



**State v Nyaoke & another (Criminal Case 7 of 2019)  
[2024] KEHC 10479 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE 7 OF 2019  
RE ABURILI, J  
AUGUST 21, 2024**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**ABISAYE ODONGO NYAOKE ALIAS “SIAYA” ..... 1<sup>ST</sup> ACCUSED**

**SYLVESTER OYOO OGADA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, Chapter 63 of the Laws of Kenya. Particulars of the offence are that on the nights of 14<sup>th</sup> and 15<sup>th</sup> January 2019 at Ramogi sub-location, Nyakach sub-county within Kisumu County, jointly with others not before court, they murdered one Kevin Onyango Abuto alias Dadi.
2. The accused persons pleaded not guilty to the charge and the case proceeded to full trial. The prosecution called nine (9) witnesses in support of its case while the accused testified on oath and called no witnesses. The evidence as adduced by the prosecution witnesses and the defence is summarised below.

**The Prosecution’s Case**

3. PW1 Elida Atieno Abuto the deceased’s mother testified that on the 14<sup>th</sup> January 2019 at about 7pm she was at the market where she saw the deceased but did not talk to him. She stated that the deceased appeared as if he had taken alcohol. It was her testimony that she went back home at 8.00pm and that she did not see the deceased after that on that day.



4. PW1 further testified that at about 11pm, while she was on her bed, but not yet asleep, she heard the deceased returning at about 11.20pm as he was making, saying that the son of Ong'eché had come back home. She testified that at the time that the deceased entered, a bodaboda cyclist rode past and next to their home which prompted the deceased to demand from the rider as to who had given the said rider permission to pass near the home at that hour and asking the rider to stop which the rider complied. She testified that the deceased ordered the rider to turn back and the rider complied.
5. PW1 testified that the deceased went to the door when he saw someone standing behind the house and started chasing after the man for being at the home at the late hour of midnight. She testified that she did not hear from the deceased again.
6. It was her testimony that on the 15<sup>th</sup> January 2019 at about 10am, she went to the market where she met an Administration Police Officer from Kabondo, who called her and inquired as to the whereabouts of the deceased to which she replied that she had not seen him since the previous night. She further testified that the Officer informed her that the deceased had been beaten at the Bar of Michael Onyango Odengo, known as 'Bobby.' She testified that the AP further informed her that the deceased was beaten by Michael, Siaya Abisaye and Sylvester Oyoo. PW1 testified that when she asked where the deceased was, the Officer informed her that the deceased was at Pap Onditi as he had been beaten badly. PW1 went to Pap Onditi at 2pm and found the deceased badly beaten with injuries on his eye, chest and with a broken leg.
7. It was her testimony that when she went to the bar where the deceased was beaten, she found Siaya and Oyoo. She further testified that she spoke to Siaya Abisayi asking him what had happened to which Abisayi responded stating that it was the deceased who had attacked him. She further testified that Siaya further threatened her to leave saying he could harm her. She testified that she did not speak to Oyoo and that she then returned to her home.
8. In cross-examination, PW1 testified that on the 14<sup>th</sup> January 2019, she heard the deceased first speak to the rider and that he later spoke to another person. She further testified that she knew that the incident was at Handshake Bar and not Sigoti Hill Top Bar. It was her testimony that she got a report from the Administration Police Officer.
9. PW2 Tony Ochieng Okoth testified that on the 14<sup>th</sup> January 2019 at 11.00pm, he left Handshake Bar when he met with the deceased having followed a shortcut near the deceased's home. It was his testimony that the deceased stopped him and informed him that there was no through way at that place. He testified that the deceased was armed with stones and that PW2 informed the deceased that he was going home but the deceased insisted that PW1 turns back and follow the road and that he did not see the deceased again.
10. PW2 further testified that later, a man called Siaya called him and asked him if anybody had disturbed him to which he responded that he was already at home and had left the person who had disturbed him. He testified that on the evening of 15<sup>th</sup> January 2019 his friend phoned him and informed him that the deceased had died.
11. In cross-examination, PW2 testified that he was not aware of any bar known as Sigoti Hill Top Bar neither was he aware of any mob injustice that occurred there. He affirmed that to get to his home, he had to pass through a shortcut through the deceased's home. It was his testimony that on the 15<sup>th</sup> January 2019, the first person he met at 8.00 am was Siaya and as the distance between his home and that of Siaya's was over 4 kilometres, this signified that Siaya did not sleep at home that night. PW2 testified that he heard about the mob injustice meted out on the deceased on the evening of 15<sup>th</sup> January 2019.



12. In re-examination, PW2 testified that on the night of 14th January 2019 when he met the deceased, he was not alone but was in the company of one, Marvin. He further testified that he knew both the deceased and Siaya very well.
13. PW3 Joseph Odhiambo Nyamuga, a mason from Sigoti testified that on the 16th January 2019, he had been working for one Ronald Sungu when at 9.00am, one Michael Odongo informed him that during the night, the deceased, Kevin Onyango had been beaten and had later on been taken by the Officer In Charge of the Police Station. He testified that Michael informed him that the deceased had been beaten for interfering with the people where Michael lived and further that he was beaten at Michael's bar. He testified that the next day, he went to Pap Onditi Hospital but found the deceased already dead.
14. In cross-examination, PW3 testified that he did not know the name of the bar where the deceased had been beaten and further that one Christine Onyango, his niece, had cautioned him not to speculate about Kevin's death.
15. PW4 Wycliffe Ochieng Abuto, the deceased's brother testified that on the 14<sup>th</sup> January 2019, he was in his rented house in Sigoti Trading Centre when the deceased visited him at about 11.20pm. He testified that the deceased was drunk as he was staggering and smelling of alcohol so he advised him to go and sleep where he normally did. He testified that this was the last time he saw his brother.
16. PW4 testified that the following day on the 15<sup>th</sup> January 2019 he woke up and went to a brick making site and that on his way back he met one Amigo who informed him that the deceased had been beaten badly when he was found stealing at the compound of Michael Odongo alias Bobi. It was his testimony that he and his mother prepared to go and visit the deceased at Pap Onditi Hospital but before they went there, his cousin Christine Ojwang informed him that the deceased had already died. He testified that he later found out that the deceased had been beaten by a mob led by Michael Odongo.
17. In cross-examination, PW4 testified that the deceased had been beaten up at Sigoti Top – In – Bar. He testified that if PW1, the deceased's mother and PW2 said that the beating was at Handshake Bar he would not be surprised as the deceased's mother did not know the names of the bars. He admitted that he did not know which bar the deceased was beaten up at and that Christine Onyango and (PW1) told him that the deceased had been beaten by a mob.
18. PW5 Simon Malombe, the Officer In Charge at Sigoti AP Camp testified that on the 15<sup>th</sup> January 2019 at 12.30am, whilst he was at the camp, he received a call from the manager of Hill Farm Bar, one Abisai or Siaya who informed him that a suspect was found within the compound of the Bar.
19. PW5 testified that together with Corporal Evans Nyanch and APC Michael Kimaiyo they proceeded to the scene and got there around 1.00am where they found 4 people including the suspect who was lying down. He testified that of the four, he knew Abisai, Sospeter, Major Odongo and the 'suspect' whom he later learnt was named Kevin Onyango.
20. PW5 testified that the 'suspect' had been beaten up badly and when he inquired as to who had beaten him up, he was informed that it was a mob. He testified that he phoned the OCS Pap Onditi Police station who later came and took Kevin to the hospital and that he left the investigations to the OCS. He testified that he did not ascertain the identity of those who beat up Kevin.
21. In cross-examination, PW5 stated that before the OCS arrived, and when he arrived, he found the deceased lying on the ground already beaten with the 2 accused persons herein standing nearby. He testified that the incident occurred at Hill Pub Bar at Sigoti Bar Market and that it was the Bar manager, Abisaye, who informed him that the deceased had been beaten up.



22. PW6 Dr. Agwanda Anfield Odhiambo testified that he was the author of the post-mortem report dated 30<sup>th</sup> January 2018 which was done on the same date at Nyakach sub-county District Hospital over the body of Kevin Onyango who was in his late 20's well-built and an African male. He testified that the post-mortem was done 2 weeks after death and that the body was well preserved.
23. PW6 testified that the oxygen supply at the time of death was not sufficient and that there were some abrasions and contusion, also some lacerations especially on the right side of the face. He testified that the right temporal region had lacerations, so was the right cheek and that on the left side of the chin there were lacerations. He further testified that there were 'panda' signs around the eyes, which indicated an injury in the head; on the lower part of the brain.
24. Dr. Agwanda testified that lacerations were also on the 4 limbs and on the anterior chest; that there was a closed fracture on the right leg, below the knee; that there were no signs of any prior ailments and that there was evidence of medical intervention as there were some stitches and a tube on the right hand for providing medication through a drip. He testified that in the respiratory system on the area above the stomach, there was blood clot at the left shoulder. He testified that the rib cage was intact and that there was sputum in the air wave, the bronchial tree which was indicative of a sudden death.
25. Dr. Agwanda testified that the vessels on the right leg were broken; that there was minimal food in the stomach with bleeding with the liver, pancreas and bowel loops(intestines) all intact. He testified that the kidneys were swollen from liquid accumulation but that the urinary bladder and external genital were intact. It was his testimony that there were blood clots extending from scalp to the back of the neck, largely on the right side and that the skull was fractured on the right side at the back, on the lower side with fluids accumulated in the brain cells. He testified that there was no bleeding within the brain cells. He testified that the cervical spine was fine with the spleen intact though there was bleeding under the skin in numerous areas.
26. Dr. Agwanda testified that the cause of death was circulatory collapse due to extensive soft tissue injuries, following assault. He testified that he issued the Death Certificate No. 1070875. It was his testimony that given the nature of the injuries, he concluded that the man was assaulted. He produced the post-mortem report as Exhibit 4.
27. In cross-examination, Dr. Agwanda testified that the date of death was 14<sup>th</sup> January 2018 and that he did not know the date of admission as he did not see the patient when he was alive but only carried out the post-mortem. On being asked by the Court, Dr. Agwanda testified that the deceased was assaulted by blunt objects though he could not specify the nature of the objects used.
28. PW7 PC Michael Kimaiyo testified that between 2012 and 2021, he was based at Sigoti Police station. It was his testimony that on the 14<sup>th</sup> January 2019, his senior, Sergeant Malombe woke him up and informed him that a thief had been found in somebody's home so they proceeded to the scene together with Corporal Nyauntu. He testified that at the scene they found 4 people; Bob the owner of the bar, Siaya the manager and 2 other young men whose names he did not know. He testified that they also found a person whose legs had been tied and who had been beaten.
29. PW7 testified that on inquiry, Siaya stated that the pub was closed at 11.00pm with one drunken client to be escorted home which they did but on their return to the bar, they heard movements within and on opening the main door, they heard 2 people jumping over the perimeter wall with another hiding inside the compound. PW7 testified that they learnt from Siaya that on the rear, a door had been broken and when they walked around, they found a chair and a drum.



30. It was his testimony that Sergeant Malombe talked to the person who had been tied up, but the person did not talk and that subsequently, Malombe phoned the OCS of Pap Onditi Police Station. He testified that the person had been beaten up and that PW7 realized he was a person whose face was familiar. PW7 testified that apart from Bob and Siaya, they found 2 other persons 2 of whom, Siaya and one other, were in court. He further testified that it was at night but that there was security lighting which was facing the direction where the people were standing when they arrived.
31. In cross-examination, PW7 testified that they first went to the scene on the 14<sup>th</sup> January 2019 but that as it was almost midnight, when Sergeant Malombe woke him up, it was no surprise that Sergeant Malombe and Corporal Nyakundi said they went on 15<sup>th</sup> January 2019. He testified that the victim was alive when he saw him, that the scene of crime was called Top Hill Bar and that he did not know who beat the deceased. He testified that he did not get any report of mob justice by a crowd.
32. PW8 Retired Police Officer No. 230130 Chief Inspector Samuel Otongo testified that his last station was Pap Onditi where he worked between 2018 and January 2019. He testified that on the night of 14<sup>th</sup>/15<sup>th</sup> January 2019, at about 1.30am, he received a phone call from AP Sergeant Malombe based at Sigoti AP Camp that members of the public had arrested a suspect within the compound of Hill Top Bar Sigoti and had beaten up the suspect who was then unconscious. He testified that he went to the scene with his colleague where he found Sergeant Malombe and other officers.
33. PW8 testified that on entering the compound of Hill Top Bar, he found the deceased tied with a rope on both legs and next to the victim there was a plastic drum (blue in colour), a chair, a panga and a padlock. He testified that he inquired from the officers where the manager was and the manager identified himself to him
34. PW8 testified that on inquiry, the manager revealed that 3 thieves entered the compound of the bar and that he heard them breaking from the rear and raised an alarm to which members of the public responded immediately. It was his testimony that the manager informed him that 2 of the thieves escaped over the wall and that members of the public searched the compound and found the deceased hiding, disarmed him and beat him up.
35. PW8 testified that the manager showed him the door which had been broken. He testified that the wall was made of iron sheet and the hinges at the door were damaged. He further testified that he rushed the victim to Nyakach Sub-County Hospital for treatment and took the chair and padlock but left the drum with the Aps as he had no space to carry the drum.
36. PW8 testified that it was at night and that he had a spot light. He testified that the victim had injuries on the head, was unconscious and was not talking. He testified that later in the morning, he got a phone call from the hospital that the victim had succumbed. He testified that he had not known the manager prior to that night and that he talked to him at length. He identified the 1st accused as the manager.
37. In cross-examination, PW8 testified that he had not seen the 2<sup>nd</sup> accused until coming to court and further that he did not see him at the scene because it was night. He testified that he did not know who beat up the deceased. It was his testimony that whilst at the scene, the Manager and the APs who talked to him informed him that it was a case of mob justice. He testified that the AP officer who talked to him was Sergeant Malombe.
38. PW9 No. 236870 Chief Inspector Urbanas Kioko testified that in 2019, he was stationed at DCI Nyakach as an Investigator. He testified that on the 29<sup>th</sup> January 2019 he was instructed by Mr. Dominic Muteti ASP, the then DCIO to take over investigations of a mob injustice report at Pap



Onditi Police station made on 15<sup>th</sup> January 2019 where it was alleged that one named Kevin Onyango Abuto alias 'Dadi,' had been subjected to mob injustice at Sigoti area at Hill Top Bar.

39. PW9 testified that together with PC Ambroce Nyaberi and PC Musyoki Stephen, they proceeded to the scene of incident where they met the owner of the premises one Michael Onyango Odongo and a police officer, Michael Kimaiyo who had initially visited the scene on the night of 14<sup>th</sup>/15<sup>th</sup> January 2019. It was his testimony that at the premises, they established that it has a perimeter wall but the front was fenced with barbed wire leaving only one exit and entry point. He testified that they interviewed witnesses who had responded on that night of 14<sup>th</sup>/15<sup>th</sup> January 2019.
40. PW9 testified that from their investigations, they established that only 5 people were in the premises during the incident. Michael Onyango Odongo the bar owner, Abisaye Odongo Nyaoke, the Manager in the Bar, Sylvester Oyoo Ogada, an employee at the Bar, Jacob Odhiambo alias Boyi and Kevin Onyango Abuto now deceased. He testified that they further established that on the night of incident, officers from Sigoti police station went to the scene at night on foot, that the area was calm on the way to the scene with no movements.
41. PW9 produced the Blue 200 litres super drum as P. Exhibit 1, a broken padlock as P. Exhibit 2, a metallic red seat chair as P. Exhibit 3, a panga with black leather handle as P. Exhibit 5. It was his testimony that the super drum and chair are alleged to have been stolen by the deceased and that the panga is alleged to have been in possession of the deceased whereas the padlock is the one securing the premises which were allegedly broken. He testified that he witnessed the postmortem on the deceased body and that subsequently arrested three suspects; Michael Onyango Odongo, Abisaye Odongo Nyaoke and Sylvester Oyoo Ogada.
42. In cross-examination, PW9 testified that the deceased did not die as a result of mob justice but rather he was beaten by the accused persons and that although it was reported as a mob injustice incident, the OCS at Pap Onditi pursued the same but discovered that it was not mob injustice. He further testified that they investigated and found that it was not mob injustice as no persons came to the premises other than the accused; and further that all witnesses and relatives neighbour the premises and that therefore, if there was mob injustice in the area, they would know.

### **The Defense Case**

43. Placed on their defence, the 1<sup>st</sup> accused testified as DW1 giving a sworn testimony. He testified that on the 14<sup>th</sup> January 2019, he was working at Sigoti Hill Top Bar and that at 11.00pm, he was with Susan Bowen with whom he lived and so they closed the Bar and left. He testified that at midnight, he heard noises and screams at the Bar, got out and saw people fighting. He testified that he called the owner of the Bar and a Police Officer stationed at Sigoti police post who came and found the deceased Kevin Abuto lying down. It was his testimony that he did not see anyone assault the deceased but that there were many people at the scene. He reiterated that he was not at the scene when the deceased was assaulted.
44. In cross-examination, the 1<sup>st</sup> accused admitted to knowing his co-accused as well as the deceased. He denied taking part in the deceased's assault or telling the deceased's mother or Tony Otieno about the assault.
45. The 2<sup>nd</sup> accused testified as DW2. He stated that on the 14<sup>th</sup> January 2019, he was in his house asleep when he heard screams. He testified that he peeped through the window and saw many people at the compound of Hill Top Bar but that he never got out and the next morning, he heard people say that 'Dadi' had been beaten until death. He testified that he never saw the people who assaulted and killed the deceased.



46. In cross-examination, DW2 stated that the 1<sup>st</sup> accused is his cousin and that he knew the deceased. He testified that on the night of 14<sup>th</sup> January 2019, the accused had stolen a drum and was arrested while stealing ready-handed and disciplined. He testified that he was in his house and that he stood at the door and saw the deceased being disciplined but denied that he and the 1<sup>st</sup> accused took part in disciplining the deceased.

### **Analysis and Determination**

47. I have carefully considered the evidence adduced in this case, for the prosecution and the accused persons. The accused persons jointly face a charge of murder contrary to section 203 of the *Penal Code*. That section provides that: “Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder.”

48. For the Prosecution to secure a conviction on the charge of murder, it has to prove four main elements against an accused person. In *Anthony Ndegwa Ngari v Republic* [2014] eKLR, the elements of the offence of murder were listed as follows:

- (a) that the death of the deceased occurred;
- (b) that the death was due to an unlawful act or omission;
- (c) that it was the accused who committed the unlawful act or omission which caused the death of the deceased; and
- (d) that the accused had malice aforethought.

49. Accordingly, the duty of the prosecution in this case is to adduce evidence to establish beyond reasonable doubt that there was death, its cause, that the death was unlawfully caused, that it was the accused person or any one of them who unlawfully killed the deceased and finally, that the accused had malice aforethought when they unlawfully killed the deceased.

50. The deceased’s death is not in doubt and was confirmed vide the testimonies of all the prosecution witnesses who testified that they subsequently became aware of the deceased’s death. PW9 testified that he witnessed the post mortem on the deceased’s body. Therefore, the prosecution proved the deceased’s death beyond reasonable doubt.

51. As to the deceased’s cause of death, PW6 Dr. Agwanda testified that after carrying out the postmortem on the body of the deceased Kevin Onyango Abuto, he concluded that the deceased died due to circulatory collapse due to extensive soft tissue injuries following assault. Dr. Agwanda further testified that given the nature of the injuries, he concluded that the man was assaulted. I am thus satisfied that the cause of death was proved by the prosecution beyond reasonable doubt.

52. As to whether the deceased’s death was caused by an unlawful act or omission, Article 26 (1) of *the Constitution* guarantees every person the right to life. Thus, no person has the right to take away the life of another except as provided by law and under *the Constitution*. In *Gusambizi Wesanga v Republic* [1948] 15 EACA 65 the Court stated:

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

53. The postmortem report revealed that the deceased sustained widespread injuries all over the body consistent with an assault using blunt objects. The deceased was found lying down, badly beaten and



unconscious. He did not talk to those witnesses were called to check on him because of the serious injuries which included a fracture, lacerations, contusion and blood clots.

54. Dr. Agwanda listed the injuries sustained by the deceased to include that the oxygen supply at the time of death was not sufficient and that there were some abrasions and contusion, also some lacerations especially on the right side of the face; that there was a closed fracture on the right leg, below the knee; that the kidneys were swollen from liquid accumulation; that there were blood clots extending from scalp to the back of the neck, largely on the right side and that the skull was fractured on the right side at the back, on the lower side with fluids had accumulated in the brain cells and that there was bleeding under the skin in numerous areas.
55. From the above evidence, I have no doubt in my mind that the above enumerated injuries, if caused by an individual, then they amounted to an unlawful act as no-one has the right to deprive another of their life. I am thus persuaded beyond reasonable doubt that the deceased person died out of an unlawful act.
56. As to whether it was the accused who unlawfully caused the death of Kevin Onyango Abuto alias 'Dadi', none of the prosecution witnesses saw the accused kill the deceased. In essence, the prosecution case was based on circumstantial evidence. According to the prosecution, it was the accused persons who assaulted the deceased. On their part, both accused persons testified that the deceased was assaulted by a mob.
57. Sections 111(1) and 119 of the [Evidence Act](#) provide that:

“ 111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

- “119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”



58. In *Abamad Abolfathi Mohammed and Another v Republic* [2018] e KLR, the Court of Appeal stated as follows on reliance on circumstantial evidence:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

59. 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; 9iii) 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.”

60. Examining the evidence adduced, PW1, the deceased’s mother testified that following the incident, she went to the scene where she found the accused persons and inquired from them what had happened to which the 1st accused informed her that it was the deceased who had attacked him and further that the 1st accused threatened her to leave the premises or he would harm her.

61. PW2 also testified that on the morning following the night of the incident, he met the 1st accused who inquired as to whether the deceased had disturbed him. He further testified that he was not aware of any mob justice that had occurred in the area, a point that was reiterated by PW9, the Investigating Officer who testified that the scene was surrounded by the homes of the relatives of the deceased and they would have been aware if any mob injustice was administered the previous night.

62. Both PW5 and PW7 who were the first Police Officers to arrive at the scene after the assault also testified that there were only four people at the scene and that there was no mob there. PW5, Sergeant Malombe testified that when they arrived at the scene, they found the accused persons standing where the deceased was lying down having had his legs tied together.

63. On the part of the accused, they both denied being at the scene. DW1 testified that he had already gone home when the deceased was assaulted and that he returned thereafter. Similarly, DW2 also



testified that he was not at the scene but rather, that he stood at his door watching the deceased being “disciplined.”

64. The law is clear that the burden of proof lies on he who alleges and in this case, the burden of proof lay solely on the prosecution to prove its case against the accused persons beyond reasonable doubt. that means that the accused persons were under no duty to testify adduce or challenged evidence adduced against them, although they had the right to do so. Further, the accused persons had the absolute right to remain silent. They however elected to exercise their right to adduce and challenge the evidence adduced by the prosecution. The question is whether the defence offered by the accused persons displaces the circumstantial evidence adduced by the prosecution.
65. From the evidence on record, it is my view that there was no mob that assaulted the deceased. As testified by both PW5 and PW7, the accused persons and two other people were the only people found at the scene, with the deceased and the latter’s legs were tied. This evidence remained unchallenged. The two accused persons herein were the ones found standing next to the deceased who was in that state of immobility and he could not even talk. There was no scintilla of evidence that there was any mob at the scene where the deceased was found badly beaten and his legs tied.
66. Further, the testimony of PW1 that the 1st accused informed her that it was the deceased who attacked him first in response to her query as to what had happened, combined with the testimony of PW2 that the 1st accused inquired as to whether the deceased had disturbed him the previous night, in my view, point towards some conflict between the deceased and the 1<sup>st</sup> accused person. Granted, PW1 got the name of the Bar where the incident occurred wrong and I am satisfied by the testimony of PW4, the deceased’s brother who stated that PW1 was not aware of the names of bar’s within the area.
67. I also find the testimony by the 2nd accused that he was not involved in the unlawful killing of the deceased to be devoid of any credibility. He testified that he and the 1st accused lived near the Bar where the deceased was assaulted. He initially testified that he peeped and saw a group of people gather by the bar after which he went to sleep and did not open the door till the next morning and that he did not see the people who assaulted the deceased. However, in cross-examination, it was his testimony that he stood at the door and saw the deceased being disciplined. This is the same person who was found standing next to the deceased and in the company of the 1<sup>st</sup> accused.
68. The defence proffered by the accused persons in my mind amounted to a mere denial. The evidence presented before this court unerringly point at the accused persons being those who assaulted the deceased leading to the fatal injuries which he sustained.
69. In the circumstances I am satisfied that the prosecution has proved that it was the accused persons who committed the unlawful acts of assaulting the deceased which caused the death of Kevin Onyango Abuto alias Dadi.
70. Finally, as to whether the accused persons had malice aforethought when they unlawfully killed the deceased, under Section 206 (a-e), of the Penal Code, the circumstances which constitute malice aforethought are described as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving 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.”

71. The courts in interpreting the provisions of section 206 have stated as such in various authorities. In the locus classicus case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, the Court held that an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
72. In the instant case, evidence adduced by the prosecution shows that the aim of the deceased’s attacker was clearly to cause grievous harm. This is further established by the nature of injuries suffered by the deceased as contained in the post-mortem report produced as PEx.4.
73. In the end, I find and hold that the prosecution has proved all the elements of the offence of murder against the accused persons beyond reasonable doubt.
74. Accordingly, I find the accused persons Abisaye Odongo Nyaoke alias “Siaya” and Sylvester Oyoo Ogada Guilty of the offence of murder as charged contrary to section 203 of the Penal Code. I convict them accordingly.
75. Sentence shall be pronounced after records, mitigation and presentence report are considered.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF AUGUST, 2024**

**R.E. ABURILI**

**JUDGE**

