



**Republic v Kimeli & 2 others (Criminal Case E045 of 2021)  
[2024] KEHC 16242 (KLR) (19 December 2024) (Judgment)**

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**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE E045 OF 2021  
RN NYAKUNDI, J  
DECEMBER 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MICAH BITOK KIMELI ..... 1<sup>ST</sup> ACCUSED**

**PHILEMON KIPCHUMBA TERER ..... 2<sup>ND</sup> ACCUSED**

**ELIUD KIPRUTO KORIR ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. Micah Bitok, Philemon Kipchumba Terer and Eliud Kipruto Korir were jointly charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 16<sup>th</sup> June, 2021 at Kapchan Soy sub-county within Uasin Gishu County, they murdered one Brian Kipsanai Murgor. During the time of plea taking, each of the accused pleaded not guilty of any involvement in the killing of the deceased. This therefore put the prosecution to task to disprove their innocence by summoning the relevant evidence to prove the elements of the offence as postulated in section 203 of the Penal Code.
2. The court must determine three critical questions in this case: First, whether the prosecution has established beyond reasonable doubt that the accused persons participated in causing the death of Brian Kipsanai Murgor. Second, if such participation is proven, whether their actions were accompanied by malice aforethought given the context of home invasion. Third, whether the doctrine of common intention applies to make all accused persons culpable for the death. These questions must be analyzed against the backdrop of a challenging evidentiary landscape where the prosecution's case substantially relies on a single eyewitness.
3. The prosecution's case is that one Brian Biwott testified on oath that on 16<sup>th</sup> June, 2021 he was asleep in his room when he received a phone call with information that there is a thief in the neighbor's



house. The caller wanted his assistance which he promptly acted upon by moving to the scene which was about 200 meters away. It was the evidence of PW1 that on entering the house, they found Brian Kipsanai Murgor, the deceased seated on the floor and being a person known to him earlier on, he made a quick inquiry as to how he found himself in that particular place. According to PW1, he decided to pick the deceased's phone so that he can call his father but the number was missing from the call history. It followed soon thereafter, there was someone else who had the telephone number of his father and immediately a call was placed to him being told of the imminent arrest of his son who had been found in somebody's house at Kapchan village. It was further the testimony of PW1 that the deceased appeared to have been assaulted and unconscious. He did not know what had happened to the deceased before his arrival. In the same scene, PW1 told the court that on Micah who is the first accused, tied the deceased as the beatings were being inflicted while at the same time waiting for his father to arrive for any further action to be undertaken. It was the evidence by PW1 that first aid in the form of milk was procured so that the deceased could be forced to drink in order to get him to normalcy but he crawled and finally collapsed. When PW1 asked whether he could identify the person responsible in beating the deceased, he positively pointed at the three, the accused persons herein.

4. The next in line to give evidence on behalf of the prosecution was one George Kirwa (PW2). In his testimony, PW2 recollected the events June 2021 when he received a telephone from a neighbor and a friend by the name Micah Bitok who also happens to be the 1<sup>st</sup> accused person. The friend and neighbor wanted to have PW2 probox so that they can be driven to the scene to take the victim to the hospital. According to PW2, on arrival at the scene, the victim was in a bad condition and he was not even sure that he was still alive. PW2 decided to call back Micah Bitok who instructed him to carry the body but he decided not to drive off and wanted to wait for the police who had been informed of the incident.
5. Thirdly, in support of the prosecution's case was the testimony of PW3 – Daniel Mugo who gave evidence as the father of the deceased who died on 16<sup>th</sup> June, 2021. He gave evidence on the personal profile of his son, the various organizations he worked with before he was employed as a police constable with the National Police Service. PW3 went on to state that he received a telephone call that the deceased had walked into somebody's compound and had been beaten up and that indeed surprised him because he could not foresee under which circumstances his son could be found in somebody's premises. As a father, he responded and drove to the scene where he saw the deceased with multiple injuries more pronounced to the head and lower limbs. Thereafter, he proceeded to the mortuary where he identified the body during post mortem examination.
6. The fourth witness lined up for the prosecution was PW4 - corporal Isaac Mukabi, a police detective who investigated this homicide which occurred. The highlights of PW4's testimony were that the deceased had been killed in the home of Micah Kiptoo and as a result members were gathered trying to establish where the victim had been beaten. In the same scene PW4 went on to state that the victim had multiple injuries, the scene was not disturbed and on further inquiry he found out that he deceased had entered that house at 4:00am. It also appeared that the door was not locked. The investigation did not reveal how the deceased found himself at the house of Micah Kiptoo. This arrival of the deceased prompted the wife to raise an alarm and the members of the public responded to the distress call. What followed was multiple assault by members of the public who came into contact with the deceased. It happened that the three accused persons were part of the members of the public who facilitated in beating up the deceased. The first accused is the owner of the compound whereas the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were part of the first responders to the scene of the murder.
7. Finally, as reflected from the other witnesses the prosecution, the deceased died at the scene and his body taken to Moi Teaching and referral for post mortem examination. This was conducted by Dr. Macharia Benson, a pathologist at the institution who on examination came up with the following



findings: multiple bruises upper limbs, right lower limb, extensive hematoma in both upper limbs lateral and left lower limb laterally and left lower limbs laterally, 3x1 cm occipital laceration, the testes were crushed. He concluded that the cause of death was extensive soft issue injuries due to blunt force trauma.

8. At the close of the prosecution's case pursuant to section 306 of the Criminal Procedure Code, each of the accused persons was placed on their defense.
9. The 1<sup>st</sup> accused Micah Bitok, to the best of his recollection of the events of 16.06.2021, stated that he was at his house in company of his family having gone to sleep in the early hours of the night. However, on or about 4:30AM, his wife heard a knock at the door. The necessitated him to wake up and proceed towards the direction of that knock and unfortunately, he saw someone entering into the children's bedroom. He therefore in hot pursuit, he came into contact with a middle aged man who was not known to him and on inquiry on what he was doing at his house, there was no response. He decided to walk towards the bedroom and followed the young man and got hold of him and at this time he was now apprehensive that a thief had entered into his house. In the same scenario, his wife continued to scream and raise an alarm which invited the members of the public. Again at this juncture, the members of the public also interrogated the young man but he was not responding to any of the questions. That is when the accused person decided to call the police to come to his assistance to sort out the issue. According to the 1<sup>st</sup> accused, as the events unfolded, PW1 came to the scene and identified the young man as a resident of Kipsangui which is forty kilometres away from his homestead. Thereafter, the father of the victim and deceased herein was telephoned and made his way home. Simultaneously so, the 1<sup>st</sup> accused decided to go to the police station and make a report of the incident which was 4/16/6/21. In his evidence, the 1<sup>st</sup> accused told the court that he never assaulted the deceased and even when he left for the police station.
10. In support of the 1<sup>st</sup> accused defence Beatrice Akinyi identified herself as a waiter I at PW1's house. she recalled that on the 16<sup>th</sup> of June, 2021 she heard the wife screaming: "thief! thief." This necessitated her to wake up so as to verify the nature of the screams. That is when she saw the accused and the deceased having a confrontation. This was around the children's bedroom. It happened that on the same wee hour, the screams attracted members who started to apply more beatings to the deceased but the 1<sup>st</sup> accused pleaded with them not to endanger him. She was also told to prepare tea by the 1<sup>st</sup> accused and in the meantime the deceased made attempts to take flight from the scene for reasons to escape from the beatings by members of the public. The 1<sup>st</sup> accused according to the witness left the homestead for the police station to secure attendance of the police officers to secure the scene. However, when he came back, the deceased had already succumbed to his injuries and died.
11. The 2<sup>nd</sup> accused Philemon Kipchumba denied the offence that he was one of the perpetrators who committed the offence of homicide against the deceased. On 16.6.21 the accused explained himself that on the material day, he had rushed to the scene following a knock at the door by his Uncle Eliud that he accompanies him to a 1<sup>st</sup> accused's house where a thief had been spotted at the premises. That is how he found himself at the scene of the crime amongst other people from the neighborhood. On arrival the deceased was seated on the floor with no short or shoes. In the course of interaction, it came to pass that the young man is a resident of Kipsangui but it was not very clear what he was doing in the 1<sup>st</sup> accused's house. In furthering his defence, the 2<sup>nd</sup> accused alluded the beatings upon the deceased by the members of the public who were outraged by him taking steps to escape from the scene.
12. The 3<sup>rd</sup> accused person, Eliud Kipruto Korir denied the offence of any unlawful involvement of beating the deceased. He confirmed that his presence at the home of the 1<sup>st</sup> accused was a response to the distress call from that homestead. According to the 3<sup>rd</sup> accused on arrival at the home of the 1<sup>st</sup> accused they



more than 10 members of the public trying to come to terms on the circumstances of the incident. In his recollection, there was nothing unusual happening until when the deceased took flight from the scene and members of the public inflicting injuries as a way of stopping him from escaping to avoid arrest.

13. The court having received both the prosecution and defense evidence, for and against the charge of murder contrary to section 203 took the liberty to have the issues canvassed by way of written submissions.

### **Summary of the prosecution's submissions**

14. The Senior Prosecution Counsel structured his submissions around the essential elements of murder as established in *Anthony Ndegwa Ngari v Republic*, noting that while the fact of death and its cause were undisputed, the accused persons strongly contested their participation in the act that led to the deceased's death. They also appeared to suggest justification for assaulting the deceased due to his intrusion into the home of Accused 1.
15. On the crucial aspect of identification, counsel relied heavily on the testimony of PW1, who stated that he witnessed Accused 1 (Micah Bitok) striking the deceased with a bakora with such force that the weapon broke into pieces. PW1 further testified that Accused 2 and 3 were involved in restraining the deceased. The prosecution emphasized that this was a case of recognition rather than identification of strangers, as PW1 knew all the accused persons as neighbors.
16. Regarding malice aforethought, the prosecution drew the court's attention to the post-mortem findings which revealed extensive injuries from blunt force trauma, including crushed gonads and multiple injuries to the head, upper and lower limbs. However, counsel made two significant concessions: first, that the deceased had indeed intruded into Accused 1's home as a stranger, making the initial suspicion reasonable; and second, that apart from the head injury, the wounded body parts did not contain vital organs.
17. Notably, the prosecution acknowledged that based on precedent from *Maxwell Kiplangat Chirchir v Republic*, where similar circumstances of home intrusion were considered, the evidence more strongly supported a conviction for manslaughter rather than murder.
18. On the matter of common intention, counsel relied on Section 21 of the Penal Code and cited *Republic v Simon Ikunza Lusuli* to argue that all accused persons either actively participated in or witnessed the assault without dissociating themselves from it, thereby forming the requisite common intention.
19. In concluding his submissions, learned counsel emphasized that while the deceased had indeed intruded into Accused 1's home, he posed no actual threat due to his temporary mental illness, a fact that was communicated to the accused persons by the deceased's father (PW2). The prosecution maintained that after the deceased was subdued and restrained, there was no justification for the continued assault, and the force used was unnecessarily excessive. On these grounds, counsel urged the court to find the accused persons culpable for their actions.

### **Summary of the defence submissions**

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

20. The first accused person was represented by learned counsel Mr. Oduor who pitched his submissions. That the five prosecution witnesses for the prosecution have not discharged the burden of proof of



beyond reasonable doubt on any of the elements of the offence of murder to warrant the findings of guilt and conviction on the part of the 1<sup>st</sup> accused. He placed reliance on the following case law:

- a. Republic v Tumbere S/O Ochen (1945) 12 EACA63.
- b. Joseph Kimani Njau v Republic (2014) eKLR
- c. Republic v. Michael Muriuki (2014) eKLR
- d. Republic v. James Kioko Malungu (2021) eKLR
- e. Roba Galma Wario v. Republic (2015) eKLR
- f. Republic v. Mohammed Dadi Kokane & 7 others (2014) eKLR.
- g. Republic v. Daniel Musyoka Muasya, Paul Mutua Musya and walter Otieno Ojwang.
- h. Nzuki v. Republic (1973) KLR 171
- i. Beckford v R. (1988) AC 130
- j. Mokwa v. Republic
- k. Palmer v. R (1971) 55 Cr. App. R. 223

## **2<sup>nd</sup> Accused submissions**

21. Counsel for the 2nd accused emphatically submitted that the prosecution evidence was lacking, as there was no evidence demonstrating that the 2nd accused person had in any way caused the death of the deceased. In buttressing this submission, Counsel pointed out that the deceased was unknown to the accused person at the time of death and was in the company of a crowd during their first encounter.
22. Learned Counsel further submitted that the 2nd accused person had merely responded to a distress call concerning his brother, who resided some distance away and had been attacked by an intruder (the now deceased). Significantly, Counsel emphasized that upon the 2nd accused's arrival at his brother's homestead, the threat had already been neutralized.
23. On the question of alibi, Counsel cited the case of J M v Republic [2015] eKLR, where Justice Edward M. Muriithi established that an accused does not assume the duty to prove their alibi. Supporting this principle, Counsel referenced Karanja v. R. 1983) KLR 501 and Kiarie v. R. (1984) KLR 739.
24. Regarding malice aforethought, Counsel cited Rex v Tubere S/o Ochen [1945] 12 EACA 63, arguing that the prosecution failed to establish this essential element of murder. Counsel contended that the 2nd accused had no intention to harm the deceased, and his actions were actually directed toward getting medical help for the deceased.
25. On the doctrine of common intention, Counsel referenced Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR, which outlined the five key ingredients necessary to establish common intention. Counsel also cited Njoroge versus Republic 1983 KLR 197 and Solomon Munga versus Republic 1965 EA 363 regarding the elements of common intention.
26. Learned Counsel strongly argued that the prosecution failed to establish the role of the 2nd accused person in the murder. It was submitted that the accused did not plan, participate in, or execute any plans for the demise of the deceased, and no evidence was tendered to indicate his role.



27. In conclusion, Counsel urged the Court to find that the prosecution had failed to prove its case to the required threshold and accordingly acquit the 2nd accused of the charges made against him.

### **3<sup>rd</sup> Accused person submissions**

28. Learned Counsel for the 3<sup>rd</sup> accused person outlined the prosecution's evidence through five witnesses and proceeded to address three key elements of murder as established in the case of Antony Ndegwa Ngari Vs Republic (2014): death of the deceased, commission of unlawful act causing death, and malice aforethought.
29. On the first element regarding death of the deceased, Counsel acknowledged that evidence from PW 1, 2, 3, 4 & 5, including the postmortem report confirming extensive soft tissue injuries due to blunt force trauma, established this element of murder.
30. Regarding the second element (actus reus), Learned Counsel emphatically submitted that the eye witness (PW1) testified that when he arrived at the house of the 1<sup>st</sup> accused, both the 2nd and 3rd accused had NOT arrived. Counsel stressed that PW1 confirmed during cross-examination that the 3rd accused arrived around 5:40 am and was NOT armed with any weapon, neither did he harm the deceased.
31. On the crucial element of malice aforethought, Counsel cited the case of Nzuki vs Republic [1993] KLR 171, where the Court of Appeal held that for an act to constitute murder, it must be aimed at someone and committed with intention to cause death or grievous bodily harm, or where the accused knows their acts risk causing death and proceeds without lawful excuse.
32. Counsel argued that the 3<sup>rd</sup> accused had no malice aforethought as he did not know the deceased and merely accompanied his friend (the 2nd accused) to help his brother (the 1st accused). Counsel emphasized that the 3rd accused neither harmed the deceased nor harbored any intentions of causing harm.
33. In conclusion, citing Republic Vs Martin Thigunku (2021) eKLR, Counsel urged the Court to find that the prosecution had failed to prove beyond reasonable doubt that the 3rd accused murdered Brian Murgor and accordingly sought his acquittal under Section 306(1) of the Criminal Procedure Code.

### **Analysis and determination**

34. The tragic events of June 16, 2021 present this court with the complex task of evaluating criminal liability in the context of a home invasion that ended in death. The prosecution has charged three accused persons with murder, requiring careful examination of not only their individual actions but also their collective responsibility under the doctrine of common intention. The challenge before this court is particularly acute given that the evidence rests substantially on a single eyewitness account, set against the backdrop of a chaotic pre-dawn confrontation involving multiple participants.
35. With regard to this offence, it is the duty of the prosecution to prove beyond reasonable doubt the following ingredients:
- i. Death of each of the persons
  - ii. Unlawful causation of the death
  - iii. Malice aforethought in causing the death
  - iv. Participation of the accused in causing the death



36. The cardinal principle in criminal law, as articulated in *Woolmington v DPP* (1935) AC 462, remains our guiding star, the prosecution bears the burden of proving guilt beyond reasonable doubt. Lord Sankey's famous "golden thread" running through criminal law emphasizes that this burden never shifts, regardless of the circumstances. This principle takes on heightened significance in a capital offense where the stakes could not be higher. The court in the said case stated as follows:

“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 the qualification involving the defence of insanity and to any statutory exception). If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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.” Similarly in *Andrea Obonyo & Ors V. JR* (1962) E.A 542, the court stated as follows: “As to the standard of proof required in criminal case DENNING, L.J as he then was) had this to say in *Bater v Eater* (1950) 2 ALL E.R. 458 at 459. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degree of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.”

37. The court's analytical task requires a three-tiered examination. First, I must evaluate the reliability and sufficiency of the identification evidence, particularly considering the challenging circumstances under which observations were made. Second, I must examine whether any proven actions crossed the threshold from legitimate defense of property into criminal conduct, especially after the initial threat had subsided. Third, I must determine whether the evidence supports the prosecution's theory of common intention among the accused persons.

38. This analysis must be undertaken while keeping in mind two crucial contexts: the undisputed fact that these events began with an unexplained intrusion into a family home in the pre-dawn hours, and the eventual revelation that the deceased was suffering from temporary mental confusion. These circumstances create a complex interplay between the right to defend one's home and family, and the legal limits on the use of force, particularly after a threat has been contained.

39. Having framed these preliminary considerations, let me turn to a systematic examination of the evidence against the standards required by law.

40. In a murder case, the prosecution must establish four essential elements: the fact of death, that death was caused by an unlawful act, that the accused committed the unlawful act causing death, and that the accused acted with malice aforethought. While the fact and cause of death are not in dispute in this case, having been conclusively established through the evidence of PW5 Dr. Macharia, the critical issues for determination are the identification of the perpetrators and whether any acts proven against them were accompanied by malice aforethought.

41. The prosecution's case substantially rests on the testimony of a single witness, PW1 Brian Kibitok Biwott. While the law permits conviction on the evidence of a single witness if the court is satisfied of their truthfulness, such evidence must be approached with utmost caution, particularly in a capital offense. The court must carefully examine whether such evidence is free from possibility of error or



embellishment, and whether it is corroborated in material particulars. The law requires the trial court to carefully scrutinize evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error or mistake. In *Wamunga versus Republic* [1989] KLR 424 the Court of Appeal stated thus:

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

42. In *Roria v Republic* [1967] EA 583, the court warned on the dangers of convicting on the evidence of a single identifying witness, stating:

“A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

43. Several crucial factors emerge from scrutiny of PW1's evidence. First, PW1 was not present at the inception of the incident but arrived after receiving information about a "thief" being caught. This means his testimony does not cover the critical initial encounter between the first accused and the deceased. Second, and most importantly, his account stands uncorroborated on the central issue of who actually assaulted the deceased. While PW2 through PW5 confirm the deceased's injuries and ultimate death, none of these witnesses saw who inflicted the injuries.

44. A critical context that this court must consider is that these events occurred during a home invasion. The undisputed evidence shows that the deceased was found inside the first accused's house at 4:30 AM, specifically in the children's bedroom. He could not or would not explain his presence. This created a situation of genuine fear and apprehension for the first accused and his family.

45. The Court of Appeal, in *Maxwell Kiplangat Chirchir v Republic* [2021] KECA 1KLR, confronted remarkably similar circumstances where a homeowner was charged with murder following the death of an intruder. The Court emphasized that when evaluating such cases, the context of home invasion and the natural human response to perceived threats must be carefully considered.

46. The prosecution has urged this court to treat this as a case of recognition rather than identification, since PW1 knew the accused persons as neighbors. However, as held in *Peter Kifue Kiilu & another v Republic* [2005] 1 KLR 174, even in recognition cases, the court must carefully examine the circumstances and satisfy itself that the evidence is free from error. In the present case, several factors create reasonable doubt about the reliability of PW1's recognition evidence.

47. First, the events occurred between 0430 and 0530 hours, during the twilight period. While there was allegedly light from electric bulbs, no evidence was led about the positioning or intensity of these lights. Second, PW1's testimony about the sequence of events and the roles played by each accused person is contradicted by other witnesses, including DW2 Beatrice Akinyi, who testified that the first accused actually pleaded with people to stop beating the deceased.

48. The medical evidence, while establishing the cause of death as extensive soft tissue injuries due to blunt force trauma, cannot identify who inflicted these injuries. Given the evidence that multiple people had gathered at the scene, and the possibility that the deceased sustained some injuries while allegedly



trying to escape, the prosecution has not excluded the reasonable possibility that persons other than the accused inflicted the fatal injuries.

49. The prosecution argues for common intention under Section 21 of the Penal Code, suggesting that even if all accused persons did not physically assault the deceased, they shared a common intention. However, mere presence at a scene of crime does not constitute common intention. The second and third accused persons responded to what they believed was a genuine distress call about a home invasion. Their presence, without more, cannot transform into proof of criminal intent beyond reasonable doubt.

50. There is no dispute that the accused persons have been charged jointly with the offence of murder contrary to Section 203 of the Penal Code. The prosecution case therefore falls squarely under Section 21 of the Penal Code which expressly defines the concept of common intention. It provides as follows:

“When two or more persons form a common intention to prosecute unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of that purpose, each of them is deemed to have committed the offence.”

51. A decision that is on point on the question of common intention is that of *Ismael Kiseregwa & another v Uganda CA CR Appeal No. 6 of 1978* where the court said:

“in order to make the doctrine of common intention, applicably it must be shown that the accused 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 persons shared with one another a common intention to pursue a specific unlawful purpose, and that prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence 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 himself from the assault. It can develop in the course of events though it might not have been present from the start. It is immaterial whether the original common intention was lawful 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.”

52. The doctrine of common intention, as articulated in Section 21 of the Penal Code and elaborated in *Ismael Kiseregwa & another v Uganda*, requires careful application to the distinct circumstances of this case. While common intention need not arise from a pre-arranged plan and can develop in the course of events, there must still be demonstrable evidence of shared unlawful purpose. The prosecution's theory requires this court to find that the accused persons, particularly the second and third accused who arrived after the initial confrontation, either arrived with or developed a shared intention to cause grievous harm to the deceased. However, the evidence presents a more nuanced reality. The second and third accused arrived in response to what appeared to be a legitimate distress call about a home invasion, an initially lawful purpose.

53. This doctrine was also addressed in *Abdi Alli v R (1956) 23 E.A.C.A 573* the court of Appeal held at p 575 that” ....The existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of



common intention must not be too readily applied or pushed too far. It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section (of the penal code) can be applied.”

54. The evidence before this court shows a chaotic scene with multiple participants, where the precise roles and intentions of various actors remain unclear. More significantly, there is evidence suggesting that some of the accused, particularly the first accused according to DW2's testimony, actually attempted to moderate the actions of others, a fact that directly contradicts the prosecution's theory of shared criminal purpose. The mere presence of the accused persons at the scene, even if during the time when fatal injuries may have been inflicted, cannot automatically transform into proof of common intention. The prosecution must demonstrate, beyond reasonable doubt, that each accused person either actively participated in or consciously aligned themselves with the unlawful purpose that led to the deceased's death. On the evidence before this court, this burden has not been met. The requirements for common intention as established in both statute and case law demand more than concurrent presence at a tragic scene, they require proof of shared criminal purpose, either from the outset or as it developed.
55. The doctrine of common purpose to invoke criminal liability in Kenya recognizes four separate distinct elements as already mentioned elsewhere, an Act of omission or commission, that Act must be unlawful, it must cause the crime to take place defined in any of our penal laws, and there must be evidence that the crime was committed with the necessary intent or for murder malice aforethought as defined in Section 206 of the Penal Code and the conspirators of the crime acted with a common intention as concerns the commission of the crime. On the facts of this case, a prior agreement or at the time it is alleged the deceased was assaulted by the accused persons was not proved by the prosecution. The question is therefore whether the evidence as adduced by the prosecution is capable of actively associating the accused persons with the aims of the attack of the deceased. The answer to this question is wholly dependent on the single identifying witness summoned by the prosecution. It is with this respect and important for the court to bear in mind the distinctive features of the evidence with a view to establish the standard and burden of proof of beyond reasonable doubt to place the accused persons at the center of the homicide. The star witness for the prosecution herein PW1 failed to convince this court that his evidence falls within the common design or purpose as between each of the accused person in the execution of the murder of the deceased. The evidence also failed to establish the existence of facts in issue for the prosecution to secure judgement against the accused persons as having acted jointly and had the necessary mens rea. It is not disputed that there were more than 10 people who had responded to the distress call from the homestead of the first accused. Presumably all the 10 members of the neighborhood woke up from their respective homes with an objective to respond to the distress call and offer any support which may be required at that alleged scene of the crime. It is clear in my respective view there was no active association by this 3 accused person acting in concert to cause the deceased's death. As it is quite evident from the facts of this case the participation of each accused in the death of the deceased must be separately analyzed so as to create a chain of events to impute the doctrine of common intention. A view of the totality of evidence shows that this incident occurred on or around 4.00am. Yes I agree that the accused persons have been known by PW1 but a globe of view of his evidence as referenced from the scene failed to give a logical inference as to how he was able to single out the three accused person out of a mob of 10 members of the public. It is upon that basis that this court assesses the question whether PW's evidence could reasonably possibly be true given the surrounding circumstances. This was evidence of a witness purely presented in general terms and the court is obliged to consider the conduct in relation to each individual accused so as to find whether the state evidence against each one of them meets the threshold of beyond reasonable doubt. So in respect of killing the deceased it was the duty vested with the prosecution to proof beyond reasonable doubt



the requisite mens rea that whatever was done by each of the accused must have intended them to kill the deceased or must have foreseen the possibility in performing the unlawful act death was to ensue. In adjudicating this case the actions of the accused persons individually do not paint evidentially an active participation appropriately, to establish the factual context of the elements of the offence looked at from the perspective of Section 203 of the Penal Code or for them to be found guilty for the offence of manslaughter as defined under Section 202 of the penal code. I don't consider the evidence in respect to every accused person as being cogent, consistent and iron clad in proving beyond reasonable doubt of placing the accused as key participants out of the more than ten members of the public who had gathered in the odd hours at the home of the 1<sup>st</sup> accused. I have warned myself that relying on this evidence of PW1 in absence of corroboration the degree of occasioning injustice to the questions of culpability against the accused persons is foreseeably very high. This is what the court had in mind in ABDALLABIN WENDO AND ANOTHER -VS- R 20 EACA 168 when it remarked as follows: "subject to certain well-known exemption, 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 know that the condition favouring a correct identification were difficult, in such circumstances what is needed is the evidence, whether it was 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 error." This crucial element remains unproven on the evidence before me.

56. A troubling aspect of this case is the prosecution's failure to investigate or call other witnesses who were admittedly present at the scene. I share the view that where the prosecution fails to call material witnesses without explanation, the court is entitled to draw an inference that their evidence would have been adverse to the prosecution's case.
57. The prosecution's failure to call other witnesses who were present at the scene creates a significant evidential gap. According to multiple testimonies, there were at least ten members of the public present. Their absence from the witness stand is particularly problematic because they could have either corroborated or contradicted PW1's account of events. The prosecution offered no explanation for this omission. Following the principle in *Bukenya & Others v Uganda* [1972] EA 549, where the prosecution fails to call available material witnesses without explanation, the court must assume their evidence would have been unfavorable to the prosecution's case. This assumption gains particular force in the present case where the uncalled witnesses were reportedly first responders who might have had better opportunities to observe the crucial initial moments of the incident.
58. The law is well settled that in criminal cases, the benefit of doubt must always go to the accused. Where two or more inferences are possible on the evidence, the court must adopt the one favorable to the accused. In this case, the evidence permits several reasonable hypotheses consistent with the innocence of the accused persons:
59. First, that the injuries may have been inflicted by other members of the public who responded to the alarm. Second, that some injuries may have been sustained when the deceased allegedly attempted to escape. Third, that in the confusion and darkness of the early morning hours, PW1 may have been mistaken about who exactly was assaulting the deceased.
60. The words of Lord Denning in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 remain instructive: proof beyond reasonable doubt must carry a high degree of probability. While it need not reach absolute certainty, the evidence must be so strong as to leave only a remote possibility in favor of the accused that can be dismissed with the sentence "of course it is possible, but not in the least probable." The evidence in this case falls short of this standard.



61. Although the court has found that the prosecution failed to prove its case beyond reasonable doubt, it is worth noting certain mitigating factors that would have been relevant even if the accused had been found guilty. The context of home invasion, particularly the intrusion into children's sleeping quarters at 4:30 AM, created a situation of genuine fear and apprehension. The first accused's initial response to protect his family, and the second and third accused's response to what they believed was a genuine distress call, while not justifying excessive force, provide important context for evaluating their actions. Furthermore, evidence suggests attempts were made to provide first aid to the deceased, indicating a lack of ultimate intention to cause death. These factors, while not determinative given the acquittal, illustrate the complex human dynamics at play in this tragic incident.
62. There can be no doubt in my judgement the individual acts of the 3 accused persons charged of murder contrary to Section 2003 of the Penal Code did not constitute active association which caused the death of the deceased. It was clear from the evidence that the deceased is not a resident of the neighborhood, village, center, market or surroundings in which the crime of murder was committed against him on the fateful day of 16.6.2021. For reasons which did not come out clear in the entire proceedings, the deceased found himself strangely inside the house of the 1<sup>st</sup> Accused. The wife to the 1<sup>st</sup> Accused was the 1<sup>st</sup> Responder who told the 1<sup>st</sup> Accused that it appears a stranger or a criminal has invaded their homestead. She raised an alarm and simultaneously the 1<sup>st</sup> Accused stepped out of the room to check and verify the whereabouts of the suspect and his objective of being in their house without notice. The 1<sup>st</sup> Accused gave a chronology of events on what transpired following his encounter with the deceased. His unchallenged defence was to the effect that the deceased was headed towards the children's bedroom when he acted swiftly to prevent any likely harm to be done to his children by this intruder. Following hot on the heels of this incident obviously must have applied some force to disempower the deceased. These Acts by the 1<sup>st</sup> accused are protected under Section 17 of the Penal code on self defence to self or other persons in close affinity, consequently or any such person whose life is in imminent danger and as of necessity some force ought to be applied to save his life. In this case, the deceased stood his ground and failed to justify his presence in the wee hours of 4.00am in the house of the 1<sup>st</sup> Accused.
63. There are three kind of threat occasions which are applicable for the purpose of self defence, (a) Actual occasion, like the locus in quo of this offence in which the deceased met his death (b) and honest belief albeit unreasonably on the part of the accused that there is imminent danger hovering around the surroundings likely to endanger his life, other connected persons or property, (b) that there is no escape route to retreat but first to deal with the suspect who poses danger to his life or property. This is essential elements were never disapproved by the prosecution. In *Helmbout v R* (1980) 49 F.L.R the courts dicta is more relevant for the purposes of the facts of this case. " The test of whether an accused's belief was reasonable is not whether an unlawful attack was being made or was about to be made upon him (that is an actual attack) nor even whether the hypothetical reasonable man in the accused's position would have believed that an unlawful attack was being or was about to be made on him. The test is whether the accused himself might reasonably have believed in all the circumstances in which the found himself that an unlawful attack was being or was about to be made upon him.
64. Under this test it is possible for the first Accused person to form a belief which differs from that which a reasonable person would have contemplated in the same circumstances. In evaluating therefore, the conduct of the accused persons in general, one has to go deeper to determine whether they could have had reasonable grounds for believing what they honestly believed if indeed they are the ones who applied force to inflict soft tissue injuries as founded by the pathologist who performed the post mortem examination on the body of the deceased. The personal characteristics I have in mind will include all facts from which the accused persons drew their inference that an attack was being made



by the deceased when he entered the homestead of the first accused. It is my logical inference that a reasonable person in the accused persons shoes would have believed the force applied upon the deceased was reasonably necessary. It is trite law that every one is excused from criminal liability for an offence committed by way of reasonable response to threats of serious and immediate bodily harm to himself or those under his protection. Put in another way, on the facts of this case the acts done if ever were singularly attributable to the accused persons cannot be stated to be out of proportion to the peril to be avoided, given the unique features of this case in which a stranger unknown to the family entered the house occupied by the 1<sup>st</sup> accused at 4.00am. The question is, was the deceased preparing to commit a felony? What was his motivation to leave his residence for the 1<sup>st</sup> accused house at such odd hours and without notice walked towards the bedroom occupied by the children. How would one establish that he was not alone in the scheme of preparing to commit an offence. Indeed, the occupants of the homestead of the 1<sup>st</sup> accused must have felt threatened as to their security, guarantee to right to life, and the right to their private property. Which reasonable man would come into contact to a stranger in his house at 4.00am and not have it addressed by use of force if no justifiable explanation comes from the suspect.

65. In the case of Palmer (1971) AC 814 Lord Morris said: If there has been an attack so that the defence is reasonably necessary, it would be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. The law permits a person to prepare to repel an attack. The founders of this law must have heard the case of deceased in mind. I should have a point out that I empathize with the family who lost their loved one on this fateful day but as they deal with the out come of this decision, undoubtedly may they find solace on the fashioned facts of this case. In effect the successful justification and excuse on the part of the accused person satisfactorily rebuts what might look like a prima facie case on the part of the prosecution that the accused persons committed the criminal Act of murder. Questions may be asked whether Section 202 of the Penal Code should not have applied in the circumstances of this case, to the layman yes but for the threshold of the law and legally speaking the criminal conduct of the accused persons, has failed to rise to the level to find them culpable for murder contrary to Section 203 or manslaughter contrary to Section 202 of the Penal Code.
66. For those reasons the elements of unlawfulness of the death of the deceased has been rebutted by the concept of self defence in Section 17 of the Penal code and likewise malice aforethought as manifested in Section 206 of the Penal Code also fails. Similarly, the doctrine of common intention is also not applicable to the facts of this case. As a consequence, I take the view of not finding any of the accused persons guilty of the main offence or the lesser offence of manslaughter. All these failed the threshold of a crime proved beyond reasonable doubt. It is painful for the victim family but that is the law in Kenya.
67. The accused persons are hereby acquitted under Section 306(1) of the Criminal Procedure Code. Each is at liberty unless lawfully held. Their cash bail is to be refunded and any sureties who entered cognizance on behalf of the accused be and are hereby discharged.
68. Orders accordingly.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**R. NYAKUNDI**

**JUDGE**

