



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 98 OF 2014

REPUBLIC..... PROSECUTOR

VERSUS

GEORGE OTIENO MARIKO alias ALIFA

JOSEPH ALIWA ODIELO.....ACCUSED

JUDGMENT

1. The prosecution's case against the accused persons herein, **GEORGE OTIENO MARIKO alias ALIFA** (hereinafter referred to as '**the first accused person**') and **JOSEPH ALIWA ODIELO** (hereinafter referred to as '**the second accused person**') on the information of the murder of **JOSHUA MAJIWA OLOO** (hereinafter referred to as '**the deceased**') is premised on circumstantial evidence.

2. It is alleged that on the 22nd day of August 2014 at Otati village in Karungu Location of Nyatike District within Migori County, the accused persons jointly with others not before Court murdered the deceased.

3. The accused persons denied committing the offence and the case was set for hearing. Due to the age of the case, the fact that the accused persons were still in remand despite being granted bond and the need to enhance access to justice, the hearing was conducted at Karungu AP Camp in Sori town within Nyatike Sub-County of Migori County. A total of nine witnesses testified in support of the information against the accused persons.

4. **PW1** was **CHARLES OCHIENG ADHIAMBO**. He was a cousin to the deceased as his father and the father of the deceased were siblings. He ran a shop at Otati Market. He was also a neighbour to the first accused person whom he knew quite well. It was the testimony of **PW1** that in the night of 22/08/2014 at around 09:00pm, as he was riding his motor cycle from his shop to his home along the Otati-Sori road, he came across the first accused person and the deceased standing at a T-Junction. The two stopped him and as he slowed down he realized that they were drunk as they were commanding him to stop. **PW1** instead did not stop. He clearly saw the two using the head light from his motor cycle as the two were facing the direction of his travel and that he had no helmet on his head. The two were friends and did not appear to have differed. **PW1** proceeded to his home and spent.

5. It was **PW1**'s further evidence that on reaching at the T-Junction where he met the first accused person and the deceased, the home of the deceased was about 400 metres away and that there was a dam around 100 metres away. Whereas his home was around 2 kms ahead, the home of the first accused person was about 1 km from the junction.

6. **PW1** woke up the following morning and proceeded to Sori town where he dropped some clients

before returning to his shop at Otati market at around 10:00am. While at his shop, PW1 saw people running towards the dam which was near the market and as he wondered, he began hearing screams from the direction of the dam. He closed his shop and also rushed to the dam. On reaching there, he saw many people having already gathered and he was shocked to see the body of his cousin, the deceased, having been retrieved from the dam. He carefully observed the body which was facing upwards and lifeless and saw three injuries; on the right hand, near the ear and on the neck. To PW1, the injury on the hand was a cut likely to have been caused by a sharp object like a panga or a sword and the injuries on the neck and ear appeared to have been stab wounds likely to have been caused by a sharp object. Although the dam had several stones, PW1 denied that the injuries which the deceased had sustained could have been caused by the stones.

7. The body of the deceased was later collected by the police and taken to St. Camillus Mission Hospital mortuary at Sori town for preservation.

8. **VOVAC OPIYO ORATA** testified as **PW2**. On 21/08/2014, PW2 tethered his six cows and when he went to collect them in the evening, he found that one of them was missing. The missing one was a bull named '**Siro**'. As it was late, PW2 decided to return home and spend. He woke up quite early on the following day and began looking for the bull along the K'ogalo River. At around 03:00pm, PW2 met the deceased near the homestead of one Joseph Okumu Migwambo (not a witness) who asked PW2 what he was looking for. PW2 explained and the deceased told him that it was **Rasto Odhiambo Okumu (PW8)** who had taken the bull. He advised PW2 to go to the homestead of PW8 and collect his bull but to ensure that he did not disclose that it was him, the deceased, who had so informed him. Since the deceased was also going to the homestead of PW8 to take the local alcohol (chang'aa) as PW8 and his wife dispensed the same at a fee, the two agreed that each uses a different route to the homestead. They did so but more or less reached at the homestead at the same time.

9. There were several people at the homestead of PW8 taking chang'aa. PW2 confronted PW8 and demanded for his bull back. PW8 told him that indeed some five people had come into his homestead with a bull alleging that they had bought it at Ndhiwa and since they were taking some chang'aa, they had tied it elsewhere. The five were the first accused person, the second accused person, **John Alila Magawi, Oluoch Osewe** and one whom he could not recall his name. As PW2 pressed for his bull, the first accused person told PW2 that he had eventually found his bull. John Alila Magawi directed the first accused person and **Oluoch Osewe** to go and collect it and to hand over the bull to PW2. As the team was enraged by the returning of the bull to PW2, Oluoch Osewe and John Alila Magawi accused the deceased of disclosing the whereabouts of the bull and vowed that the deceased 'would see'.

10. PW2 then left the homestead of PW8 and rushed to Otati market to get someone to help him take his bull home as it was then late in the evening. On returning, PW2 only found PW8 and his wife whom they told him that since it was late in the evening it would be prudent for PW2 to return to his home and whenever the bull is returned PW8 would so inform him. PW2 obliged and went back to his home.

11. In the morning of the following day PW2 reported the issue to the village elder (also not a witness). The village elder visited the homestead of PW2 and as the village elder was having a word over the issue with PW2 and his father, PW8 arrived and informed PW2 that the bull had been returned to his homestead and asked PW2 to go and confirm whether it was the one. That was around 07:00am. PW2 was accompanied by his father and the village elder to the homestead of PW8 where he confirmed that it was his bull. PW2 collected the bull and on asking PW8 where it came from, PW8 said that the bull had been returned by the first accused person, the second accused person, John Alila Magawi and Oluoch Osewe. By that time the first accused person was at the homestead of PW8.

12. As PW2 was about to leave, PW8 mentioned that those who had returned the bull had in fact assaulted the deceased. PW8's words were overheard by **Ruth Juma Majiwa Oloo (PW4)** one of the wives of the deceased. PW4 asked PW8 on the whereabouts of the deceased and thereafter all the people who were at the homestead of PW8 formed two groups and each group went towards the dam from the opposite direction. PW2, PW8 and the first accused person were in the same group among others while PW4 was in the other group. On reaching the dam, PW2 saw PW8 run towards PW4. However, the first accused

person ran away into a nearby bush and did not show up again at the dam. PW2 followed PW8 closely. When they reached where PW4 was, PW8 said that that was the very place '*those people had killed their own brother.*'

13. Since there was something looking like a paper bag in the dam, PW8 volunteered and went into the dam and retrieved a human body which happened to have been that of the deceased. PW2 observed the body carefully and saw an injury on the hand. The body was collected by the police and was taken to St. Camillus Mission Hospital mortuary at Sori town for preservation. PW2 was later on summoned by the police to Macalder Police Station where he recorded his statement. PW2 identified the accused persons before Court as among those who had taken his bull.

14. **PW3** was **BARRACK ALATA OURE**. He was a neighbour to the deceased and knew him well. He lived near the dam where the body of the deceased was retrieved. PW3 heard someone screaming in the night of 22/08/2014 at around 09:00pm. As he was inside his house, he stepped out and recognized the voice to be that of the deceased. Since the deceased was in the habit of making noise when drunk, PW3 assumed that the deceased was doing what he always did best and went back inside his house where he spent.

15. On the following day at around midday, PW3 heard screams from the direction of the dam and rushed there. He met so many people there but managed to see the body of the deceased having been retrieved from the dam. On observing it, he saw a stab wound near the ear. PW3 left before the police arrived. He however recalled having seen the second accused person, Oluoch Osewe and another person walking towards the dam in the evening of 22/08/2014 on a public road that passed through his homestead.

16. **RUTH JUMA MAJIWA OLOO, PW4**, was the first wife to the deceased. She had last seen her husband, the deceased, on 22/08/2014 at around 02:00pm. PW4 testified that in the morning of 23/08/2014 at around 08:00am, PW8 had gone to her home and asked for the deceased and left on learning that the deceased was not there. PW8 however returned to PW4's home at around 10:00am still looking for the deceased. As PW8 used to sell chang'aa, PW4 was aware that at times PW8's clients are arrested by the police and she suspected that the deceased may have been arrested and taken to custody. As PW4 grew anxious, she kept on asking PW8 where the deceased could possibly be, but PW8 kept quiet and left.

17. PW4 then followed PW8 to his house where she met several people outside the house. PW8 was talking inside the house and PW4 could hear him. She listened. It was PW8 talking about a bull and that the deceased had been assaulted by some people as he had cried near the dam. PW8 then asked the people to go and search for the deceased in or around the dam. The people then began walking towards the dam in two groups.

18. As they walked, PW4 met some children throwing stones into the dam. She asked them why they were so doing and the children told her that they were hitting a hippopotamus which was inside the dam. PW4 was in the same group with the wife of PW8. On hearing what the children said, the wife of PW8 also looked into the dam and saw what looked like a hippopotamus. She called her husband, PW8, who was in the other group and PW8 rushed towards the dam. It was the further testimony of PW4 that when PW8 reached where they were, he looked inside the dam and immediately recognized that it was not a hippopotamus but the deceased. PW8 quickly undressed and went into the dam. He managed to successfully retrieve the lifeless body of the deceased. PW4 asked PW8 who was likely to have killed the deceased and PW8 reiterated that it must be those who had differed with the deceased over the bull. PW4 observed the body of the deceased and saw an injury on the hand and another one near the ear. The body was collected by the police and was taken to St. Camillus Mission Hospital mortuary at Sori town for preservation. PW4 was later on summoned by the police to Macalder Police Station where she also recorded her statement.

19. The second wife to the deceased was **MARGARET ALAL**. She testified as **PW5**. She was also last with the deceased in the morning of 22/08/2014 when the deceased left her house which was near the dam

and went to the house of the first wife, PW4. PW5 testified that the deceased never returned to her house that day. The following day at around 07:00am, PW8 went to the house of PW5 looking for the deceased. He did not get him and he left. PW8 returned to PW5's house at around 09:00 am still looking for the deceased in vain.

20. As PW8 was about to leave, PW5 asked him about the noise she had heard near the dam the previous night but PW8 just kept quiet and left. It was around midday when PW5 saw people rushing to the dam and children running away from the dam. She asked one of the children why they were running away and she was told that there was a dead body at the dam. PW5 also rushed to the dam and was surprised to see her husband, the deceased, dead. The body of the deceased had an injury on the neck and the hand. She accompanied the body to St. Camillus Mission Hospital mortuary at Sori town for preservation when it was collected by the police. PW5 was also later on summoned by the police to Macalder Police Station where she recorded her statement.

21. **KENNETH OCHIENG NYAMARA** testified as **PW6**. He was a *boda boda* rider who had rode to the home of PW8 in the night of 22/08/2014 at around 08:00pm and taken some chang'aa where he saw PW8 leading a bull into his compound. PW8 then quarrelled him as he had highly turned on the volume of his radio. PW6 reduced the volume and continued taking his Kshs. 30/= chang'aa. PW6 then saw four people walk into the house of PW8. He recognized two of them. They were **Sidling** and **John** (both not witnesses). These two remained outside the house of PW8 whereas the other two entered into the house. He then finished his brew and left. PW6 neither saw any of the accused persons at the house of PW8 nor heard any screams for help during the short time he was at the house of PW8.

22. **Dr. ARNOLD MOSETI NYAMBANE** conducted the post mortem examination on the body of the deceased on 03/09/2014 after the body had been identified by two of its relatives. He was **PW7**. In the course of the examination, PW7 confirmed three injuries on the left forearm which were about 8cm, 7cm and 4cm respectively. The right forearm bone was fractured. There was a penetrating injury on the right infraauricular area with blood clots from the right side of the ear and the mobility of the head was enhanced. The lungs had collapsed and had a clot. He chest wall was fractured and there was a lot of blood in the chest cavity. PW7 formed an opinion that the probable cause of death was gross haemorrhage with severe head injury likely to have been caused by both blunt and sharp objects. PW7 filled in a Post Mortem Report which he produced as an exhibit.

23. It was the evidence of PW8 that corroborated most of the evidence of the other witnesses. **PW8, RASITO ODHIAMBO OKUMU**, was taken by the police for interrogation for two days after the death of the deceased. He then ran a chang'aa den at his house and was aided by his wife one **Emily Auma Oneko** (not a witness). PW8 enjoyed a very good clientele most of who were his villagers. PW8 then quit the business and was employed as a Security Officer by Resilient Security Company by the time he testified.

24. PW8 testified that on the 21/08/2014 at around 06:30pm, as he arrived at his home from Sori market he found several people taking chang'aa. They included **the first accused person, the second accused person, John Magawi, Owira Odero, Omondi Orata, Alido Oluoch, John Ogari, the deceased** and PW8's brother one **Austin Ochieng Nyawilo** among many others. They were almost 20 people. It was his brother, Austin Ochieng Nyawilo, who informed PW8 that there was a bull that had followed his cows into the homestead and that the bull belonged to the first accused person. PW8 saw the bull that had then been tied next to a granary and was keen to know its ownership. Two of the people began haggling over who the real owner of the bull was. They were the first accused person and one Alido Oluoch. The said Alido Oluoch claimed that the bull was his having bought it at the market. The deceased then asked Alido why he did not leave the bull at his home which he passed before reaching PW8's homestead. The said Alido became hostile on the deceased and told him not to ask him anything. PW8 asked his brother to properly tie the bull as they waited for the real owner to surface and the matter rested.

25. The first accused person, Alido Oluoch, John Ogari and the deceased sat outside the house of PW8 and faced the bull. PW8 was then called by his wife into his house to take supper and he invited his customers to join him. It was only John Ogari who followed PW8 as the others continued drinking

outside the house. The first accused person then entered PW8's house and bid PW8 good bye as he was accompanying Alido Oluoch. All the rest of the people also left PW8's homestead except the deceased. The deceased did not stay any longer either but before leaving, he told PW8 that he would tell him something the following morning. Before PW8 went to bed he was suprised to find that the bull was missing. He readily suspected that those who had left were behind the bull's disappearance from his homestead. PW8 spent the night.

26. The deceased truly came to see PW8 the following morning at around 08:00am and revisited the events of the previous night. The deceased informed PW8 that the bull had been taken away by the first accused person and Alido Oluoch and they had promised the deceased a share of the proceeds upon selling the bull on condition that the deceased would not disclose to any one who took the bull away from PW8's homestead. The deceased also informed PW8 that the two had threatened him with dire consequences in the event he disclosed that the two had taken the bull away. The deceased further revealed that he had been asked to avail himself at PW8's homestead at around 02:00pm, that is later that day, for the sharing of the proceeds after the bull would have been possibly sold. The deceased then went away.

27. The group that was associated with the bull for real turned up at PW8's homestead that afternoon. They included the deceased, John Migaya, Ogol Samwel, Alido Oluoch, the first accused person, the second accused person and a stranger whom PW8 did not know. Some of them were armed. The second accused person carried a rungu and a stick and Alido Oluoch had a rungu and the stranger had a rungu as well. The first accused person was armed with a panga and a rungu. PW8 then asked them who took the bull away from his homestead the previous night and as PW8 engaged them, PW2 arrived at the PW8's homestead. PW2 outrightly asked Alido Oluoch where his bull was. As PW2 became very tough on Alido Oluoch, the first accused person, who had also claimed the ownership of the bull alongside the said Alido Oluoch, disappeared from the home. Alido Oluoch then promised to return the bull to PW2 but vowed to teach the deceased a lesson since it seemed that the deceased was the one who had disclosed the whereabouts of the bull. Alido Oluoch then left to get the bull back. PW8 asked the second accused person who the stranger he was in company of was and the second accused person was very harsh on him that it was not necessary that he knew all those who took chang'aa at his homestead. The second accused person and his companion as well as the rest then left the homestead of PW8 at around 06:00pm. The deceased also left and went towards the direction of the home of his second wife, PW5, which was near the dam. When all his customers had left, PW8 took the brew and went to bed that early.

28. PW8 was woken up by his wife at around 02:00am that the deceased was screaming near the dam. PW8 woke up and took a torch and a panga and went outside his house. He then saw a bull just walking by itself towards his house and he took and tied it. He returned inside his house and continued sleeping. PW8 woke up early the following morning and asked his wife to keep proper vigil over the bull as he went to look for the deceased to come and confirm if that was the bull in issue. PW8 was not successful in tracing the deceased at the homes of his two wives and returned to his home. PW8 asked his wife whether there was anyone who had asked for the bull but no one had done so. PW8 then went back to the home of PW4 to check whether the deceased had surfaced but he was still not successful. As PW8 was on his way back to his home, he met PW2 working on his farm whom he informed about the bull. The two went to PW8's homestead where PW2 positively identified the bull as his. PW2 called the bull by its name "Siro" and it responded so well. PW2 took the bull and left and PW8 rested at his home as it was a Saturday.

29. A short while later, PW2, his two brothers and their father went to PW8's homestead to know more about the whereabouts of the bull. They found PW8 and his father at home and they entered inside PW8's house where they began talking about the bull. Shortly, PW8's brother (the said Austin Ochieng Nyagilo) and the first accused person came running into the homestead and stood outside the house. The first accused person was called inside and was warned against taking other people properties. As the discussion went on PW4 also went to the hmestead of PW8 and found the group discussing. She asked them to assist her find her husband in the dam as she had learnt that the deceased had been heard screaming at the dam the previous night. The meeting then came to an abrupt end all the people proceeded to the dam for the search.

30. The search began around the bush near the dam. PW4 then called PW8 and informed him that there seemed to be a hipopotamus in the dam. PW8 rushed to the dam and readily recognized that it was instead a human body. PW8 undressed and went inside the dam. He retrieved the body which turned out to be that of the deceased. Surprisingly, the first accused person disappeared from the dam. The villagers gathered and later the body was collected by the police. PW8 left with the police to assist in the investigations where he also recorded a statement.

31. The investigations were led by **PW9** one **No. 79589 Copl. James Nzioka** from the Nyatike DCIO's office. On receiving the report that there was a dead body at the Otati dam, he was accompanied by his other colleagues and proceeded there. That was on 23/08/2014. On reaching at the dam, they found the Area Chief and the Assistant Chief who informed them that the body had been collected by some officers from Luanda Police Post to St. Camillus Mission Hospital mortuary for preservation and that a suspect had been apprehended as well. The officers proceeded to the said St. Camillus Mission Hospital mortuary and viewed the body. PW9 saw a deep cut on the left hand and a major injury on the head. The police witnessed the conduct of the autopsy on 03/09/2014.

32. PW9 then collected PW8 from the Luanda Police Post and interrogated him for two days before he released him. PW9 oversaw the recording of the statements from several witnesses and on the completion of the investigations began looking for all those culpable in the murder of the deceased. Although the suspects hailed from Otati village, they had all disappeared from their homes. Concerted efforts of PW9 with his counterparts from the administration police bore some fruits with the arrest of the two accused persons. The first accused person was arrested at Sori town by two Administration police officers and the second accused person was arrested on a date PW9 could not recall. PW9 took the accused persons for mental assessment before preferring the information against them with others not before Court. PW9 stated that the police were still looking for the other suspects.

33. At the close of the prosecution's case, the accused persons were placed on their defences and opted to give sworn testimonies without calling any witnesses. The first accused person denied taking part in the killing of the deceased. He however did not recall the 22/08/2014 and did not also know the deceased. He only recalled that he was arrested on 18/09/2014 at Sori town and was charged. He also denied knowing any of the witnesses except PW9 whom he knew after his arrest. He stated that the witnesses were not truthful.

34. The second accused person also denied committing the offence. He likewise denied knowledge of any of the witnesses and denied that he ever took chang'aa either as alleged or at all.

35. At the close of the defence case, the matter was left for judgment.

36. It is now on the basis of the foregone circumstantial evidence that this Court is called upon to decide on whether or not the accused persons are guilty as charged.

37. As I have severally stated when dealing with cases based on circumstantial evidence, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitly and firmly established;

(ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

38. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske &**

Another (supra) and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

39. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:-

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

40. The chain of events leading to the arrest and arraignment of the accused persons before this Court came from the nine witnesses who testified in this case and whose evidence I have reproduced verbatim above. I carefully watched the prosecution witnesses as they testified and I am still satisfied that they were truthful. They were quite forthright, unwavering and withstood the cross-examination. They were credible witnesses.

41. By taking the evidence in totality, I am satisfied that the accused persons were part of the group that was involved in the issue of the bull belonging to PW2 and that the deceased was the one who was key in ensuring that the lost bull was recovered. He is the one who kept both PW2 and PW8 abreast of all the plans the accused persons and their colleagues mooted on the bull as he also stood to be ‘a beneficiary’ thereof after the intended sale. The deceased was not deterred in his intent to reveal the truth even after being threatened with dire consequences. That is what is expected of a good citizen.

42. There is cogent evidence that the accused persons and their colleagues who are still at large were not happy with the disclosure made by the deceased that led to the return of the bull to PW2. Their dissatisfaction was evident when they were at the homestead of PW8 in the afternoon of 22/08/2014. One of them, Alido Oluoch together with Oluoch Osewe, who are still at large told the deceased in the presence of PW2, PW8 and the others that he would ‘see’. These were the people who were even armed that very afternoon as they converged at PW8’s home to meet the deceased whom they had asked to avail himself at so as to share the proceeds from the sale of the bull. They were also in the company of a stranger whose identity the second accused person refused to disclose to PW8 on request. The accused persons and their colleagues thereafter left PW8’s homestead while still armed.

43. That very night at around 09:00pm, PW1 met the first accused person and the deceased standing at a T-Junction along the Otati-Sori road and they appeared drunk. At that junction, the dam where the body of the deceased was retrieved was barely 100 metres away. At around that time, that is 09:00pm, PW3 who lived near the dam heard the deceased screaming towards the dam, but he dismissed the cries as normal to the deceased. After PW1 had seen the two at the junction and PW3 had heard the deceased scream at the dam, PW8 was awakened by his wife who told him that she had also heard the deceased screaming near the dam. The screams were also heard by the second wife of the deceased, PW5.

44. When PW8 went out of his house that night, he found the bull walking towards his homestead and tied it. He was not surprised to see the bull at that time of the night as Alido Oluoch had promised to return the same to him for onward transmission to PW2.

45. The conduct of the accused persons are also worth looking at. When the first accused person realized that PW2 was so hard on Alido Oluoch who was also claiming the ownership of the bull as himself, he disappeared and did not return to PW8’s homestead that night until the following day, just a short while before the body of the deceased was retrieved from the dam. The first accused person again disappeared at the dam immediately the body was retrieved. He was never to be seen until when he was arrested in Sori on 18/09/2014. Likewise, the second accused person disappeared from the village until he was

arrested in Nyatike much later. The disappearances of the accused persons in the circumstances of this case are hence suspicious.

46. When the accused persons were placed on their defences, they adopted a more or less common defence. They denied everything. They knew none of the witnesses not even the ones they had been with at PW8's place. As the evidence unfolded, it is clear that the accused persons were indeed known to several witnesses as they hailed from the neighbourhood and that indeed they had been at the very places they were said to have been. As earlier on stated, the evidence of the witnesses remained highly believable and credible. The defences are hence mere denials and are for rejection.

47. As above said, the totality of the evidence is that it forms a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused persons and the others who are still at large and none else. The upshot is that the evidence places the accused persons as part of the group that jointly caused the death of the deceased. Since there is no doubt that the deceased died and that the cause of the death was ascertained by PW7 as gross haemorrhage and severe head injury which is commensurate to a deliberate attack on the deceased, I will now ascertain whether the accused persons, in liaison with the others not before Court, acted with malice aforethought.

48. Having considered the evidence, I have no hesitation in finding that no malice aforethought was proved in this case. The incident leading to the death of the deceased person can be described as an isolated one having been pampered with emotions arising out of a 'lost opportunity'. The accused persons and the others believed all along that they were together and realized at the very end that it was not the case. Prompt bitterness cropped in that led to the loss of the life of the deceased.

49. The foregone finding is guided by the law and precedent. The Court of Appeal in the case of **Joseph Kimani Njau vs R (2014) eKLR** while concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;-

i. The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55”. (emphasis added).

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

“There was a complete absence of motive and there was absolutely nothing on record from

which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

51. The foregone analysis does not therefore support a conviction in respect of the information of murder. The accused person is hence found not guilty of the murder of the deceased and they are hereby acquitted. However, it is clear that the deceased lost his life as a result of the joint actions of the accused persons together with others not before Court, but of course without any malice aforethought.

52. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused persons **GEORGE OTIENO MARIKO** *alias* **ALIFA** and **JOSEPH ALIWA ODIELO** guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

53. As I come to the end of this judgment, I wish to sincerely thank the Learned Defence Counsel Mr. Sam Onyango and the Senior Principal Prosecution Counsel Miss Owenga for making it possible to conduct the hearing of the case at Karungu AP Camp which is quite some distance from where this Court normally sits. That hearing was therefore a great stride on access to justice. Once again, thank you. To that end and in view of the distances involved and the fact that the Defence Counsel used his own means of transport, I hereby direct that the Deputy Registrar shall add one-half of the taxed fees on the Counsel's Bill of Costs.

54. These are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017.

A. C. MRIMA

JUDGE