



**Republic v Ogira & 2 others (Criminal Case 48 of 2019)
[2024] KEHC 10144 (KLR) (12 August 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE 48 OF 2019
RN NYAKUNDI, J
AUGUST 12, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

VITALIS OWUOR OGIRA 1ST ACCUSED

GABRIEL OMORO OBAT 2ND ACCUSED

MICHAEL OTIENO OCHIDO ALIAS JAWAYA 3RD ACCUSED

JUDGMENT

1. The accused person was charged with murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence are that on 31st July, 2019 at Pioneer Estate in pioneer location within Uasin Gishu County jointly with others not before court, murdered Vincent Juma Oboo.
2. The accused persons pleaded not guilty to the offence, calling upon the prosecution to discharge the burden of proof as against the accused person. The state at all times was under the leadership of Senior Prosecution Counsel Mr. Mark Mugun whereas the 1st and 2nd accused persons were represented by learned counsel Mr Oduor and the 3rd Represented by Learned Counsel Mr. Nyambegera.
3. The prosecution marshalled 7 witnesses in to establish the ingredients of the offence of murder as tabulated hereunder:

Prosecution’s Case Summary

4. Having presided over the matter and having gone through the submissions by both counsels, the submissions by the state counsel captures a fairly true record of the evidence adduced and the same has been adopted.



5. PW1: Chief Inspector Abel Onyapidi testified that he was an officer based with crime scene support. On 01/08/2019 at around 08:20a.m, he was requested by the investigation officer to document a scene of murder. He was led to the crime scene where they found a dead body in an iron-sheet house within Pioneer estate. The home was next to a garage. The background information they got was that the deceased had been beaten up by a mob of people working in the garage. He took 28 photographs of the crime scene, which included photographs of the alleged murder weapon and the spot where the deceased was subjected to a beating from the mob. He produced the photographs collectively as Exh 1a and the certificate of photographic enlargement as Exh 1b.
6. PW2: Joan Cherut testified that she was the widow and that on 31/07/2019 at around midday, the deceased, who was a care-taker of the garage left for work. Shortly thereafter, the mechanics from the garage came looking for him. She noted that the accused were part of the mob of about 8 mechanics who had come looking for her late husband. They had lived in the premises for about 3 months and she was very familiar with the accused persons. The mob, of which the accused were part of, had metal bars, clubs and a tyre. She recalled that Accused 3 had a metal bar and Accused 1 had a tyre. They were complaining that they had lost their tools in the garage. She informed them that the deceased had just left and asked them to wait for him to come back. They decided to leave for a little while to a destination which was not within his knowledge. Shortly, her husband came back at around 06:00 p.m. with a bandaged leg and asked for water to take medicine with. As he was taking his medicine, the accused persons came back. They demanded for their tools from him and assaulted him when he did not give them the tools. They put a tyre around his waist and beat him up using the metal bars. In as much as she ran and hid herself in a maize plantation 50m away, she could see them assaulting her husband till around 09:00p.m. She said that the accused persons had torches which helped her see what was going on very clearly. The accused persons and other members of the mob then took her husband back to the house and left. She tried to get assistance from a security guard who declined on account of the time of night. She reported the incident at Langas police station and came back with police officers. By this time, her husband had passed on. Photographs were taken in the morning. She had noted that her husband's body bore visible injuries on the legs, hands, chest, back and head. She named the persons she had seen assaulting her husband and accompanied them as they were arrested.
7. PW3: Dickson Nyongesa Kakai testified that he knew the deceased and his family as a neighbour. He stated that on 31/07/2019 he was in Nairobi during the day but came back at around 11:30p.m. The following morning, the deceased's son notified him that police officers wanted to see him. He found the officers in the house and inside lay the body of the deceased with blood flowing down from the body. He also noted that the leg was bandaged. The body was taken away by the officers after the scene was documented.
8. PW4: Stephen Oboo testified that the deceased was his father. He identified the body for purposes of post-mortem. He noted that the body had injuries on the knees, lower part of the legs and hands that were possibly caused by a blunt weapon.
9. PW5: Dennis Oboo after voire-dire testified that he is one of the deceased's sons. On 31/07/2019 at around 08:00 a.m. he was at home with his mother (PW2) when the accused persons, in the company of others, came looking for his father. They said that they would kill his father on account of tools that had gone missing in their garage. They believed that his father was stealing items and selling it off as scrap metal. They were notified that the deceased was not at home and they left but would keep on coming back to check if the deceased had returned from wherever he had gone. His father, the deceased, came back at around 07:00p.m. asked for water to take medicine. As he was taking the medicine, the accused persons came back and beat him up using whips, clubs and metal rods. He noticed that 2nd and 3rd accused persons had metal rods and the 1st accused had a tyre and a club. They threatened to



lynch his father. The accused had torches which helped him see what was going on. He ran to hide himself inside a nearby maize plantation. When he came back at around 09:00p.m. the accused had left his father in their house alone. The matter was reported to the police in Langas and investigations were commenced on the assault incident against his father. He testified that he helped the police in identifying 5 people who were arrested from the garage, the 1st accused being one of them. In as much as he did not identify Accused 2 and 3 prior to their arrest, he had recognised them as part of the people who had assaulted his father.

10. PW6: Michael Kamunya testified that he owns the yard where the garage is operated at a place called Kamalisa. He testified that the deceased was a caretaker in the premises. He was aware that the mechanics left their tools and machines in the yard every evening when the workers close the shop for the day. Accused 1 was the one who would open the garage in the morning and closing the gate in the evening. On 31st July 2019 he went to the garage and found some of the mechanics complaining that their tools were stolen. He advised them to report the matter to the police. When he came back the following morning, he found the garage open but nobody inside. He found it highly unusual that none of the mechanics turned up that morning. He later heard that the care-taker had been beaten to death the previous night. He identified the accused persons as part of the mechanics who worked in the garage.
11. PW7 PC John Okach testified that he was the officer investigating the case. On the 01/08/2019 the DCIO assigned him the matter to investigate. He rushed to the scene of the crime together with a crime-scene support staff to document the scene. They found the body of the deceased on a couch within his house with visible injuries on the legs. There was a pool of blood around the couch where the body was found. His investigations revealed that the previous night, the deceased was beaten by a mob of mechanics using metal bars. The wife and son of the deceased identified one of the metal bars that was used to beat their kin to death. They also named some of the mechanics who beat the deceased. He was able to arrest the accused persons in various parts of the country because they had gone into hiding as soon as news of the death of the deceased spread. By mutual consent, this witness produced the Post-Mortem Form because the fact and cause of death was not in dispute.

The defence case

12. At the close of the prosecution case, each of the accused was placed on his defence and the brief highlights of each one of them is as follows:

First, to take the witness box was Vitalis Oduor on oath told the court that on 31st July, 2019 it is alleged that he was part of the gang which attacked and killed the deceased which evidence he countered to be false for he was never at the scene in which the crime was committed. According to DW1 to the best of his recollection, he reported to work at Pioneer where he works as a mechanical engineer when on arrival he learned of the theft of some tools from the facility. He worked the whole day with the other co-workers and left the premises without any major incident. However, in the evening at around 4:00Pm he was informed by a neighbour that a watchman has emerged from the facility and at the same time, one of his co-worker namely Mogaka telephoned him in relation to this alleged incident. He therefore decided to visit the scene where he saw the deceased person with multiple injuries and one Gordon Alias Nyoka and Ochieng were interrogating the said victim. In addition to this observation about the injuries to the deceased, the accused decided to report to the proprietor of the security farm. Thereafter he went to the workshop closed it and went home. The body of the deceased was collected from the scene and taken to the mortuary.



The accused was categorical in his evidence that there was no time he was at the scene in which the deceased sustained fatal injuries.

The second accused, Victor Kiplagat also gave his sworn evidence as to the evidence of 31.7.2019 alleging that he was working at Pioneer workshop together with the 1st accused and other technicians. He denied the offence of the murder and told the court that he only heard of it without any knowledge how it occurred and how he was involved in killing the deceased.

In support of his defence, DW2 summoned the evidence of Gabriel Omoro who testified to the effect that on 31st July, 2019 he was on duty with other colleagues when he went to the store only to find his tools of trade missing. He enquired around but there was no positive response from the watchmen who guard the facility. This prompted them to report the matter to Langas police station for investigations to be commenced to arrest the suspects. It was at the police station he learned that the watchman had been arrested and was being interrogated in connection with the loss of the tools of trade at the workshop. According to the witness, members of the public later escorted the watchman to his house but on 1st August 2019, the 1st accused informed him that he had succumbed to death.

Lastly, it was the defence of Michael Otieno (PW4) told the court that he works as an electrician at Highway and Kamuya's garage. The accused recalled that on the material day of 31st July, 2019 he was walking at the Kamuya's garage where he had gone to diagnosed and repair a motor vehicle of a customer. In the course of the day he left for Highway garage in company of one Meshack. Thereafter it was the defence of the accused that he had been asked by a customer to travel all the way to Homabay to repair a motor vehicle of another client. He therefore denied of any knowledge with regard with the death of the deceased. His wife Vivian told the court that the 3rd accused on 31st July, 2019 he woke up from the house and went to work at Eldoret town. In the evening it was her evidence that the accused came back at around 7PM when they both retired for the day in their house and on 1st August, 2019 he left for Homabay to attend some work for two weeks. He came back to the homestead on the 24th August, 2019

Submissions in Support of the Prosecution's Case

13. The Prosecution Counsel, Mr. Mark Mugun filed submission in making a case for the state. Learned Counsel submitted that the fact of death was proved, the accused persons were properly identified and there was a common intention of doing his harm. The accused persons believed that he had stolen their tools and had become quite infuriated with him. In support of this elements, he cited various authorities

Analysis & Determination

14. As stated elsewhere the accused persons jointly were arraigned in this court charged of murder contrary to section 203 of the Penal Code that they unlawfully and intentionally fatally injured the deceased namely, Vincent Juma Oboo. The following are the issues to be determined in this matter:
 - a. The death of the deceased one Vincent Juma Oboo
 - b. The death was unlawfully caused
 - c. The death was caused with malice aforethought
 - d. The accused persons participated in or caused the death of the deceased.
15. In order for the prosecution to discharge the onus of proof of beyond reasonable doubt, it is burdened to avail credible evidence to meet the following requirements:



- a. That the evidence is in compliance with the principle of legality as stated in Art. 50(4) of the [Constitution](#) and the accused persons are charged with a recognized crime under the Penal Code
 - b. That the accused persons before court must have been the ones who committed the homicide.
 - c. That the crime or charge must comply with each definitional element with the offence for the judgment to be pronounced in their favour.
 - d. That the unlawful act of the offence of murder must have been committed with culpability with the accused persons endowed with the necessary criminal capacity actuated with malice aforethought.
16. This being a criminal matter, the burden of proof in all the elements of offence against the accused person lies with the prosecution. The [Constitution](#) of Kenya in Art. 50(2)(a) expressly states that every accused person is presumed innocent until the contrary is proved. That contrary is purely the duty of the prosecution presenting both direct or indirect evidence accompanied with any physical or documentary evidence in support of discharging the burden of proof of beyond reasonable doubt. It is settled in law that the existence or non-existence of the facts in issue or not in issue to secure a judgment over a given criminal case is essentially the burden of the prosecution on behalf of the estate.
17. Conversely, there is no burden laid upon the accused persons to prove their innocence except in exceptional circumstances which may fall within the provisions of Section 111 of the [Evidence Act](#). This doctrine on the standard and burden of proof found its way in the provisions of Section 107(1), 108 and 109 of the [Evidence Act](#). In order to articulate it more succinctly given its origin in common law. The locus classicus case law articulates the standard and burden of proof in the following language: in the case of [Woolmington v DPP](#) (1935) AC 462 at pp 487 Viscount Sankey, L had this to say

“But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained It is not the Law of England to say as was said in the summing up in the present case: ‘if the Crown satisfy you that this woman died at the prisoner’s hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident....”

In the case of [Miller v Ministry of pensions](#) (1947) 2 ALL ER 372 at 373 Denning, J buttressed the point as regards the burden of proof required when he stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible,



but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

18. Therefore, an accused person cannot be found guilty of murder in absence of proof beyond reasonable doubt of at least objective unlawful act, element of foreseeability that the act will cause death and malice aforethought.
19. The case is built on a hybrid evidential material of direct and circumstantial evidence. Direct evidence is defined in the Blacks Law dictionary as evidence, that if believed, directly proves a fact in issue. Directly means that a person does not have to make any inferences or presumptions as to proof. Direct evidence is evidence of a fact based on a witness's personal knowledge of that fact acquired by means of the witness's senses. Direct evidence may prove guilt of a charged offense or liability for a civil wrong if, standing alone, that evidence satisfies a court that guilt of the offense has been proved beyond a reasonable doubt or that liability for a civil wrong has been proven by a preponderance of the evidence or other applicable burden of proof.
20. The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence or a combination of both may be enough to meet the applicable burden of proof, depending on the facts of the case as determined by the finder of fact. The Law on circumstantial evidence is illuminated in the following authorities:
21. In the case of *R v Hillier* (2007) 233 ALR 63, *Shepherd v R* (1991) LRC CRM 332 the courts observed that:

“The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt. It is not the individual stand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.”
22. Similarly, the Court of Appeal in *Simon Musoke v R* 1 EA 715 held that:

“In a case depending exclusively upon circumstantial evidence, he (the judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.” (See also *R v Kipkering Arap Koske* 16 EACA 135, *Musili Tulo v R* (2014) eKLR).
23. What follows is to test the evidence by the prosecution with the elements of the offence of murder as framed against the accused persons.
24. As regards to the element on proof of death of the deceased, the prosecution's case is supported circumstantially by the testimony of PW1, PW2, PW3 PW4 and the post mortem report dated 9th August 2019 produced in evidence as Exhibit 3 by PW8. (See *Ndiba v Republic* (1981) KLR 103 and *Kella and another v Republic* (1967) EA 809 and *Musyoka and others v republic* (2003) 1 EA 177) The defence does not dispute the fact that the deceased Vincent Juma Eboo, the former watchman at Highway workshop is dead.



25. The second ingredient is on whether the cause of death of the deceased was unlawful. It is settled law that every homicide is unlawful unless excusable as stipulated in Art. 26(3) of the Constitution. The provisions of Section 213 of the Penal Code defines what constitutes causation issues in the offences against the person which includes murder, manslaughter or infanticide etc. The cause of death can be either through direct or circumstantial evidence.
26. In settling this issue with finality, the prosecution placed reliance on the testimony of PW2 and PW5. It was their evidence that on the 31st July, 2019 a gang of people who apparently included the accused persons before court emerged at their homestead armed with metal bars, rods, a tyre, clubs etc. in rage looking for the deceased as a suspect of theft of some workshop tools routinely used by the accused persons at Highway garage. In a brief interrogation PW2 told the court that the deceased was assaulted using the metal bars that had been carried by the third accused person as the first accused held unto a tyre which later was used to assault the deceased simultaneously, with other acts of assault.
27. It is a requirement under the law of Kenya, for every crime in Kenya without exception, the element of unlawful act of omission as a condition precedent for criminal liability be established beyond reasonable doubt by the prosecution. As indicated above, and going by the principles of *R v Gusambiza S/o Wesonga* (1948) 15 EACA 65. There is no cogent evidence in this murder incident the deceased's death falls within the exceptions contemplated in Art. 26(3) of the Constitution as notably read with Section 17, 207 and 208 of the Penal Code. In the final analysis it appears sustainable to find that there are no unanswered questions on the unlawful cause of the death of the deceased.
28. In the case of *Republic v Joseph Chege Njora* 2007 eKLR, *Anthony Njue Njeru v R* Cr Appeal No. 77 of 2006 the court held:
- “A killing of a person can only be justified and excusable where the accused's action which caused the death was in the course of averting a felonious attack and no greater force than this necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or part arising from a sudden and serious attack by his victim. It must also be shown the reasonable force was used to avert or forestall the attack.”
29. Sometimes it is difficult to believe the level of animosity meted out by the accused persons as against the deceased. The unlawful acts precipitated by the accused persons are not founded on the principle of necessity, self-defence or provocation.
30. It is clear in enacting section 203 of the Penal Code, Parliament's objective was to deter the use of unlawful force, act or omission against another human being for it was likely to increase the risk of causing grievous harm or in the worst case scenario, the risk of death. The principles of proof of beyond reasonable doubt require that the particular nature of the unlawful act referred to by the prosecution, be established that it was foreseeable for it to result in the death of another human being. The provisions of Section 213 of the Penal Code brings into focus various features or characteristics on causation in which an accused person can be held culpable for the death of another human being. It is about the proximate cause without any intervening factor to exclude criminal liability of an accused person. In the course of the testimony of PW2, one finds credible evidence on the chain of events of the 31st July, 2019 when it was alleged that the tools stored at Highway workshop had gone missing and the suspect of that theft happened to be the deceased in this homicide. The crime scene attracted a number of persons some being the victims of that theft while others were responding to the information communicated around the workshop on the loss of the tools which were being used by some of the accused persons before this court. The 2nd accused person is the spouse to the deceased. She gave a narration on the series



of times the gang of people who visited their house in search of the suspect apparently her own husband was at the centre of the crime. It is fundamental to deduce from her evidence that she witnessed the assault of the deceased with men who included the three accused persons armed with metal bars and a tyre ready to lynch him whenever necessary. That is why she told the court that her life was in danger and in company of her son PW5 they sought refuge in a nearby maize plantation. These unlawful acts of actual assault of the deceased coupled with the intention by the assailants had a likelihood of causing death. It was therefore foreseeable that if you hit another human being with a metal bar to the head and nervous system, it means serious harm that one knows is likely to cause the death of the victim. Here again, death indeed ensued. This is what one can describe as culpable homicide. Simply stated, where a person for an unlawful objective does anything like the accused persons did that he knows or ought to know is likely to cause death and thereby causes death notwithstanding that he desired a different effect and that person dies nevertheless he is liable for the offence of murder. The deceased's death was as a result of the accused persons using weapons against the vulnerable parts of his body and the death ensued as a consequence. This element has been discharged by the Prosecution beyond reasonable doubt for there is evidence to connect the acts or omissions of the accused persons to the death of the deceased.

31. In all crimes of murder, for an accused person to be found guilty, the fundamental element to be proven is that of Malice aforethought. As regard to proof of availability of malice aforethought in any indictment against an accused person, Section 206 of the *Penal Code* gives the following guidelines:
- (a). An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
 - (b). Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
 - (c). An intent to commit a felony.
 - (d). An intention to facilitate the escape from custody of a person who has committed a felony.
32. The court in *Rex v Tubere s/o Ochen* (1945) 12 EACA 63 held:
- “The court has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick”
33. In the matter at hand, malice aforethought is manifested from the evidence of PW1, PW2, PW3, PW4, PW5 and PW7 by dint of the weapons used identified as Metal bars and crow bars applied unnecessary force to the most vulnerable organ being the head of the deceased. In targeting the head, the accused persons intended to cause death or grievous harm to the deceased. In fact, from the post mortem report, the cause of death was head injury, secondary to blunt force trauma and severe haemorrhage secondary to multiple wounds. The post mortem goes further to capture the vulnerability of the deceased during the assault with diagnostic evidence that he suffered defence wounds to the forearms with deep lacerations measuring 7x4 cm & 8x4 cm with massive haemorrhage. It is generally settled that even if this case the dangerous weapon was not recovered as it happened in most cases, courts are at liberty to scrutinize the probative value of the evidence to rule on manifestation of malice aforethought. In this case however, that was not the scenario for PW2 saw the accused persons and others not before court armed with the metal bars and other crude weapons aiming at the deceased with the ultimate



outcome of inflicting fatal injuries. this is a gang who took the law into their own hands with one objective; to cause grievous harm or the death of the deceased. The testimony of PW2 drives malice aforethought home within the scope of the Tubere case when one incorporates that evidence to this element as regards the conduct of the accused person before, during and after the commission of the offence. The accused persons in committing this offence which is prohibited by law did so intentionally, recklessly with knowledge of the facts constituting the offence. This is not a case of mere negligence but the context of the prosecution case falls within the Men's rea required by the legislature to prove the offence of homicide. The ultimate test of the Constitutionality of Art. 26 on the right to life is whether the death of the deceased fell within the scope of sub-section four, whether in causing the death of the deceased, the accused person under the penumbra of self-defence, or provocation which will answer the ultimate question that the death was excusable or justified. It is clear to me that the effect of having lost their tools and with a suspect in mind, were never the circumstances that will have driven them to harm themselves with dangerous weapons search and trace the deceased severally and without according him a fair hearing on the surrounding circumstances of the alleged offence, they applied excessive force resulting in the death of the deceased. In addition, the measures adopted by the accused person were not reasonable and demonstrably justified. This element on malice aforethought stands proven beyond reasonable doubt.

34. This analysis will be incomplete without factoring in the doctrine of common intention under Section 21 of the *Penal Code*. The ingredients of common intention were enunciated in *Eunice Musenya Ndui v Republic*, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

- (1) There must be two or more persons;
- (2) The persons must form a common intention;
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- (4) An offence must be committed in the process;
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

35. Similarly, I find a valuable line of persuasion on the doctrine of common intention in the case of *Ismael Kisegerwa & Anor. v Uganda*; CA. Crim. Appeal No. 6 of 1978 thus;

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused person shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed the doctrine of common intention would apply irrespective the offence committed was murder or manslaughter.

It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate themselves from the assault, it can develop in the cause of events though it might have not been present from the start, it is immaterial whether the original common intention was unlawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the



commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.”

36. The test for the prosecution therefore is to proof existence of a common intention of the joint responsibility of the accused persons that in their unlawful act, it was in furtherance of that common intention. What is of significance is that if there are two or more people in the scene of the murder and one of them armed with a rival or any dangerous weapon likely to cause grievous harm and uses it to inflict the fatal injuries, the result of that crime will bring the three offenders within the scope of section 21 of the Penal Code.
37. The prosecution in this case adduced evidence from the chronological observation presented before this court by PW2 as corroborated by PW5. The circumstantial evidence PW1, PW6 and PW7 renders credibility to the evidence of PW2 and PW5. With regard to the evidence of PW2, a gang of about 8 mechanics went to her house in which they live with the deceased with a need to have a conversation with him as the caretaker of the workshop. This gang of 8 was armed with metal bars, clubs and a tyre. She recalled that the 3rd accused has a metal bar and the 1st accused had a tyre. The three accused persons vehemently refuted the allegations made by PW2 that they did not involve themselves with the acts of homicides with which they have been indicted and stood trial for it, in the sense they contested any allegation connecting each one of them to the commission of the offence. The third accused even went further to raise a plea of an alibi defence. The import of all these was to find their way out of liability for the offence against the typology laid down the prosecution case as the main perpetrators. In my evaluation of the evidence, this offence of assault primarily later resulting in the death of the deceased constituted not only malice aforethought under section 206 but also common intention under Section 21 of the Penal Code.
38. Last but not least, Identification of the accused is highly contested. It is therefore necessary to lay down the principles on identification before making any conclusive findings on this matter. The court in *Roria v Republic* (1967) EA 583 held thus:

“Subject to 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In Maitany v Republic (1986) eKLR the Court of Appeal stated:

It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

...There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to



the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.”

39. This case involved persons who were not strangers to the scene of the crime. The victim happened to be the caretaker or the watchman of the workshop where the accused persons and other not before court practiced their skills as mechanics or technicians in repairing motor vehicles or other auto chattels. The facts of the case were that some tools had been stored within the premises of the workshop. The accused persons then formed the opinion that no other person could have made entry to that store save for the deceased. The case for the prosecution build around the testimony of PW2 revealed that the accused persons went to the house of the deceased and were first to meet with the wife who told them that his husband was not within the homestead. At the time, PW2 thought that the explanation given to the gang of people armed with crude weapons was sufficient to let the whole issue rest but that was never to be the case as they came back knocking seeking answers from her on the whereabouts of her spouse, the victim of the crime. Fortunately, PW2 testified as corroborated by PW5 that the deceased happened to be in the house and all what the accused persons being in the gang of 8 did was to inflict further bodily harm to the deceased. The witness also told the court that on the deceased returning to the house, he had already suffered injuries to the arm and this second beatings was an escalation of use of excessive force. Clearly, PW2 and PW5 fearing for their lives took flight from the scene to the maize plantation only to come back and discover that their next of keen is dead. This being a case of recognition due to the prior knowledge of PW2 and 5, it is unequivocal that the accused persons were positively identified and there was no error, or mistaken identity committed by PW2 and PW5 to place them at the scene of the crime.
40. For those seasons, the safest and most satisfactory way of exercising discretion in entirety of the prosecution and defence case is that the charge of murder contrary to section 203 as punishable under Section 204 of the *Penal Code* has been proved beyond reasonable doubt. The value of it is to find the accused person jointly and severally guilty of the offence and have them convicted hereof with a residual schedule of the sentencing hearing to arrive at an appropriate verdict on sentence.

Verdict on Sentence

41. The three accused persons jointly have been convicted of murder contrary to Section 203 of the *Penal Code*. The offence is punishable with a maximum sentence of the death penalty. Initially this was the only sentence but following the Supreme Court decision *Francis K. Muruatetu v Republic* (2017) eKLR the mandatory sentence of death was declared unconstitutional giving way for sentencing as an individual process of a remedial nature for each case to be considered within the unique circumstances. There are various instruments which guide the court on inquiry as to the fair, appropriate and proportionate sentence for the offence. The fundamental purpose of sentencing is to contribute along with crime prevention initiative, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- a. To denounce unlawful conduct
 - b. To deter the offender and other persons from committing offences
 - c. To separate offenders from society, where necessary
 - d. To assist in rehabilitating offenders



- e. To provide reparations for harm done to victim or to the community and
 - f. To promote a sense of responsibility in offenders and acknowledgement of the harm done to victim and to the community
42. A court that imposes a sentence shall also take into consideration the following principles:
- a. A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender and, without limiting the generality of the foregoing
 - i. Evidence that the offence was motivated by bias prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor.
 - ii. Evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim or
 - iii. Evidence that the offence was committed for the benefit of at direction of or in association with a criminal organization
43. It is plain from the various case law for example the principles in Muruatetu that the following are the relevant aggravating and mitigating factors in the sentencing of murders:
- i. Type and gravity of murder
 - ii. Mental state-including a degree of diminished responsibility
 - iii. Other partial excuses including an element of provocation of undue influence.
 - iv. Character
 - v. Remorse
 - vi. Capacity for reform and continuing dangerousness
 - vii. Views of the victim's family
 - viii. Delay up until time of sentence and provision conditions
 - ix. Delay up until time of sentence and prison conditions
 - x. Guilty pleas
 - xi. Prison conditions.
44. In the instance case both counsels, Mr Oduor and Mr. Nyabegera made oral submissions on mitigation on behalf of their respective accused persons. Whereas on the other hand lead prosecution counsel Mr. Mark Mugun submitted on aggravating factors of the offence. It is understood that the accused persons are men of good character with no previous record of violence. It was also fortified both counsels that the court should take into account there respective ages, and that they regret the offence which involved the deceased. I have on my part considered the character of the convicted persons together with the circumstances that surround the commission of the offence. The death sentence should only be imposed in the most exceptional cases where there is no reasonable prospect of rehabilitation and the object of punishment will not be properly achieved by any other means or sentence. Therefore, given the gravity of the offence and the level of culpability by each of the accused person I impose a



sentence of 15 years imprisonment with a credit period of pre-trial detention to be subtracted from the overall penalty imposed by this court under Section 333(2) of the *Criminal Procedure Code*.

45. 14 days Right of Appeal. Orders Accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF AUGUST, 2024

.....
R. NYAKUNDI

JUDGE

In the Presence of

Mr. Nyambegera Advocate for the 3rd Accused

Mr. Oduor for the 1st & 2nd Accused

Mr. Mugun for the State

