



**Republic v Marienya (Criminal Case 33 of 2019)
[2025] KEHC 2927 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 33 OF 2019
MS SHARIFF, J
FEBRUARY 27, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

ALFAYO OUMA MARIENYA ACCUSED

JUDGMENT

1. The Accused herein Richard Akombo Gori has been charged with an offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars are that on the 7th of September 2019, at Gudka Carwash in Kisumu East Sub- County within Kisumu County, murdered Vincent Thomas Otieno alias CHIEF. He pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. The Prosecution called six (6) witnesses in support of its case which was as follows: -
3. PW1 Eurick Nyinga testified that on 7th September 2019 at around 6.30 pm while in the company of his friend Maxwell they went to buy meat at a butchery in Carwash area in Kisumu and while they were awaiting to be served, he heard some noises behind him saying someone had been stabbed. He proceeded to investigate the same and he found the person who had been stabbed was known to him by the nickname “chief”. He observed a deep cut in stomach of the victim, with his intestines protruding. He noted that the victim was crying and saying that he was in a lot of pain. This witness stated that as he was about to call the police, a man appeared and dissuaded him from calling the police. That man then proceeded to pick up the victim, placed him on a motorbike and rode towards Kondele direction. PW1 testified that while in the company of his friend Maxwell, they boarded a motorbike and pursued the man and the victim to Jaramogi Oginga Odinga Referral Hospital. The deceased was talking and telling the man that “You are the one who has stabbed me so why are you pretending to be helping me.” Upon confronting the man, the Accused person herein, he turned violent, evasive and was hesitant to accompany PW1 and his friend to the police station. They then raised an alarm and the security



- guards of the hospital apprehended him. While in the company of Maxwell this witness proceeded to Kondele police station where they lodged a report and recorded their statements. The following day he was notified of the demise of the deceased herein. He told the Court he had been seeing the Accused person in the neighborhood and that he was also the one in the dock.
4. On cross-examination, he told the Court that he did not witness the stabbing incident and that it took like 20-30 minutes for the Accused to stop him from summoning the police. He told the Court that the Accused rushed the deceased to the hospital. He told the Court that he does know the deceased person, but could not tell if he was mentally disturbed and that he never participated in any identification parade.
 5. On re-examination, he reiterated that the person at the scene is the same person in Court and he was apprehended at the hospital by the security guards.
 6. PW2 No. 96188 P.C. Kiplagat Ruto Shadrack testified that he is based at DCI Migori and was previously station at DCI Kondele Police Station. He recalled on 7th September 2019 while at the station an assault report was lodged and the OCS requested one police officer to visit the scene. One female officer proceeded to the scene and established the deceased had cuts on his stomach and the security guards had apprehended the person who the deceased identified as the person who stabbed him and later took him to the hospital. They arrested the Accused person and he was taken into police custody. The next day they established that the deceased died and the file was transferred to the DCI. Witness statements were recorded and the murder weapon recovered. One officer Njehia proceeded with the investigations and recorded statements. He told the Court that he took the suspect for mental assessment. He forwarded the following samples to the government chemist in Kisumu: nails of the deceased and suspect, suspect's shirt which he produced in Court as PEXH.2, and knife recovered at the scene which he produced in Court as PEXH.1. He produced in Court the exhibits memo as PEXH.3. He took the exhibits to the government chemist and attended the post mortem exercise. He identified the Accused person in Court as the person they initially apprehended for assault.
 7. On cross-examination, he told the Court he visited the scene but initially other officers visited the scene. Also, the exhibit memo did not disclose the place and time of recovery of the Accused person's shirt but the investigating officer would be in a good position to know that. He told the Court that on 7th September 2019, one Corporal Ryan recovered the shirt of the Accused and that they did not record the statements of the security guards. He told the Court that it was not mentioned that the deceased had mental issues and that he does confirm one of the witnesses mentioned the deceased had mental issues.
 8. On re-examination, he told the Court that he is 2nd investigating officer in the case and that they do not do identification parades for all cases. He confirmed that the exhibit did indicate the place and time of recovery of the exhibits which was 1830 hours at Carwash area in Kisumu and it was done by Corporal Ryan.
 9. PW3 Pamela Mercy Ombee testified that the deceased herein was her nephew and that she recalls on 7th September 2019, she identified his body at Jaramogi Oginga Odinga Hospital and was present during the post mortem examination.
 10. PW4 No. 225459 Corporal Rael Akoth Ouko testified that she is attached to Kondele Police Station and that on 7th September 2019, she was the duty officer together with other colleagues when they received a call about a person who had been stabbed and was taken to Jaramogi Oginga Odinga Hospital. It was also reported that the assailant was apprehended by the security guard at the institution. They proceeded to the hospital and after deliberating with the hospital, they allowed her to



she told the Court that the deceased identified himself as Thomas Vincent aged 30 years old and he was at Gudka area in cuts butchery Manyatta and there was a man selling water. The water vendor was one Alfayo and when he requested water from him, he declined and chased him away saying he was busy. The deceased was adamant and that was what led to Alfayo going into the butchery, picking a knife and instructed him to leave that place, but when the deceased refused to do so the water vendor, Alfayo, stabbed him on his head (right side of his cheek) prompting him to fall down and the water vendor proceeded to stab him in his abdomen leaving him with part of his intestines visible and hanging out. The deceased told her that he remembered the water vendor ordered for a motor bike that took the deceased to the hospital for treatment. She asked the deceased if he could identify the water vendor and he said he could. She instructed his colleagues to bring the Accused person and the deceased positively identified him as the water vendor known as Alfayo. When he noticed the blood-stained shirt the Accused had on, he proceeded to apprehend him. He produced the blood-stained blue striped shirt in Court as PEXH.2.

11. PW4 told the Court that when she returned the station she 3 people namely Eurick Nyinga, Victoria Achieng and Maxwell Omondi were there to lodge a report on the incident and she proceeded to book their report and followed up with investigations at Gudka area with her colleagues. On arrival they were led by the three reportees to the butcher and found one Cliff who confirmed that the Accused person took his knife and that he used it to stab the deceased. He handed over the knife. After receiving report on the death of the deceased, her commanding officer instructed her to hand over the exhibits to the DCI officers and to continue with investigations. He identified the Accused person in Court as the person they arrested.
12. On cross-examination, she told the Court that she only interrogated the deceased with the permission of the hospital management and that she is not the investigating officer. She told the Court that an identification parade is only conducted based on the circumstances of the case and that the Accused was identified by the deceased. She told the Court that she did not mention in the investigations diary that she took the suspect's shirt and that the entry for taking the suspect into custody was done at 1935 hours but the exhibit memo did not indicate the date, time and place which to her was 7th September 2019 at 1830 hours at Car wash. She told the Court that the murder weapon was handed over by one Clif and that his statement was recorded but it was recovered by a next-door barber.
13. She confirmed that the deceased identified the Accused person as his assailant when he was brought into the room and that she does not know what the 3 people who lodged their report told the investigating officer. She told the Court she does not know if the deceased had mental problems.
14. On re-examination, she told the Court that the 1st report was booked, O.66/7/9/2019 at 19.35 hours by CPL Rael & D.C Linda.
15. PW5 Polycarp Luha Kweyu testified that he is the principal government analyst and that he prepared a report dated 26th August 2021 in relation to items submitted by the P.C Shadrack Ruto attached at DCI Kondele for DNA profiling. He told the Court that he received a total of 4 items and his findings were the shirt and knife had blood stains that tested positive for human blood, and that the generated DNA profile concluded that it matches that of the deceased. He produced the report dated 26th August 2021, in Court as PEXH.4
16. On cross-examination, he told the Court that he lacked proof that the shirt was worn by the Accused person and the knife was also handled by him. He told the Court that he was in no position to speak on how the blood stains got to the shirt of the suspect.



17. PW6 Dr. Omboka Lucy testified that she was in Court to produce the post-mortem report for the deceased herein performed at Jaramogi Oginga Odinga Hospital on 17th September 2019 by Dr. Eddy Owour who was currently in Tanzania pursuing his masters degree. According to her, the deceased body external examination showed inter alia; cut wound on the right side of the jaw, cut wound on the head, stab wound on the abdomen. On internal examination she observed inter alia; penetrating stab wound that lacerated the liver causing bleeding in the abdomen. She formed the opinion that the cause of death was massive bleeding in the abdomen from lacerated liver due to a penetrating abdominal injury. She told the Court that samples of blood and nail thumb were taken and she produced the post-mortem report dated 17th September 2019 in Court as PEXH.5.
18. On cross-examination, she told the Court that she was not the one who conducted the post-mortem examination.
19. At the close of Prosecution's case, this Court established that the Accused had a case to answer.
20. Upon being placed on his defence, the Accused testified on oath and stated that the charge against him is false. He told the Court that he was only trying to help the deceased as he fell down at the place he conducts his business, laying upwards. He told the Court that he noticed that the deceased was bleeding and his internal organs were protruding. He told the Court that he informed the sister of the deceased. A crowd was gathering but no one was helping and this prompted him to help him by taking the deceased to the hospital where as he awaited news of his condition the security guards apprehended him and took him to Kondele police station. He told the Court that he knew the deceased very well and that he was not a person of sound mind and that he does not know who hit him on the head and stomach.
21. On cross-examination, he told the Court that he knew the deceased prior to this incident and he did not produce any evidence of the deceased's mental illness.
22. On re-examination, he told the Court that when he left to go the deceased's sister, Alice, to seek help he left his customers who had come to patronize his business and when he returned he found a crowd.
23. DW2 Erick Wesonga testified that he is a boda boda rider and that he knows the Accused person as he was his customer and that he used to patronize his business. He recalled on 7th September 2019 in the evening he had gone to fetch water as usual and he saw a crown and there was a person bleeding. He told the Court that he used to see the person bleeding walk around as he was a mad man in the neighborhood and that he saw the Accused carrying him and placing him on a motorbike. He told the Court that he was not aware of where they were heading to but the injured person was not talking.
24. At the close of the defence hearing, parties were directed to file and exchange their written submissions. Both parties complied.
25. I have considered the evidence adduced herein by both the Prosecution witnesses and the defence proffered by the Accused person. The main issue for determination is whether the Prosecution has proved its case against the Accused person to the required standard and which standard has been held to be that of beyond any reasonable doubt.



26. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The offence of murder is defined in Section 203 of the *Penal Code* as follows:-

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

a. The death of the deceased.

27. The post-mortem form, PEXH.5, filled by PW6 Dr. Ombok Lucy on 17th September 2019, reveals that the deceased died of massive bleeding in the abdomen from lacerated liver due to a penetrating abdominal injury. I find that the Prosecution proved this ingredient of the offence beyond reasonable doubt.

b. Proof that the accused persons committed the unlawful act which caused the death of the deceased.

28. The Prosecution evidence on record depicts that there was no eye witness who saw the Accused person stab the deceased. There was no direct evidence to connect the Accused to the charge. Section 63 of the *Evidence Act* provides:-

- “(1) Oral evidence must in all cases be direct evidence.
- (2) For the purposes of subsection (1), “direct evidence” means–
 - (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;
 - (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;
 - (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
 - (d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

- (3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.”

29. The above section requires that oral evidence must in all cases be direct evidence. What was tendered and relied on was not direct evidence. PW1 testified that when he heard some commotions outside, he



proceeded to the scene and that was when he saw the deceased lying on the ground with deep cut in his stomach and his intestines protruding. As he was about to call the police the Accused herein intervened deterring him from doing so and he proceeded to pick him up and place him on a motorbike to head towards Kondele direction. In the company of his friend they boarded a motorbike in pursuit to Jaramogi Oginga Odinga Referral Hospital. The deceased was talking saying that the man who brought him to the hospital was the one who stabbed him and on confronting the man, the Accused person herein, he turned violent, evasive and hesitant to accompany them to the police station. They raised an alarm and the security guards apprehended him. PW4 on the other hand testified that during her interrogation of the deceased, he told her that the Accused person was the one who stabbed him and she asked the deceased if he could identify him and he said he could. She instructed his colleagues to bring the Accused person and the deceased positively identified him. I find it a fact from the evidence that the deceased indeed made the statements to them. As to whether the statements amounts to a dying declaration Section 33 (a) of the *Evidence Act* (Cap 80) states that:-

“ 33. Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, ... are themselves admissible in the following cases—

(a) Relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;.....”

30. The principles governing dying declarations were considered by the Court of Appeal in the case of Philip Nzaka Watu v Republic [2016] eKLR. The Court held that:-

“Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.

Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction



founded on a death declaration is indeed safe. This Court expressed itself as follows in *Choge V. Republic* (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

31. The Court reiterated those principles in the case of *Charles Njonjo Gituro V Republic* [2019] eKLR; and in the case of *Moses Wanjala Ngaira V Republic* [2019] eKLR where it held inter alia:-

“19. The situation in Kenya is, however, different as exemplified in section 33 of the *Evidence Act* (supra). There is a catena of authorities from this Court on the nature and the manner of receiving and considering evidence of dying declaration. We take it from *Choge v Republic* [1985] KLR 1, citing the predecessor of this Court in *Pius Jasanga s/o Akumu R (1954) 21 EACA 331*:

“In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time, a settled, hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by the taking of an oath.

In Kenya (as in India) the admissibility of statements by persons who have died as to the cause of death depends merely upon section 32 of the Indian *Evidence Act*. It has been said by this court that the weight to be attached to dying declarations in this country must, consequently, be less than that attached to them in England, and that the exercise of caution in the reception of such statements is even more necessary in this country than in England. (*Republic v Muyovya bin Msuma (1939) 6 EACA 128*. See also *Republic v Premanda (1925) 52 Cal 987*.)

The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases, and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval:

“The caution with which this kind of testimony should be received has often been commented upon. The test of cross examination may be wholly wanting, and... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed... The deceased may have stated inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them. (*Ramazani bin Mirandu (1934) 1 EACA 107*; *R v Okulu s/o Eloku (1938) 5 EACA 39*; *R v Muyovya bin Msuma (supra)*). The fact



that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case: it is not guarantee for accuracy (ibid).

It is not a rule of law that, in order to support a conviction there must be corroboration of a dying declaration (R v Eligu s/o Odel and another (1943) 10 EACA 9; Re Guruswani [1940] Mad 158, and there may be circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. See for instance the case of the second accused in R v Eligu s/o Odel and Epongu s/o Ewunyu (1943) 10 EACA 90). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject of cross-examination, unless there is satisfactory corroboration. (R v Said Abdulla (1945) 12 EACA 67; R v Mgundulwa s/o Jalo (1946) 13 EACA 169, 171).”

See also R v Eligu s/o Odel (1943) 10 EACA 90, Okethi Okalo v Republic [1965] EA 555, Aluta v Republic [1985] KLR 543, and Kihara v Republic [1986] KLR 473.

20. The law in this area is clearly articulated in the case of Nelson Julius Karanja Irungu vs. Republic [2010] eKLR which was cited to us by learned counsel for the appellant. It is clear however that this case does not support counsel’s contention that the deceased’s statement does not qualify as a death declaration because she was not under contemplation of imminent death. We do not therefore need to discuss the details as to whether the deceased was in imminent danger of death when she made the statement in question. The statement is clearly admissible in evidence.”
32. In this case, after the deceased was stabbed, he started crying out in pain, the commotion attracted the attention of a crowd, including PW1. Upon arriving at the scene PW1 noticed the person lying on the ground with a deep cut and protruding intestines was a person he knew as “chief”. He immediately started to call the police but the Accused herein intervened as asked him not to do so and the accused then proceeded to pick up the deceased and place him on a motorbike and head towards Kondele direction. Quickly, in the company of his friend Maxwell they boarded a motorbike and followed the Accused person to Jaramogi Oginga Odinga Referral Hospital. While at the emergency section, the deceased was saying that the Accused stabbed him and now he was the one purporting to help him get to the hospital. This prompted them to confront the Accused person and he only became evasive, hesitant and violent to accompany them to the police station. This action made them to raise an alarm and with the assistance of the hospital security guards he was apprehended and held at their sentry.
33. PW4, Corporal Rael Akoth Ouko, Force Number 225459 testified that on 7th September 2019 she was on patrol along Kisumu/Kakamega Highway with PC Linda, PC Kibet Lego and Police driver, Corporal Ekidor Andrew when at around 19.30 hours when PC Kibet informed her that he had received a call from unknown caller who had informed him of a stabbing incident and that the victim was then at Jaramogi Oginga Odinga Teachinh and Referral Hospital(Jootrh). Further that the assailant had been apprehended by the security personnel of the institution and that he had been detained in the sentry box.



34. PW4 testified that her colleagues and herself immediately went to the hospital and after consultation with the hospital management she was allowed to see and interrogate the deceased. During the interrogation she established that the Accused herein, a water vendor, had stabbed the deceased on the head and abdomen because he was insistent that the Accused person should assist him with some water. The deceased told PW4 that whereas the accused had chased him away, he remained adamant and kept asking for water and that is when the accused got angry, went onto the butchery pick the butcher's knife and went back to his water vending station where the deceased was still awaiting to be given some water and he (accused) stabbed the deceased. She stated that the deceased had a cut on his abdomen and his intestines were visibly hanging out. That the deceased told her that the Accused had ordered a motorbike that took him to Jaramogi Oginga Odinga Referral Hospital for treatment. Furthermore, the deceased told her that when he arrived at the hospital he had informed the nurses that it was the Accused herein who had stabbed him and that they should not let him go.
35. PW2 Police Constable Kiplagat Ruto Shadrack Stated that he was the one who took the accused for a mental assessment report. That he also attended the post mortem examination of the body of the deceased and submitted the samples to the government chemist for DNA profiling. He produced the knife that had been recovered at the scene as P Exhibit 1, The blood stained shirt of the accused as P Exhibit 2 and the Exhibit Memo as P Exhibit 3. According to this witness, the exhibit memo indicated that the exhibits were recovered at Car Wash area at 18.30 hours on 7th September 2019 by Corporal Rael.(PW4)
36. PW5, Polycarp Lutta Kweyu a principal government analyst testified that one PC Shadrack Ruto (PW2) from DCI Kondele had submitted the following items to the Government Chemist Kisumu:-
1. Blood sample from Vincent Thomas Otieno- deceased.
 2. Finger nail of the deceased
 3. A blue and white striped short-sleeved shirt of Alfayo Marenya- accused.
 4. A knife with a wooden handle.
37. This witness told the court that He told the Court that after conducting a DNA profile analysis he made the findings that the blood on the Accused person's striped shirt and on the knife belonged to the deceased person. He produced in Court the report dated 26th August 2021 as PEXH.4.
38. The statements by the deceased to the two witnesses related to the events that eventually led to his death and I am therefore satisfied that they amounted to a dying declaration. Whereas a dying declaration does not require corroboration, in this case the same was made to two different people who I found credible and trustworthy witnesses as they had no reason to lie against the Accused. The deceased was very consistent in his mention of the Accused as one who attacked him and it is my finding that this coupled with evidence of PW5 on the DNA profiling analysis leaves no doubt that the Accused committed this offence. I am therefore satisfied that this exculpatory fact is inconsistent with the innocence of the Accused and it cannot be explained on any other hypothesis other than his guilt.
39. As regards the Accused's defence, he denied involvement in the death of the deceased and allude to the deceased being mentally unstable. The Accused person did not avail before this Court any medical evidence of the supposed mental instability of the deceased at the material time.
40. The evidence of DW2 did not aid the accused person given that this witness was not a psychiatrist and he did not witness the commission of the offence save that he arrived after the event and found a crowd had surrounded the deceased who was then bleeding. This witness said that he saw the accused person



carrying the deceased onto a motor bike. In any event, even if such evidence would have been availed, the same would not justify the unlawfully taking of the life of the deceased by the accused person. It is my finding that his evidence though sworn was not credible. Moreover, it did not shake the very cogent evidence tendered by the Prosecution witnesses that clearly tends to his guilt. I am satisfied beyond reasonable doubt that he committed the unlawful act that culminated in the death of the deceased.

c. Malice aforethought

39. Having found that the Prosecution has proved the actus reus of the offence, the issue for determination is whether malice aforethought can be inferred now that a single blow to deceased's head as well as myriad injuries caused his death.

39. The offence of murder is complete when, "malice aforethought" is established if, pursuant to Section 206 of the *Penal Code* evidence proves any one or more of the following circumstances:

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

41. In determining whether the Accused person had malice aforethought, the Court must take the surrounding evidence into account. This was held by the Court of Appeal in the case of *N M W v Republic* [2018] eKLR where it stated:-

"It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit V. Uganda*, CR. APP. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

42. In this case there is evidence that the assault on the deceased was perpetrated by the Accused and that the deceased sustained multiple injuries as evidenced by the evidence of PW6 (the doctor who performed the post mortem form). PW1 who saw him immediately after the attack stated that he was in a lot of pain had, deep cut on his stomach and his intestines were severed and visible. The deceased also told PW1 and PW4 that he was stabbed. He gave a vivid dying declaration of how the accused perso was vexed by his request for water to the point of getting into the butchery during the absence of the butcher wherein he took a knife and went out and stabbed the deceased. It is evident from the extent of the injuries and the aforesaid facts that the Accused intended either to kill the deceased or to cause him grievous harm and therefore it would not be an error to infer that the Accused perpetrated the attack of aforethought.



43. I am satisfied therefore that the Prosecution has proved, beyond reasonable doubt, that the accused person murdered Vincent Thomas Otieno at the time and place stated in the information dated 19th September 2019. In the premises I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* and convict him accordingly.

44. Sentence will be after records and mitigation.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY 2025.

M.S.Shariff

Judge

In the presence of:

Ms Muema for the state

Mr Emukhule for the accused person

Diana/ Juma/David- Court Assistants

