



REPUBLIC OF KENYA



**State v Otieno alias Smokie & another (Criminal Case E011 of 2023)
[2024] KEHC 16440 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E011 OF 2023
RE ABURILI, J
NOVEMBER 27, 2024**

BETWEEN

STATE PROSECUTION

AND

DOUGLAS OCHIENG OTIENO ALIAS SMOKIE 1ST ACCUSED

GEORGE OWUOR OMINO ALIAS APOTH 2ND ACCUSED

JUDGMENT

Introduction

1. The two accused persons herein Douglas Ochieng Otieno alias Smokie and George Owuor Omino alias Apoth are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 8th March 2023 at Nyabera village in Kisumu West sub-county jointly and with others not before court, they murdered Dennis Odongo Otieno. The accused persons pleaded not guilty to the charge and the case proceeded to full trial. The prosecution called a total of six (6) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

2. PW1 No. 122707 PC Nicholas Onyango Odongo the deceased's brother testified that on the 8th May 2023 at around 10am, he was at their home in Nyahera with the deceased who was to go to Karateng area to do some works as PW1 was also preparing to go to work. PW1 testified that he left the deceased at midday. It was his testimony that in the evening at about 6.30pm, as he and his other brother Benson Owino Odongo were leaving town, Benson received a phone call from a lady church member who asked him if he was aware of what was happening on social media before directing him to the Team Wazito WhatsApp group wherein they saw a photo of their deceased brother Dennis Odongo sitting down with his trousers removed and looking injured.



3. PW1 testified that another phone call was made to Benson using the deceased's phone and the person identified himself as the person from Karateng and who claimed that his electric meter had been stolen by the deceased and that the person sent them videos and photos showing how Dennis was being beaten. He testified that they called the deceased's phone and the person who picked, not being their brother Dennis, asked them how much time it would take for them to reach Karateng and he told them to carry Kshs. 50,000 so that they could carry their brother to go and die elsewhere.
4. PW1 testified that they called their other brother and together, they proceeded to Karateng where they arrived at around 8pm and found a Motor Vehicle from Maseno Police station, with the deceased lying in a ditch and next to him were 5 men, 3 of whom had runguns, one who had a jembe and another had a panga. He testified that the police vehicle was at the scene with lights directed at the scene and the people at the scene had torches, their motorbikes also had lights on so the scene was well lit and so they saw the people at the scene very well.
5. PW1 testified that the deceased had injuries on the hand but was not dead yet and he could speak though with some difficulties. He testified that the deceased's body was swollen and his head had cuts and swellings. It was his testimony that he touched the deceased and saw that he indeed was alive. PW1 testified that he saw the 5 people whom they found stepping on their brother, some beating him with runguns and forcing him to stand up.
6. PW1 testified that one of the assailants held the hand of PW1 and took him aside and spoke to him, telling him that he was the one who had called PW1's brother Benson and that they should part with Kshs. 50,000 before leaving with the deceased because the deceased had been stealing electrical metres in the area and that the 5 people present were all victims hence each wanted Kshs. 10,000. PW1 testified that he informed the person that he did not have Kshs. 50,000 but that he could send them Kshs. 10,000 via Mpesa, if the people could allow PW1 take his brother to hospital then go and commit himself at the police station to pay the balance but that the man refused saying that they would only take cash money.
7. PW1 further testified that he went to where his brothers were and shared with them the demand and together they raised Kshs. 10,000 which they gave to one of the men who had a jacket on, and who counted and confirmed that it was Kshs. 10, 000 and handed over the money to the man who had a jembe. PW1 identified that the said man who was holding a jembe was the 2nd accused who was dark, taller and in a purple striped shirt and the 1st accused who was light skinned and shorter respectively. It was his testimony that after the people received the money, they allowed PW1 to take away his brother, now deceased and subject of this murder charge. He testified that him and the people who had held his brother hostage negotiated for over 45 minutes at the police car with full lights illuminating the area so he saw the people very well.
8. PW1 testified that he spoke to the 1st accused who was holding a jembe and requested him to give him (PW1) the deceased's mobile phones which the 1st accused was using to take photos of the deceased but that the 1st accused asked PW1 for money in exchange for the two phones. That PW1 told the 1st accused that he had no money and was ready to leave the phones and take his brother to hospital first but that eventually, the 1st accused accepted Kshs. 100, the only money PW1 told the 1st accused that he, PW1 had on him.
9. PW1 testified that they placed his brother in the police vehicle and on their way to Chulaimbo Hospital, his brother strained to tell him that he had been beaten for an offence he did not commit. He testified that his brother was crying and saying that the son of the woman who called him to go and repair her metre beat him with a jembe and called other people to join him beat the deceased. It was



his testimony that they took Dennis to hospital but power was out and that the nurses received him and tried treating him but said he was not responding to the tests being done so they were referred to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH).

10. It was PW1's further testimony that together with his brother Victor Oluoch Odongo, they took Dennis to JOOTRH in an ambulance where tests were done including brain CT scan, X-rays in the abdomen and lungs after which the doctor told them that Dennis was out of danger so he was admitted for observations and was discharged at 9am the following morning when they took him home using a private car where his condition changed for the worse and he then died in PW1's hands as PW1 was holding his head and talking to him.
11. PW1 testified that they went to Dago police station with his brother and the police came and removed the body of Dennis to JOOTRH mortuary as PW1 and others proceeded to Maseno DCI to record their statements. It was his testimony that the person who was said to be the son of the woman who called his brother was the 1st accused and that he was the one who had the jembe. He further testified that when he handed over the money to the 2nd accused as identified in the dock, the 2nd accused passed the money over to the 1st accused.
12. In cross-examination, PW1 stated that when he arrived at the scene, the 2 accused persons were still beating the deceased. He testified that the 2nd accused had a rungu and was beating the deceased on the chest while the 1st accused was armed with a jembe and that he interacted closely with both of them in a well-lit scene.
13. PW2 Benson Owino Odongo, the deceased's other brother who was with PW1 on the day of the incident testified and reiterated the testimony of PW1 which he corroborated on the happenings of that evening. It was his testimony that on arrival at the scene, as stated by PW1, he saw the 1st accused had a jembe. It was his testimony that on the 12th May 2023, he witnessed the post-mortem on the body of the deceased and that some money was transferred from the deceased's phone to Douglas Ochieng Otieno's phone possibly by the person who was calling them.
14. In cross-examination, PW2 testified that when they got to the scene at night, they found the assailants still beating the deceased. He testified that the person who had the rungu forcing his now late brother to talk was the 2nd accused who had a leather jacket, was dark and had a rungu. He testified that the 1st accused was light skinned and had a jembe.
15. In re-examination, PW2 testified that when he arrived at the scene, he saw five men standing near his now late brother. He reiterated that the suspects were harassing, kicking his brother, pushing him and knocking him with a club forcing him to talk. He testified that they negotiated with the assailants for long and the brothers to the victim raised money and gave it to the 2 accused persons.
16. PW3 Victor Oluoch Odongo another of the deceased's brothers testified and gave similar corroborative testimony to those of PW1 and PW2. It was his testimony that at the scene, they found 5 people beating the deceased one of whom had a jembe, another had a rungu and another had a jembe. He identified the attackers as Owuor, the 2nd accused who had a rungu and was using it to hit the deceased brother while Douglas the 1st accused had a jembe that he used to beat the deceased as they were forcing him to talk and stand. He testified that the attackers told PW3 to give them Kshs. 50,000 before they could take away their brother.
17. In cross-examination, PW3 testified that they found the police car at the scene and that there was light from the vehicle and that the people were assaulting their brother in the presence of the police who never arrested the people at the scene.



18. PW4 No. 55647 Corporal David Omar testified that on the 8th May 2023 at about 18.30 hours, he was called on phone by the OCS Maseno Police Station who instructed him to proceed to Nyahera in Kisumu West Sub- County to collect a suspect who was reportedly impersonating a Kenya Power & Lighting Company employee to the villagers.
19. It was his testimony that he proceeded with PC Victor Omondi and PC Lusi Ogonda to the scene but on their way, they received another call from the same OCS to the effect that he had given a phone contact of the witness to a villager who was to direct PW4 to the exact scene where the suspect was being held. He testified that a person called Nicholas called him saying he wanted police assistance and PW4 directed him to follow them through a muddy rough road. It was his testimony that on arrival at the scene, he saw a middle-aged man, his clothes soaked and lying beside the road besides whom were five (5) men.
20. PW4 testified that he was informed by one Douglas that the victim had introduced himself as an employee of KPLC and had conned Douglas of Kshs. 7,000 pretending that he was inspecting KPLC tokens and meters. It was his testimony that Douglas told him that after realizing that he had been conned, he demanded the victim(suspect) to identify himself and when he failed to do so, Douglas raised an alarm and neighbours appeared and beat the victim viciously.
21. PW4 testified that he examined the victim who was unconscious and saw injuries on the top of his head which was swollen, serious bruises on his back and that the right leg had an open wound. It was his testimony that the victim's clothes were soiled and wet. PW4 testified that he tried to save the victim's life and he lifted him with Nicholas and another villager and as they were taking the injured to their vehicle, Douglas, the 1st accused demanded that they could not carry the victim away until they pay the amount the victim had conned Douglas.
22. It was his testimony that the 2nd accused also demanded the same so Nicholas started negotiating with the two, wanting to know how much the victim had conned them so Nicholas looked for money to pay them to avoid obstruction to saving the life of the victim and that after they settled out there, Nicholas came to the vehicle and they drove off but that the victim started vomiting and on reaching Chulaimbo County Hospital, his condition worsened.
23. PW4 testified that he convinced the medical personnel to attend to the victim which they did after which he left and proceeded to Holo to attend to another matter. It was his testimony that he was later notified that the victim had succumbed to the injuries he sustained.
24. In cross-examination, PW4 testified that he met a crowd of more than 40 people most of whom were armed and that the victim looked like he was beaten by a mob. He testified that he did not know Douglas before the incident and that he saw the 2nd accused at the scene when he also demanded to be paid money.
25. PW5 Dr. Ombok Lucy testified that she carried out a post-mortem on the body of the deceased whose name is given in the Information for murder herein in this case on the 12th May 2023 at JOOTRH mortuary at around 14.00 hours. She testified that the body was of an African male 40 years in good nutrition and of 175cm height. She further testified that the body was embalmed, well preserved and that she found the head had a cut wound deep and penetrating and multiple stitched cut wounds on lower limbs largest of which was 5cm.
26. Dr. Ombok testified that internally, the left lung was collapsed and there was internal bleeding in the brain with increased intracranial pressure but that other systems were normal. Following the examination, she formed the opinion that the cause of death was bleeding in the head as a result of



blunt force trauma. It was her testimony that she issued Death Certificate No. 1553898 and signed the Report on 12th May 2023 which she produced as P. Exhibit 1.

27. PW6 No. 73508 Corporal Richard Langat, the investigating officer testified that he knew both accused persons whom he both identified in court. He testified that on 9th May 2023 at around 3.30pm, while he was at Maseno DCI office when 5 people came led by Nicholas Otieno Hongo and reported that their brother Dennis Odongo Otieno had on the previous day of 8th May 2023 been subjected to mob injustice by people at Kadenge area.
28. It was his testimony that after his investigations, on the 27th May 2023 they went to the home of Douglas and arrested him after which he led them to the home of George Omino whom they went and arrested, processed and charged them with the murder of the deceased.

The Defence Case

29. Placed on their defence with a case to answer, the 1st accused testified as DW1 denying that he attacked the deceased but stated that he was trying to guard him from being attacked by other people. He testified that he did not know the deceased prior to the incident and could not kill the deceased. He testified that the deceased's family told him to admit to killing the deceased so that they could help him.
30. The 2nd accused testified as DW2 and stated that Douglas, the 1st accused was his relative, his grandson in the family. He recalled that on 8th May 2023, he received a call from Douglas' grandmother who told him that something was happening at her home. That she was his customer. That he had cement to take somewhere. That he rode via the home of Douglas where he saw an old man who told him that they wanted fuel from DW2's motorbike to burn the suspect. That he refused and rode away and returned and found a suspect had been beaten and he was lying down. He stated that his house was 50 metres to the home of Douglas.
31. He stated that the police arrived and removed the body to the morgue. He denied knowing who the deceased was. He stated that he saw many people gathered where the man was lying. That he was arrested on 27th May 2023 at 5.30am when his door was knocked and he was asked by the people knocking if he was among those who killed the deceased and received Kshs.10,000. The people took his phone which they later returned to him. He denied receiving any money.
32. In cross-examination, DW2 testified that he was at the scene where the suspect was beaten because he was sent by his customer. He testified that he told the crowd not to assault the suspect and instead to call the police.
33. DW3 Kennedy Ochieng Ongudi the Assistant Chief, East Karateng Sub-location testified that on the 8th May 2023, he received a call from his village that an unknown person who was assaulted at Nana's place had been taken to Chulaimbo Hospital and then referred to Russia Hospital and had succumbed 2 days later.
34. It was his testimony that during his investigations, he established that photographs were taken of the assault and were being circulated and that among the assailants were Zack Omuga who ran away to Qatar and Chief Okode who fled which information he gave to the police. He further testified that of the 2 accused, he knew the 2nd accused well and he only came to know the 1st accused after the incident that 1st accused worked at Nana's home
35. DW4 Mildred Nana Ouma testified that the 1st accused was her son while the 2nd accused was his father in-law. She testified that the deceased had informed her that he was a KPLC worker and that she should



- send money to him but she dismissed him and subsequently her son, the 1st accused informed her that the deceased had been taken away by the police.
36. DW5 Philisters Owino Omino testified that the 1st accused was her grandson and the 2nd accused her brother-in-law. She testified that on the 8th May 2023, someone called her and informed her that some people were fighting at her son's house. It was her testimony that the person who said that he had a customer and was passing by her home went to the scene and called her back saying that the people were outside the home. That it was 5.30 pm and that she did not follow up on what transpired after.
37. DW6 Serah Atieno Ochieng testified that the 1st accused was her husband while the 2nd accused was her neighbour. She testified that on the 8th May 2023, a man went to her home then three people started following him from behind and eventually the man was attacked. She testified that she called her husband to try and help the man but her husband was threatened to be beaten. It was her testimony that she never saw the 2nd accused at the scene.
38. DW7 Daniel Nyatenya from a farmer and businessman from East Karateng testified that he knew Douglas as his nephew while the 2nd accused Omino was his neighbour. He stated that on 8th May 2023, at around 5,00 pm, he was in his home tethering cattle when he saw people getting into Mildred's home and they started shouting. That he got there and found them assaulting a man who was on the ground. That he found Douglas trying to separate them. He then asked why they were assaulting the man. That they were 3 people whom he dissuaded from assaulting the man.
39. That one of them said that the man had defrauded them and they wanted to be refunded and that the man being assaulted said that he could pay them. That one person said he had fuliza so the man gave Kshs.1,000 to Douglas who send the money to the man who was demanding for refund. He stated that another one also asked for his money. That they continued beating the victim and Douglas told them to move away from the home. That the man took the phone of the injured man and was calling all contacts in that phone asking for money from them or they kill the victim.
40. He stated that one person called the police and that he saw Zack Omuga demanding for money so they pulled the man outside the homestead. He stated that Javan is the one who took the phone and called the contacts warning them that the man would be killed unless they send money.
41. He denied recording his statement with the police. He stated that the police arrived at 8.00pm and that some people came on motorcycles and introduced themselves as brothers to the man upon which the people at the scene demanded for money before the injured victim could be taken away. He stated that he saw money being paid to them and that he saw the 2nd accused who arrived at around 6.00pm.
42. DW8 Andrew Orao from Karateng testified to the effect that he had asked DW2 to take him to some place on a motor cycle and on the way, they found the incident having taken place with the mob wanting fuel from DW2's motor cycle to burn the deceased but that DW2 refused so they proceeded to his destination.
43. On being cross examined, he stated that he was at the scene where the deceased was being beaten for reasons that his customer had send him to go check on what was happening at her home. He stated that he was carrying a passenger, whose name he did not mention.

Submissions

44. The following issues of were framed by the accused person's counsel for determination:
- i. Whether the death of the deceased did in fact occur?



- ii. Whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused persons? (Actus reus of the offense)
 - iii. Whether the alleged unlawful act of commission or omission was committed with malice aforethought? (the mens rea of the offense)
45. On Whether the death of the deceased did in fact occur, it was submitted that PW1, the widow of the deceased (PW1 was not the widow of the deceased) and PW6, Dr Lucy Ombok established that indeed, the deceased's death did in fact occur.
46. On whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused persons, (Actus reus of the offense), it was submitted that PW2, PW3, PW4 and PW5 all gave similar evidence that they arrived at the scene of crime late after seeing photographs and videos of the deceased having been posted in a local Church WhatsApp group.
47. Accordingly, it was submitted that the mere mentioning that they saw the pictures of their brother who was helpless is enough evidence to prove that by the time they were leaving home to proceed to the scene of crime, the act of mob lynching had already ended, hence the pictures and videos that they saw from their home.
48. It was submitted that the said witnesses tried to mislead this Court that they were present at the scene of crime and that they saw the Accused persons beat the deceased with the help of head light from the police vehicle.
49. Further, that it was not logically correct that that the Police of this Country could help any perpetrator of such an offense to beat the deceased and they just provide light from their vehicle. That this was a lie that must be disowned.
50. Counsel urged this court to take notice that apart from Dr Lucy Ombok and the Police Officers, all the other witnesses were the deceased person's relatives as brothers and widow only.
51. It was submitted that the deceased was assaulted in Karateng area yet not a single witness from Karateng was called and neither was any person that was present during all the time that the mob lynching occurred was ever called to testify.
52. It was therefore submitted that none of the prosecution witnesses was present at the scene of crime during the mob lynching and that every story was an afterthought and that no independent eye witness actually saw any of the accused persons beat the deceased, and if there is any, then he/she was never summoned to come to court.
53. Counsel for the accused further submitted that no weapon was ever recovered from the custody of any of the accused persons.
54. Further, that DW5 confirmed to Court that she is the grandmother of the 1st Accused and an in law to the 2nd accused and she is the one who heard about the fight that was going on in her son's home from a by passer and she sent the 2nd accused to go and check and furnish her with a report since she could not walk due to arthritis, which evidence suggests that by the time the 2nd Accused was coming closer to the scene, the fight had started long before and he was not aware until DW5 sent him.
55. Counsel urged this court to adopt the testimony of DW2 that he stopped at the scene when he had a customer, DW8 and since the mob people threatened to use his fuel in the motorcycle, he dashed off with DW8. That no eye witness confirmed or could explain how DW2 was engaged in the fight.



- That the 2nd Accused remains an innocent bystander who was only present at the wrong place at the wrong time.
56. It was submitted that the only evidence that the state is heavily relying upon to incriminate the 1st Accused is that Kshs.1,000/= which was sent to his mpesa, which was explained in rebuttal offered by the Defense witnesses as to why the money was sent to the mpesa number of the 1st Accused person and that there is no reason beyond reasonable doubt as to why the Kshs.1, 000/= was sent to the 1st Accused other than for purposes of remitting to another person who had fuliza with an intention of trying to calm the war.
57. Counsel relied on the case of Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20 where it was stated that:
- “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 of evidence, to say, it is circumstantial.”
58. It was submitted that the circumstances of this case speak to the innocence of the Accused persons. That it is on record that it is the 1st Accused who called the Police and even led them to the scene of crime hence it cannot be that a perpetrator of an offense can call Police to come and visit a scene where he was a culprit.
59. That DW1 also called his mother trying to seek for help and it is his mother who advised him on phone to call the police while the 1st Accused/DW1 also tried to save the situation by telling the angry mob to stop beating the deceased and the mob threatened to deal with him too.
60. That the 1st Accused even volunteered his Mpesa line so that money could be sent in an attempt to solve the dispute, that DW8 confirmed to the Court that he was a pillion passenger aboard the motorcycle of DW2 when they passed near the scene of crime and the threat by the mob to use the fuel in DW’2 motorcycle is what scared them to run away.
61. Counsel submitted that DW5 also confirms that the 2nd Accused did not have any ill motive when he went to the scene since it was DW5 who sent the 2nd Accused to find out what was happening at her son’s home, which circumstances point to the innocence of the Accused persons as there is nothing repugnant.
62. It was therefore submitted that the Prosecution has failed to prove beyond reasonable doubt that the 1st and 2nd Accused persons’ actions or omissions caused the death of the deceased.
63. On whether the alleged unlawful act of commission or omission was committed with malice aforethought? (the mens rea of the offense), it was submitted that since limb (ii) has not been proven beyond reasonable doubt by the Prosecution, there was no need to submit on this last limb. Counsel for the accused prayed to this court to find that the prosecution has failed to prove their case beyond reasonable doubt and acquit the accused persons.

Analysis and Determination

64. I have carefully considered the evidence adduced in this case by the prosecution witnesses and the defence proffered by each of the accused persons together with the evidence adduced by their respective witnesses. I have also considered the arguments in submissions by the accused person’s counsel, Mr. Orego Joel. The question for determination is whether the prosecution has proved all the elements of the offence of murder beyond reasonable doubt.



65. The accused two persons jointly face the charge of murder contrary to section 203 of the Penal Code. That section establishes the offence of murder and provides as follows:

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

66. The prosecution has to adduce evidence to establish that there was death, the cause of that death, that the death was unlawfully caused by acts or omissions on the part of the accused persons and that the accused persons had malice aforethought when they unlawfully caused the death of the deceased. The standard of proof of all these elements of murder is that of beyond reasonable doubt.

67. As to the deceased’s death, PW1 the deceased’s brother testified that the deceased died in his arms. PW2, the deceased’s other brother testified that he witnessed the post mortem on the body of the deceased.

68. The fact of death and cause of the deceased’s demise was further proved beyond reasonable doubt by the post-mortem report produced by PW5, Dr. Ombok Lucy who carried out an autopsy on the body of the deceased and established the cause of death to be bleeding in the head as a result of blunt force trauma.

69. On whether the death of the deceased was caused by an unlawful act or omission, the aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. Article 26 of *the Constitution* guarantees every person the right to life and that a person shall not be deprived of life intentionally except as provided for under *the Constitution* or other written law. 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.”

70. As stated above, there is no doubt that the death of the deceased was caused by the injuries that he sustained. Dr. Ombok testified that the deceased sustained internal injuries to the left lung that was collapsed and internal bleeding in the brain. There is no evidence showing that the injuries found on the body of the deceased were self-inflicted or that it was justified in any way under the law. Further evidence presented before this court irresistibly points to an unlawful act that led to the death of the deceased following an assault. Accordingly, I find and hold that the death of the deceased was caused by an unlawful Act.

71. As to whether it was the two accused persons herein who unlawfully caused the death of the deceased subject of the charge of murder herein, the prosecution led evidence placing the accused persons herein at the scene of the offence thereby implying that they were in the group of people who assaulted and caused the death of the deceased. This was the testimony of PW1, PW2, PW3 who gave detailed evidence of how they received information on the whereabouts of the deceased, how they reached the scene and saw the accused persons herein, clearly whilst armed and attacking the deceased. PW4 similarly testified seeing the accused persons at the scene and further stated that the accused persons refused to allow the deceased’s brother to leave with him to the hospital unless the deceased’s brothers gave the accused persons money.

72. PW2 testified that when they got to the scene at night, they found the assailants still beating the deceased. He testified that the person who had the rungu forcing his brother to talk was the 2nd accused who had a leather jacket, was dark and had a rungu. He testified that the 1st accused was light skinned and had a jembe. This Court did make observations on the accused persons’ body sizes and complexion



- as the witness testified and recorded their appearance as described. PW1 stated that when he arrived at the scene, the 2 accused persons were still beating the deceased. He testified that the 2nd accused had a rungu and was beating the deceased on the chest while the 1st accused was armed with a jembe and that he interacted closely with both of them in a well-lit scene. He testified that the police vehicle was at the scene with lights directed at the scene and the people at the scene had torches, their motorbikes also had lights on so the scene was well lit and so they saw the people at the scene very well.
73. The above evidence was not circumstantial evidence as the accused person's counsel wanted this court to believe by his submissions. It is also not correct to say that the 2nd accused person arrived at the scene after the deceased had been assaulted and therefore played no part in assaulting him. His witness stated that he was dropped at 5.30 and the 2nd accused returned. The witness could not tell whether the 2nd accused went back to the scene and participated in the assault which the deceased's brothers witnessed including the aspect of demanding and receiving the money raised by PW1 and his brothers so that they could be allowed to take their badly beaten brother to hospital.
74. The detailed evidence adduced by the prosecution witnesses who were at the scene and saw what transpired was not hearsay. It was direct evidence, describing what they saw, the time they took interacting with the accused persons who were in a group of five people. The defence testified denying that they committed the offence or that they participated in assaulting the deceased. They blamed mob injustice with the 1st accused claiming that he tried to dissuade the mob from assaulting the deceased without success and that the 2nd accused was asked to give fuel to enable the mob lynch the victim but he refused and rode off.
75. In this case, the evidence on record is clear that the deceased was assaulted and killed on suspicion of having conned the 1st accused person that he was a Kenya Power & Lightning Company Officer. All those who took part in the unlawful transaction did not deem it fit to apprehend the deceased suspect and hand him over to law enforcers. Instead, they decided to take the law in their hands. They were not permitted under any circumstances to do so and having done so; they came into direct conflict with the law. They must therefore be held criminally responsible for the consequences of their unlawful action.
76. The accused persons testified that they were not in the mob of people that assaulted and killed the deceased but rather that the 1st accused was trying to guard the deceased and stop the crowd from attacking him.
77. DW7 testified at length on what he allegedly saw and he confirmed that when the deceased's brothers came, the people at the scene demanded for money before letting go the deceased and that he saw money being paid to them. This witness did not impress the court as a truthful or credible witness. He appeared to choreograph a story to suit the defence case.
78. DW8 claimed that he passed by the scene with the 2nd accused. He stated that when they passed at the scene, the incident had already taken place. However, that as he was dropped at his destination at 5.45 pm, he could not tell if the 2nd accused went back to the scene. DW8 gave a different story from that of DW2. DW2 never mentioned that he carried DW8 to the destination where DW8 was headed that evening arriving at 5.45 pm. He stated that he had cement to take somewhere.
79. PW1 and his brothers testified that they arrived at the scene at about 8.30 pm and that is when they saw the two accused persons among a group of five people assaulting the deceased and they demanded for money from PW1 and his brothers, before the latter could be allowed to take the deceased to hospital for treatment.
80. DW2 on the other hand did not even mention that he was with DW8 as his pillion passenger. He stated how he had cement and only stated that he had an unnamed passenger during cross examination. On



the other hand, his witness claimed that he was a pillion passenger of DW2 and that they passed by the scene and people wanted to take fuel from DW2 to lynch the deceased but that DW2 rode away. This is what DW2 stated in part, which is not consistent with what DW8 said on oath:

“On 8th May 2023, I received a call from Douglas grandmother. She told me that something was happening at her home. She is my customer. I had cement to take somewhere. I rode via the home of Douglas. I saw an old man who told me that they wanted fuel from my motorbike to burn the suspect. I refused and rode away. I returned and found a suspect had been beaten and he was lying down. My house is 50 metres to the home of Douglas.

81. I found the evidence by DW2 and DW8 not corresponding and not credible at all. It was unbelievable. Similarly, the evidence by DW1 was not congruent with what his mother, DW4 who stated that DW1 called her at 5pm and at 7.30 pm respectively concerning the person who had gone to her home on the mission of KPLC metres but was followed by other people claiming that he was a conman yet DW1 in his testimony never mentioned anything to do with his conversation with his mother over the incident.
82. The accused persons were under no duty to testify to prove their innocence. However, the evidence adduced by the prosecution witnesses juxtaposed with what the accused persons tendered clearly showed that the accused persons herein were both positively identified by the prosecution witnesses to have been at the scene and while actively assaulting the deceased. Each of the witnesses who were at the scene and testified on behalf of the prosecution stated that they saw both the accused herein assault the deceased. That the accused persons had weapons namely, jembe and rungu respectively and that even when the deceased’s brothers arrived and requested to take the deceased who was seriously injured to hospital, the accused persons declined and demanded for money, which money was raised and given to the accused persons in the full glare of the witnesses.
83. I have examined the evidence that the 1st accused person and that of DW7 on the issue of fuliza and the Kshs 1,000 which was allegedly exchanged at the scene to save the deceased from further beating. I will reproduce part of DW7’s evidence which was as follows:

“They continued beating him and Douglas told them to move away from the home. The man took the phone of the man and was calling all contacts in that phone asking for money from them or they kill he man..... One of them said the man had defrauded them and they wanted to be refunded. The man said he could pay them. One said he had fuliza so the man gave Kshs.1,000 to Douglas who send the money to the man.

Another one also asked for his money. They continued beating him and Douglas told them to move away from the home. The man took the phone of the man and was calling all contacts in that phone asking for money from them or they kill he man.”

84. On the other hand, DW1 stated as follows:

“The 3 people started assaulting him asking him to refund them their money. He said he had fuliza. I told them not to kill him at our place. He send me Kshs.1,000 then I gave my cash Kshs.1,000 to the 3 people. They called other people on phone. They became many. They took him near the road, away from my home.

The incident continued until 6.00pm. I called the Chief. I had threatened to call the police. I called Maseno police who came late. I did not assault the deceased. I was trying to protect him but the people warned me against protecting him because he was a metre thief.

As I tried to guard the suspect, one person hit me on my face with a wooden stick. ..”



From the underlined verbatim evidence of the 1st accused and his witness on the issue of Kshs 1,000 and how it was exchanged, it is clear that the evidence is contradictory which contradiction is material and hence, the evidence is unbelievable. Whereas DW1 stated that the deceased sent him kshs 1,000 and in turn the 1st accused gave his cash to the men who were demanding to be paid their defrauded money, DW7 stated on oath that One said he had fuliza so the man gave Kshs.1,000 to Douglas who send the money to the man.

85. Albeit the accused persons' counsel submitted that no weapons were produced as exhibits, non-production of the weapons of murder is not fatal to the prosecution's case. The Court believes the evidence of the prosecutions' witnesses to have been truthful and credible.
86. The defence counsel also submitted that there is no way the accused could have assaulted the deceased in the presence of the police officers and using the police vehicle's headlights without the police intervening. Further, that all witnesses except the police were relatives of the deceased hence they were not credible. That no weapon was recovered from the scene and that there was no witness from the Karateng area where the incident took place.
87. However, this court having heard the evidence from the prosecution witnesses though most of them were related to the deceased, I found no evidence of exaggeration of the testimonies of the said witnesses or evidence of dishonesty on their part. They were firm and they corroborated each other on what they saw and heard on that material night.
88. As earlier stated, although no murder weapon was recovered and produced in court as an exhibit, non-production of a murder weapon is not fatal to the prosecution's case as the accused persons in this case had ample time to dispose of the weapons after the deceased was taken away to hospital and prior to their being arrested following investigations that linked them directly with the murder of the deceased.
89. In *Ekai v Republic* [1981] KLR 569 it was held:

“Failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”
90. In *Karani v Republic* [2010] 1 KLR 73 at page 79, the Court rendered itself as follows:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”
91. The Court took a similar approach in *RAMADHAN KOMBE V REPUBLIC* Mombasa CRA NO. 168 OF 200 2 where it stated:

“In the matter before the trial court and before us, the cause of death of the deceased is patently obvious. The weapon used was a sword. There is no other version of how the deceased was killed nor by whom. Moreover, the record shows that the doctor who prepared the post mortem report was cross-examined. The failure by the prosecution witness to



produce the murder weapon was not fatal to the case of the prosecution nor did it prejudice the appellant's defence. We have no hesitation in rejecting this submission.”

92. On the submission that no witness from Karateng testified, it is not lost to this court that the incident indeed happened at Karateng and that the deceased came from a different location all together. Further, that the accused persons are the ones who came from Karateng and indeed, they called their witnesses all from Karateng area and majority of the defence witnesses were closely related to the accused persons. It cannot therefore be said that because witnesses from Karateng testified for the accused persons and not for the state, then that is fatal to the prosecution's case.
93. On the submission that most of the witnesses for the prosecution were relatives of the deceased, I find no fault and there is no evidence that the witnesses for the prosecution gave testimonies simply because the deceased was their brother. The fact that three of the prosecution witnesses were brothers to the deceased did not disqualify them from being competent witnesses and testifying in a case where they actually witnessed the unlawful killing of their brother. There is no rule or law barring relatives from testifying for the deceased or accused persons. What is material is their truthfulness and credibility of that evidence. Furthermore, there is no evidence that crucial prosecution witnesses were left out and substituted with relatives of the deceased person.
94. On the other hand, it was clear from the testimonies of the defence witnesses who included the mother, grandmother and wife to the 1st accused that they came to court to testify just to help the accused persons get off the hook. These same witnesses and others were also related to the 2nd accused.
95. I find that the evidence presented by the prosecution witnesses was cogent and credible as to prove that the accused were actually at the scene on the material date and time of the offence and that they actually participated in assaulting and causing the death of the deceased. This evidence was so strong and watertight that it displaced the defence evidence adduced by the accused persons and their witnesses.
96. This court, from the evidence on record, finds that the accused persons provoked the entire episode by alleging that the deceased was a conman and they led a group of villagers in assaulting and killing the deceased.
97. Thus, it is my finding that even if the deceased had initially been assaulted by villagers whom the assistant chief named, and who were said to be at large, it is clear that the accused persons herein were among those villagers and that the prosecution witnesses who testified against them had positively identified them as those persons who were found while assaulting the deceased, forcing him to talk and stand and even demanded money from the deceased's brothers before the latter could be allowed to take with them the deceased for treatment. The witnesses aforementioned positively identified the accused persons with the help of light from flash lights, motor cycle head lamps and light from the police vehicle that was at the scene which provided favourable conditions for positive identification and rendered the possibility of mistaken identity quite remote.
98. The duration of time that the incident lasted with the two accused persons being strategically placed to receive money from the deceased's brothers provided adequate opportunity for the witnesses to positively identify the accused persons.
99. In the end, I find and hold that indeed, the prosecution evidence against the two accused persons proved and established beyond reasonable doubt that the two were positively identified as being part of the mob of people who assaulted and unlawfully killed the deceased Dennis Odongo Otieno. in what is known as “mob justice” for allegedly conning the villagers on account of KPLC meters.



100. On whether the unlawful killing of the deceased was with malice aforethought and therefore whether malice aforethought was established beyond reasonable doubt against the accused persons, The circumstances which constitutes malice aforethought are described under Section 206 of the Penal Code 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.”

101. In this case, considering the nature of injuries sustained by the deceased, the weapons used to be a jembe and rungus, as established by the doctor who performed the postmortem and the conduct of the accused persons after assaulting the deceased by demanding money before letting him be taken to hospital which delay no doubt contributed to loss of life, is clear that the accused persons intended to cause grievous harm to the deceased and they achieved that intention. Accordingly, I find and hold that malice aforethought was proved beyond reasonable doubt.

102. In sum, I find and hold that the prosecution case against the accused persons and all the elements of the offence of murder were established and proved against both the accused persons herein beyond reasonable doubt.

103. Accordingly, the two accused persons are hereby found guilty as charged and are convicted for the murder of the deceased Dennis Odongo Otieno under section 203 of the Penal Code.

104. Sentence shall be pronounced after records and mitigation.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KISUMU THIS 27TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

