



**Republic v Imbuka & 2 others (Criminal Case 12 of 2020)  
[2024] KEHC 10540 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10540 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 12 OF 2020  
SC CHIRCHIR, J  
AUGUST 26, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PHILIPH IMBUKA ..... 1<sup>ST</sup> ACCUSED**

**CHRISTOSTM ANAMI MULESHI ALIAS KUGA ..... 2<sup>ND</sup> ACCUSED**

**KANUTI WOITI KHAKHAYANGA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.
2. The particulars of the offence are that on the night of 7<sup>th</sup> day of November 2019 at Makata village, Lunenere sub –location, Isulu Location in Kakamega south sub-county within Kakamega County, with others before court, murdered Alfred Ikambili Bihemo.( Deceased)
3. They all denied the charges and the case went to full trial.

**Prosecution’s case.**

4. PW1 was the deceased’s wife. She told the court that on the material day they were at home, taking the evening meal, when the dogs started barking. The deceased went to check what could have prompted the dogs to bark . He was attacked with a panga as he stepped out.
5. She further stated her son( PW2 ) stepped out to check and he too was attacked. She followed , and there were attempts to attack her, but she managed to shield herself . She did not see the attacker’s face as he had covered his face with a cloth. . She however noticed that he wore a shirt with long sleeves which



- was red in color and had gum boots. The other two attackers escaped before she could see their faces. Her neighbors took her husband and son to hospital . She later got the news that her husband had died.
6. She further told the court that she identified the 2<sup>nd</sup> accused; that a motorcycle was found a short distance from her home although she did not see it on the material day. She admitted not having seen the accused persons before, except on the day of the trial in court.
  7. On cross- examination by Mr. Khayumbi, she admitted that while recording her statement with the police , she stated that the person who attacked them had white gumboots , wore a red jumper had a cap and covered his mouth with clothes to conceal his identity.
  8. She further told the court that one of the accused persons who ran away had dreadlocks, and that she saw the 2<sup>nd</sup> accused for the first time in court.
  9. PW2 was a son to the deceased. He testified that on 7/11/ 2019, at around 9 .00 p.m, the dogs started barking and he went out to investigate and to take food to them. Once outside he was attacked with a panga and hit on the left arm. He retreated and raised an alarm and his father came out . The father was held by the neck, dragged outside and cut with a panga.
  10. According to PW2, there were 3 attackers. He identified 1<sup>st</sup> accused because he had a torch; that the said accused had worn a red jumper and a mask but he could see his eyes. He stated that he never saw the 2<sup>nd</sup> and the 3<sup>rd</sup> accused persons .
  11. On cross- examination by Mr. Momanyi, he told the court that it was the first time he was seeing the 1<sup>st</sup> Accused , but he was able to identify him because he shone a torch light on him when the 1<sup>st</sup> accused attacked him. He further stated that he was never called by the police at any time to go and identify the 1<sup>st</sup> Accused. He did not know why the 2<sup>nd</sup> and 3<sup>rd</sup> Accused persons were charged.
  12. On cross examination by Mr. Khayumbi, he stated that the 1<sup>st</sup> Accused wore white gumboots and had covered his head leaving his eyes exposed. He insisted that he was able identify the 1<sup>st</sup> Accused despite the mask he wore; that the torch light helped in the identification.
  13. On re-examination , he stated that he was the first to be attacked and that the assailant had covered his head but his face was not covered.
  14. PW3 was the deceased daughter. She recalled that on the material day, she was at home with her family when the dogs started barking and the deceased asked PW2 to go and untie them . PW2 suddenly fell back to the house and the deceased got out to check. At that point the deceased was held on the neck and dragged outside. She and PW1 attempted to go out to check and a panga was thrown at them. They ducked and struggled to close the door. she heard her father scream, but she did not see what happened to him. She said one of the accused persons had a red jacket, black trousers and black gumboots . She did not see his face.
  15. She further told the court that she was able to identify the 1<sup>st</sup> accused since he had a huge physique and had worn a red jacked and gumboots. She was also able to identify the 2<sup>nd</sup> Accused because they found him on the road as they took the deceased to the hospital. She also saw two motor cycles . She later stated that she had seen the 1<sup>st</sup> accused on several occasions as her business place and that of the 1<sup>st</sup> Accused were in the same location.
  16. On cross -examination by Mr. Momanyi, she told the court that the she had known the 1<sup>st</sup> accused since 2017 ; she knew him as philiph Imbuka. She admitted that she did not tell the police that she knew the 1<sup>st</sup> Accused as she had not seen him directly and therefore she could not say that she definitely saw him. she further stated that was asked by the police but she did not want to mention his name.



- She denied that the 1<sup>st</sup> Accused had a mask on his face. She testified that the security lights outside the house had gone off. She further told the court that she did not notice any distinguishing features on his face as they were under attack and she was trying her best to keep safe. She had previously seen the 1<sup>st</sup> Accused at Sigalagala. She was not invited to any identification parade and she was not present when the Accused persons were arrested.
17. On cross-examination by Mr. Khayumbi, she stated that the security lights were not working and there was a black-out and that the person she saw was tall and fat; she admitted that she told the police that the 1<sup>st</sup> accused had dreadlocks and his face was covered with a mask. She claimed that she was afraid to inform the police, since the 1<sup>st</sup> Accused worked in the same vicinity with her. She testified that she also knew the 2<sup>nd</sup> Accused.
  18. She stated that she met the 2<sup>nd</sup> accused outside. She stated that he was a boda-boda operator. People had surrounded him, and were interrogating him. She could see that he had been injured. He heard him tell the crowd that he had just transported people who said they were going for a funeral night vigil. He stated that he had been paid Ksh. 100 through mpesa. He said he could identify the person who sent him the money if he could get a battery to charge his phone.
  19. PW4 was the deceased's eldest brother. He told the court that at about 8.30 pm to 9.00pm on the material day, he heard screams. He armed himself with a piece of firewood and got out. He found the deceased lying down outside his house. The deceased informed him that the rest of the family had locked themselves inside the house.
  20. He called "Nyumba kumi" and he was told that two people had been arrested and were being held down the road. He was asked to go over. He further stated that the 2<sup>nd</sup> Accused was the one who was arrested. They took him to the police. He told the court that he was present during post-mortem.
  21. PW5 was the deceased's daughter. She told the court that she knew the 1<sup>st</sup> Accused but not the other two accused persons. She believed that her father was killed due to a land dispute. She did not witness the killing.
  22. PW6 was the deceased son. He knew the 1<sup>st</sup> Accused by name and as for the other two, he only used to see them. He went to identify the body at the mortuary. He stated that the deceased had been cut on the head, face and at the back.
  23. PW7 was the Village chairman. He recalled that on 7/11/2019 at about 8.00 to 9.00pm one of his children came to the house and told him that there were people running on the road. He also heard noises outside. He got out and went towards the direction of the noise. He saw torch lights and saw many people standing. He also saw two people seated. He placed a call to the Assistant – chief. He said one of the arrested persons was accused 3. He arrested Accused 3 and took him to the police and it was at the police station that he saw him well. He did not know what the dispute was all about. He identified the 3<sup>rd</sup> Accused as the person he arrested.
  24. PW9 was Police constable, Shuku Mohamed. He recalled that on 7.11.2019 at 10.30pm he was at Kisumu police post when he got a call from sergeant Jumba about an incident and was instructed to attend to it. That on his way to the scene, he met with a crowd escorting the 2<sup>nd</sup> accused person and two motorcycles registration numbers KMEQ 377V Bajaj boxer and KMEQ 529M Honda, blue in colour. They claimed that they collected the Motor bikes at the scene of crime. He informed the OCS, who came and picked the 2<sup>nd</sup> Accused. The following day DCI officer from Kakamega South came to the police post and collected the 2 motorcycles and further proceeded to the scene of further analysis and investigations.



25. He identified the motor cycles through the photos. The photos were marked MFI 1(A) to 1(I) There was no cross examination from Mr. Momanyi.
26. He claimed that he was informed that the accused had been found in the home of the deceased with the two motorcycle and that he was cornered while the others ran away.
27. The prosecution together with the counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons agreed to adopt the post mortem report by Mr. Mchana dated 19/11/2019 as P exhibit No.1.
28. PW10 was a liaison officer at Safaricom. He recalled that they received a request from the police to provide them with call- logs for the followings phone numbers: Nos. 0700-110631- registered to Christosom Buteshi( 2<sup>nd</sup> Accused), 0708-267297- registered to Philiph Imbuka( 1<sup>st</sup> Accused), 0708-765572- registered to Emmanuel Wafula , 07011-98223- registered to George Ikolomani, 0758-355731- registered to Alex Wijenje, 0706287706- registered to Kanuti Kakhayanga (3<sup>rd</sup> Accused) and 0701-475875- registered to Qool point Ltd. The call- logs were for the period between 1.11.2018 to 21.11.2019.
29. At the request of the police he also provided mpesa statements for the period between 5/11/2019 and 8/11/2019 for telephone Numbers 0701-1475878- Qool point ltd and 0758- 355731 – for Alex Wijenje. He could not provide statements for NO. 0708-765572 as there were no records.He had a certificate on extraction of data. The certificate was produced and marked PExb. 2. The call logs were produced and marked as PExb 3a to 3h. The letter requesting for the information was marked as Exb.4; mpesa statements were marked as PExb .5a to 5c.
30. On cross- examination, by Mr. Momanyi the witness told the court that the information was extracted from computer No. ETSFH 33W005 ,make- Lenovo and of serial No. SVDT 33 and printing was through printer No. 08 , of Kycero make. He further stated that his assignment was limited to extracting the information.
31. PW11 was corporal Micah Busienei , service No. 78790, and the investigating officer in the case. He testified that on 8<sup>th</sup> November 2019, he received information about murder incident at Sereve sub- location which had taken place on 7/11/2019 around 9.00 p.m.
32. He carried out the searches on the motorbikes recovered in the scene. He established that motorbike registration number KMEG377V belonged to the 2<sup>nd</sup> Accused while KMEY 539M belonged to one Vincent Anyike . He further told the court that one suspect was caught by the public and arrested while the other assailants escaped with one motorbike.
33. He further testified that they managed to get the phone data of the suspects from safaricom and found that the suspects were in constant communication through telephone numbers 0706287706, 0708267297 and 0158355731. He further stated that the communication started from where they began the journey until they reached the victim's house. They also found out that the 3<sup>rd</sup> accused received ksh. 100 from the first Accused. He stated that the circumstances show that the accused persons were working together. He confirmed that the persons he arrested were the ones in the dock.
34. On cross examination by Mr. Momanyi, he that the communication between the suspects was through SMS and the records showed the time and the locations of the accused persons.
35. On cross examination by Mr. Khayumbi, he stated that the call- logs indicated the location; that the 2<sup>nd</sup> Accused was an mpesa Agent in khayega . He was allegedly being paid for carrying a passenger. On being quried about one Alex wejenje he stated that he has been unable to trace him. He further stated that he established that the motorbikes were parked at a distance of about 200 metres from the house.



He admitted that the motorbikes were on a public road. He could not confirm if the 1<sup>st</sup> Accused was on the murder scene . When he got there he found that the members of the public had arrested the 2<sup>nd</sup> Accused. He established that the 2<sup>nd</sup> Accused is a business man . He admitted that the descriptions of the suspects as given by the witness differed from the actual appearance of the accused persons.

36. At the close of the prosecution's case the Accused persons were put on their defence.

### **The defence case**

37. Dw1 was the 1<sup>st</sup> Accused. He gave a sworn statement. He told the court that he runs a butchery business; that on 7/11/2019 he had gone to Shinyalu market to buy meat . He got a Boda Boda Rider who he identified as the 2<sup>nd</sup> Accused to carry the meat to his business place at Sigalgala. At 2 pm , he went back to sigalagala and after work he went home. Ater a week , the police came looking for him. He denied knowing the deceased or the village in which the incident occurred, and denied having any connection with his dead.

38. On cross- examination he stated that at 9pm on 7/11/2019, that day he was already at home; that he had arrived home at 8.30 pm and left the following day at 6am. He denied ever owning a motorbike. He was with his wife and children. He was not calling any of them as a witness. He further stated that he came to know his co- accused persons in court. As for the 2<sup>nd</sup> Accused he stated that he is the one who carried meat for him on that day. He further testified that he got to shinyalu market at 10 am, and it took the Rider about 10 minutes to deliver the meat. . He paid him ksh. 100. He denied that the 2<sup>nd</sup> Accused carried him to the murder scene. He did not know the 3<sup>rd</sup> Accused.

39. On cross examination by the court he stated that he met the 2<sup>nd</sup> Accused for the first time when he hired him to take the meat to sigalagala.

40. The 2<sup>nd</sup> Accused also testified under oath. He told the court that on that day at 7pm, he was called by the 3<sup>rd</sup> Accused and informed him that a client wanted to be taken somewhere. He went and met the 3<sup>rd</sup> Accused at shinyalu market. The 3<sup>rd</sup> Accused told him to go and pick the clients at a stage 9 bus stop) in luseno area. At the bus stop he met three people . He told them he could not carry the three, and hence they got a another motorbike. They went towards sigalagala, then to Isulu market. The other motorbike was ahead, while he followed.They went until they reached a section of the road where the motorbikes could no longer navigate. At the scene , he saw another motorbike.The men disembarked. He tried asking for his pay but they turned against him. After a short while he heard screams from the direction of where the men had headed to. The members of the public turned against him accusing him of having attacked people. The members of the public insisted that he had to go to the police station. Kelvin, whom he stated, was the Rider of the other motor bike , ran away. He denied taking people to the crime scene. He insisted that he never reached the house of the deceased.

41. On cross- examination he stated that he was called by the 3<sup>rd</sup> accused at 7.00 p.m. informing him that he wanted him to take some clients to Isuku. He denied that the 1<sup>st</sup> Accused had given him any work earlier on that day. He denied knowing him. He stated that what the 1<sup>st</sup> accused told the court was not true. He reiterated that he met the 3<sup>rd</sup> Accused and he told him to go and pick some people; that the people wanted to go to Isuku. He was arrested with someone called Kelvin. He had not noticed that this passengers had weapons. He only noticed when they reached the place where they disembarked from the motorbikes. He saw a panga. He could not tell exactly where the weapons emerged from. He did not know the persons he had carried. He further stated that the 3<sup>rd</sup> Accused called one of them on phone and they talked. He stated that he got to know the 1<sup>st</sup> Accused when they came to court.



42. On re-examination he told the court that he only carried the clients upon the request of the 3<sup>rd</sup> accused person. And he never knew the persons he was carrying. He denied being on the scene of the attack . He stated that some in the crowd even recognized him and came to his defence.
43. DW3 was the third accused. He told the court that on the material day a friend by the name Alex called him and told him that he had friends who needed to go to sigalagala. Alex requested for his motorbike but the 3<sup>rd</sup> Accused motorbike was not available and he decided to request the 2<sup>nd</sup> Accused to avail his motorbike. He then linked him with the clients. The following day , he received a call from the 2<sup>nd</sup> Accused's sister , who informed him that the 2<sup>nd</sup> Accused had been arrested. He called Alex to inquire about the alleged arrest and Alex stated that he knew nothing about the arrest. He denied knowing how the deceased died.
44. On cross- examination he stated that he was in the market when he was called by his friend Alex. Alex told him that the clients wanted to go to sigalagala , but did not specify which particular area in sigalagala. He told him there were two people who needed to be ferried. He denied he had ever had any dread-logs. On re-examination, he stated that he did not go to the police station, when he heard about the arrest of the 2<sup>nd</sup> accused as he was busy at work.
45. The defence closed its case.

#### **1<sup>st</sup> Accused's submissions**

46. In his written submission dated 4<sup>th</sup> March 2024, the 1<sup>st</sup> accused submitted that there was no proper identification; that although pw2 stated that he knew him before , there was nothing to link him to the crime scene . He further pointed out that there was no identification parade that was conducted. He finally submits that the prosecution failed to establish any motive on his part.
47. The prosecution and the rest of the accused persons did not file any submissions.

#### **Determination**

48. Section 203 of the penal code defines murder as follows: "any person who of malice a forethought causes death of another person by an unlawful act or omission is guilty of murder."
49. The decision in the case of Republic -vs- Mohamed Dodi Korane & 7 Others (2014) e KLR , provide further clarity on what constitutes murder. The court set out the ingredients of the offence as follows:
  - 1) The fact of the death of the decease and its cause.
  - 2) Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused.
  - 3) Proof that the said unlawful act or omission was committed with malice aforethought.

#### **The Death of the deceased.**

80. Dr. Dickson Mchana's report was adopted by the consent of the parties. According to the report, the doctor recorded that he conducted an autopsy on the body of Alfred Bihembo Ikambili on 19/11/2019 at about 11.50 am. The body was identified by peter kilova and Joseph Kashindi . He concluded that the cause of death was penetrating head injury due to sharp force trauma following Assault. Am satisfied therefore that the death of the deceased, and its cause was proved.



## Whether the death was caused by the Accused persons

50. The attack took place at around 8p.m. There are insignificant variations on the prosecution witnesses on the events that took place that night. The only and the critical issue is one of identification of the attackers.
51. The case of *R. vs. Turnbull and Others* [ 1976] 3 All ER 549 Lord Widgery CJ lays down the law on identification. The court held as follows:
- “ .....Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? .....Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.
52. According to PW1 she went outside and found a man holding a panga. He attempted to slash her but she ran inside . She did not see his face as he had covered it. All she could tell were the clothes he wore. PW2 stated that he shone a torch light on the 1<sup>st</sup> accused and at that point the accused slashed him. He further stated that the first accused had put on a mask but his eyes were uncovered. He insisted however that his torch helped in identification. In her evidence in chief PW3 told the court that she saw the person who pulled the deceased and cut him. She did not see his face but she saw the clothes he wore. On cross- examination however she said she knew the 1<sup>st</sup> accused ;she identified him by his name , philiph Imbuka. She knew him as they used to work within the same vicinity . She further stated that she was afraid to tell the police as she was not certain that she clearly saw him on the night of attack. She however denied that he wore a mask.
53. It is evident that PW1 and PW3 did not see the face of the attacker who cut the deceased with a panga . Although PW3 insisted that the attacker did not have a face – mask on, she admitted that she was not certain about what she saw. In her evidence in chief , she stated that she did not see. In cross – examination she affirmed this position by stating that she hesitated in giving the name of the 1<sup>st</sup> Accused to the police because she was not sure she identified him correctly .
54. In my view , her hesitation indeed had a basis. She only saw the deceased being dragged out and being cut , she got up in an attempt to check what was happening and a panga was thrown at her. She did not know what happened outside, as she never went out.
55. From the testimonies of the these first three witnesses therefore , it is evident that the only person who confidently stated that he saw the 1<sup>st</sup> Accused on the scene was PW2. The next question then is, whether in the prevailing circumstances, PW2 was able to identify the 1<sup>st</sup> accused in the manner he said he did.



56. According to him, he identified the 1<sup>st</sup> Accused when he shone a light on him for a brief moment before he was cut on the hand with a panga. He told the court that despite the face mask worn by the 1<sup>st</sup> Accused, he could still identify him as his eyes were visible.
57. I have carefully considered the testimony of PW2. The pertinent question is; how reliable was this identification? Did it meet the test in Turnbull's case? ( supra). If indeed the attacker had covered his head , gumboots on his feet and a face mask , then what PW2 was telling the court is that he identified him only through the eyes. For how long did he look at the attacker's eyes? That question was not answered. How close were they to each other? Was there a chance to even take a long look, considering the circumstances? Was it even possible to identify a person just by the eyes in the prevailing circumstances. The witness had shone the torch on him and the attacker, obviously not wanting to be identified must have reacted immediately. Well my assessment may sound speculative , but the onus was on the prosecution to lead the witness to clarify this grey areas.
58. In this regard I find support in the case of Abdala bin Wendo & Another v Republic (1953), 20 EACA 166 it was held: "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult." ( Emphasis added)
59. In the circumstances of this case , am not persuaded that the identification of the 1<sup>st</sup> accused met the threshold set out in Turnbull's case (supra).
60. On the 2<sup>nd</sup> Accused, PW3 told the court that she found the 2<sup>nd</sup> Accused on the road as she and other were taking the deceased to hospital. The 2<sup>nd</sup> Accused admitted as much that he was standing on the road. However none of the prosecution witnesses placed him on the scene of the attack.
61. The 3<sup>rd</sup> Accused was not placed on the scene by any of the prosecution witnesses.
62. This is case in which the issue of identification ought to have been subjected to an identification parade. I consider this a failure on the part of the investigative Agency.
63. To conclude on this issue , having failed to identify the attackers , it is my conclusion that none of the prosecution witnesses saw any of the accused persons attacking the deceased.
64. This leaves the prosecution 's case hinging purely on circumstantial evidence.
7. Circumstantial evidence was defined by the court of Appeal as ".....evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved..... It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics....." ( Ref: Ahamad Abbolfathi mohammed & Ano vs Republic ( 2018) e KLR
8. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:
- “ Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows: “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:



- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- 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.”

65. Also in *Sawe Vs. Republic* [2003] KLR 364, the Court of Appeal held : “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.” ( Emphasis added)
66. The circumstances of this case revolve around two motor bikes found about 200 meters from the scene from the scene of crime, the arrest of the 2<sup>nd</sup> Accused by members of the public from the same spot, call- logs from Safaricom Ltd, mpesa statements from the same company and a search certificate for Qool point Ltd.
67. PW10 produced the call- logs and mpesa statements from Safaricom. The two documents were accompanied by a certificate; the particulars of the computer used and the printer were provided under paragraph 4 of the certificate. There was therefore due compliance with section 106(A) and (B) of the *Evidence Act*.
68. The 2<sup>nd</sup> Accused was found on the road , 200 metres from the scene of the attack. He admitted that he carried two people from sigalagala and the third hiked a separate motorbike. The “people” left him on the road and followed a footpath. Soon thereafter screams were heard from the direction that his passengers had headed to. This corroborates the testimonies of PW1 and PW3 who told the court that they screamed when they were attacked. His fellow Rider, whom he identified as Kevin, ran away leaving his motorbike on the scene. The two motor bikes were later seized by members of the public and handed over to the police ( PExb. 6(a)- 6(b) and 7(a) and 7(b) ). The admission by the 2<sup>nd</sup> Accused, and the conduct of his fellow Rider, plus the two motorbikes on the scene indicate that indeed the 2<sup>nd</sup> Accused had carried the attackers.
69. The mpesa statement show that he was paid ksh. 100 by the 1<sup>st</sup> Accused that day at about 19 hours . That was just about one hour before the attack. The mpesa statement also show that he was paid ksh. 200 the previous day, again by the 1<sup>st</sup> Accused.
70. Further , by his own admission , he did carry people who turned out to have been the attackers. The motorbike used was registered to him and the said motorbike was found in the scene ( PExb. 6 (a) and 6(b) ). In his defence , he insisted that he just carried passengers ; that he never went to the scene of the attack. However if he was being paid ksh. 100 as fare for ferrying unknown passengers on the 7 /11/ 2019, what then was he being paid for on 6/11/2019 by the 1<sup>st</sup> Accused. Am not persuaded by this plea of innocence .



71. The 1<sup>st</sup> accused was not placed on the scene, but it is evident that he was facilitating the transportation of the attackers . His allegation that he was paying the 2<sup>nd</sup> Accused for transportation of his meat was denied by the 2<sup>nd</sup> Accused. The 2<sup>nd</sup> accused also denied that he ever did any work for the 1<sup>st</sup> Accused. In any event it does not also explain why the previous day he made a payment of ksh. 200 to the 2<sup>nd</sup> Accused .
72. Further the 1<sup>st</sup> Accused told the court that he came to know the 2<sup>nd</sup> Accused on the day he asked him to transport meat , yet the mpesa statement showed that on 6/11/2019, he paid him ksh. 200 . Why then was he paying money to a “ stranger” the previous day, if he did not know him before, as alleged.
73. Further the call- logs from Safaricom ( PExb 3(a) to (3h) ), shows constant communication between him and one Alex wejenje. These calls increased in frequency towards the day of the murder and even more frequently towards the evening of the murder.
74. There was nothing much that came from the prosecution’s witnesses touching on the said Alex Wenjenje. It is only the investigation’s officer ( PW11) who told the court, on cross- examination, that he has looked for Alex Wejenje to no avail. However the call- logs from Safaricom show that there were unusually high number of telephone calls exchanged between the 1<sup>st</sup> Accused and the said Alex and with increased frequency on the countdown to the incident and during the incident.
75. This is what the call- logs show;- On 7 / 11/ 2019 the 1<sup>st</sup> accused and Alex wenjenje exchanged 20 phone calls between 20.18 and 21.02 hours, 4 calls between 21.32 hours and 21.34 hours, and 6 phone calls between 21.36 hours and 23.07 hours. There were also two calls made at 19.16 hours between the 1<sup>st</sup> Accused and and qool point Ltd. According to the search certificate on a search carried out at the companies Registry qool point Ltd is owned by Alex Wejenje and one Emmanuel wafula. The following day , that is on 8/11/2019, the the 1<sup>st</sup> Accused and the same Alex exchanged 11 phone calls.
76. The exchange was certainly not normal. It indicates that the two were commonly conducting an urgent and unusual business.
77. Turning to the 3<sup>rd</sup> Accused. He told the court that a friend by the name Alex wijenje requested for his motorbike to ferry his friends , and because his own Motorbike was not available he asked the 2<sup>nd</sup> Accused to ferry Alex’s friends.
78. The call-logs from Safaricom show that the he exchanged eight phone calls with Alex wejenje on the day of the incident and nine calls the following day. This is the Alex who it later emerged from 3<sup>rd</sup> Accused’s defence had made a request for a motorbike to ferry “some friends”. The particulars of the calls indicate the following: On 7/11/2019, at 18.06 hours the two exchanged 3 calls, at 19.14 hours 2 calls were exchanged, and at 19. 16 there were 3 calls. On 8 /11/2019 there were 3 calls exchanged at 7.14 hours, 3 calls at 09.46 hours and another 3 calls at 10.31 hours.
79. In his defence the 3<sup>rd</sup> Accused told the court that on 7 /11/2019, Alex had called him to request for a motorbike and on 8 /11/2019 he had called him to inquire about an alleged arrest of the 2<sup>nd</sup> Accused. I find this explanation not plausible. Why would a mere incidental request for a Ride required a total of 8 phone calls on that day? Again why would such a request take a span of more than an hour, as the logs show that they talked between 18.06 to 19.06 hours on the 7<sup>th</sup> November? The following day there were a total of 9 calls made between 7.14 and 10.31 hours. Why would again, a simple inquiry about the 2<sup>nd</sup> Accused arrest required 9 calls?. Am persuaded that the calls were merely on innocent inquiries
80. What do all these exchanges demonstrate ? They showed that the three Accused and one Alex wejenje were working to gather with a common intend, namely to kill the deceased.



81. Am satisfied that beginning with the 2<sup>nd</sup> Accused presence at about 200 metres from the crime scene; his own Admission that indeed he carried people who then alighted and went towards the direction of the deceased's house; the screams emanating from the same direction, the actual attack of the deceased at the same time ; the presence of the 2<sup>nd</sup> Accused's motorbike on the road: the payment of ksh. 100 and ksh 200 to his mpesa account by the 3<sup>rd</sup> Accused there is a chain that connects 2<sup>nd</sup> actions with the 1<sup>st</sup> accused .
82. For the 1<sup>st</sup> Accused the two payments aforesaid connects him to the 1<sup>st</sup> accused and the actions he took that day. The many phone calls exchanged with Alex wejenje up to the minute of the attack places him as a central player in the commission of the crime.
83. For the 3<sup>rd</sup> Accused his own admission that he did ask the 2<sup>nd</sup> Accused to ferry Alex wejenje's " friends" and the many phone calls he exchanged with Alex also shows that he was a key player in the whole chain.
84. It is also evident that Alex wejenje , the one who has eluded the investigators , was the key player in the commission of the crime.
85. For the court to convict on circumstantial evidence, there must be a link or a series of events which when linked together excludes the innocence of the accused.( Ref: Ahamad Abolfathi- supra).
86. It is my finding that as was held in the case of Mwita v. Republic (2004) 2KLR 6 the inculpatory facts in this case are inconsistent with the innocence of the accused persons and are incapable of explanation upon any other hypothesis than guilt. The chain of events complete the chain.
87. Further the many phone calls exchanged, the money paid , their own admissions as well as the accounts of the prosecution's witnesses show that the three accused persons and one other, were working together, for a common purpose, namely to kill the deceased. On common purpose , section 21 of the Penal Code provides as follows: When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence
88. Circumstantially therefore , am satisfied that the prosecution has proved , beyond reasonable doubt that there three Accused persons participated in the killing of the deceased.

**Malice aforethought.**

89. The phone calls and Mpesa statement of the 1<sup>st</sup> Accused indicating that he sent ksh. 200 to the 2<sup>nd</sup> Accused on 6/11/2019 and calls between the 3<sup>rd</sup> Accused and Alex wejenje which began as early as 18.06 hours and several phone calls between the 1<sup>st</sup> Accused and Alex wejenje shows that there was prior and apparently intense planning of the crime. There was malice preceding the act.
90. The deceased too was hit on the head . According to the pathologist the injury on the head was caused by a sharp force trauma. The Accused persons knew that such an injury was likely to cause a fatal injury. Section 206 of the penal code sets out the circumstances which constitute malice aforethought as:
  - “ a). an intention to cause death of or to do grievous harm to any person whether that person is the person actually netted 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 netted 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.

91. The Accused persons must have known that hitting the deceased on the head with a sharp object was likely to cause grievous harm or death to the deceased. Malice aforethought was therefore proved.
92. In conclusion, it is my finding that the prosecution has proved the charge of murder against all the accused persons. I hereby find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons guilty of the offence of murder contrary to section 203 as read with section 204 of the penal code, and I hereby convict them accordingly.

**DATED , SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF AUGUST 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin- Court Assistant.

Khayumbi for the 2<sup>nd</sup> Accused.

The 1<sup>st</sup> Accused.

The 2<sup>nd</sup> Accused

The 3<sup>rd</sup> Accused.

