy fell on deaf ear of the assailant? I have carefully and anxiously weighed the evidence on this element of malice aforethought which distinguishes murder from other homicides like manslaughter. This court reaches one logical conclusion that the accused killed the deceased who was his wife with malice aforethought.

(4) Identification of the accused:

As regards identification it is noted that the accused and the deceased lived together as husband and wife at Loitokitok. On the material day when the incident happened PW1 had been invited by the accused to try and mediate a family conflict between them. According to PW1 the mediation never took place instead the accused armed himself with a panga and started to assault the deceased. The commotion within the house of the deceased attracted the attention of PW2, PW3 and PW7. The witnesses from their evidence arrived at the scene and saw the accused armed with a panga and moving in the compound with rage while the deceased in distress leaned to the wall of the house. The accused was positively identified by PW1, PW2, PW3 and PW7 witnesses who were known to him prior to the 19/6/2013. The prevailing circumstances were favourable and this made each one of them to clearly identify the accused. There are no circumstances from the prosecution evidence on identification which could have obstructed or occasioned any mistake or error for the accused not to be positively recognized by PW1, PW2, PW3 and PW7.

In the instant case the defence never controverted identification by the prosecution. The defence testimony was evaluated alongside the element on identification but the same remained watertight and sacrosanct.

I am therefore satisfied that there exist cogent and credible evidence on recognition of the accused and there was no mistake of him as the perpetrator of the murder of the deceased. In his defence the accused did not manage to impugn and impeach that case for the prosecution. The defence statement by the accused that on the 19/6/2013 he found the deceased absent from the house and went searching for her has missing gaps incapable of weakening the prosecution case. I also find the testimony by the accused that he only assaulted the deceased with sticks and kicks as half truth and flies in the face of clear evidence from PW1, PW2, PW3, PW5, PW7, PW13 and PW5. The nature of the evidence in respect of these witnesses relate to direct evidence to the effect that the accused used a panga to assault the deceased. The deceased succumbed to death. The medical evidence by PW5 confirms the nature of injuries and the cause of death being cervical spine due to blunt force trauma. There is a connection between the blood stains in the panga with the blood sample of the deceased from the DNA profile by the government analyst.

From the evidence adduced and submissions made I hold that the prosecution has proved all the ingredients of the offence of murder contrary to section 203 of the Penal Code beyond reasonable doubt. I find the accused guilty of the offence and do convict the accused accordingly. The sentencing hearings be

held for an order on sentence under section 204 of the Penal Code.

Dated, delivered in open court at Kajiado on 27th day of February, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Nyaata for the accused present

Mr. Alex for the Director of Public Prosecutions

Mateli Court Assistant

Accused present