



REPUBLIC OF KENYA



**Republic v Ondieki alias Sonko & 15 others (Criminal Case E023 of 2021)
[2024] KEHC 16227 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL CASE E023 OF 2021
KW KIARIE, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

**AMOS NYAKUNDI ONDIEKI ALIAS SONKO 1ST ACCUSED
CHRISPINE MAKWORO OGETO 2ND ACCUSED
PETER ANGWENYI GWANGA 3RD ACCUSED
BRIAN MECHA NYAKUNDI 4TH ACCUSED
RONALD OMBATI ONYONKA 5TH ACCUSED
JUSTINE MORARA 6TH ACCUSED
HESBON ONG'ONDI GICHANA 7TH ACCUSED
NELSON CHOGORO TUMBO 8TH ACCUSED
JUSTINE AKIYA TUMBO 9TH ACCUSED
HENRY AMWOMA MATOKE 10TH ACCUSED
EVANS OGETO OKARI 11TH ACCUSED
JOSPHINE MORAA NYANKIENYA 12TH ACCUSED
ROSELYNE NYANCHAMA OMWERI ALIAS MELLEN 13TH ACCUSED
JOSEPH ABUGA MIRONGA 14TH ACCUSED
VINCENT GEORGE MASEME 15TH ACCUSED
HENRY MBAMBANE ANGWENYI ALIAS OTOTO 16TH ACCUSED**



JUDGMENT

1. Amos Nyakundi Ondieki alias Sonko, Chrispine Makworo Ogeto, Peter Angwenyi Gwanga, Brian Mecha Nyakundi, Ronald Ombati Onyonka, Justine Morara, Hesbon Ong'ondi Gichana, Nelson Chogoro Tumbo, Justine Akiya Tumbo, Henry Amwoma Matoke, Evans Ogeto Okari, Josphine Moraa Nyankienya, Roselyne Nyanchama Omweri alias Mellen, Joseph Abuga Mironga, Vincent George Maseme and Henry Mbambane Angwenyi alias Ototo are charged with four counts of murder contrary to section 203, as read with section 204 of the Penal Code.
2. In count one, the particulars of the offence are that on the 17th day of October 2021, at Mbanda sublocation, in Marani Sub County within Kisii County, jointly with others not before the court, murdered Sindege Mayaka.
3. The particulars of the offence in count two are that on the 17th day of October 2021, at Mbanda sublocation, in Marani Sub County within Kisii County, jointly with others not before the court, murdered Rael Sigara Onkware.
4. In count three, the particulars of the offence are that on the 17th day of October 2021, at Mbanda sublocation, in Marani Sub County within Kisii County, jointly with others not before the court, murdered Agnes Moraa.
5. The particulars of the offence in count four are that on the 17th day of October 2021, at Mbanda sublocation, in Marani Sub County within Kisii County, jointly with others not before the court, murdered Jemimah Nyang'ate Minga.
 1. The belief and the practice of witchcraft are still rife in some parts of this country and have defied both education and religion. One area where this is real is in the County of Kisii. For reasons better known by the residents, the suspected witches are almost always elderly women. This needs further investigation to ensure people can enjoy their old age peacefully.
 2. As usual, villagers in the Nyagonyi village of Mbanda sublocation woke on the 17th day of October 2021 to begin their routine daily chores. However, their normalcy was disrupted by a blown whistle, summoning them to assemble in the home of Evans Ogeto Okari for Chrispine Makworo Ogeto, his son, had been made to walk overnight by witches, and he had turned mute. This is Chrispine Makworo Ogeto, the second accused.
 3. Amos Nyakundi Ondieki, also known as Sonko (Accused 1), claimed that he was 20 kilometres away from the scene of the incident at the time of the killing. In his defence, the fifth accused stated that he was at his workplace all day. Similarly, Roselyne Nyanchama Omweri, also known as Mellen (Accused 13), testified that she was working as a cook at Nyagonyi Secondary School on the day of the incident. She stated that she was at her workplace the entire day. Vincent George Maseme (accused 15) said he was away at his place of work in Nyanguso.
 4. Josphine Moraa Nyankienya (Accused 12) testified that she only learned about the incident after it had occurred. Accused sixteen claimed that he arrived at the scene only after the incident. All of these accused individuals provided alibi defences.



10. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie vs Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer, and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

11. I will, therefore, analyse the evidence on record guided by this legal principle.

12. The third, fourth, sixth, seventh, eighth, ninth, tenth and fourteenth accused said they were not involved in the offences.

13. Chrispine Makworo Ogeto (accused 2) contended that on the material day, he was too sick to know what was happening.

14. Evans Ogeto Okari (accused 11) is the father of the second accused. He contended that he woke to find a cross and what appeared like a grave. The tee shirt of the second accused was placed on the cross, and the latter could not talk. The villagers killed Jemimah and Agnes, but he was not involved.

15. The issues for determination are:

- a. Whether the evidence on record displaced the alibi of the accused;
- b. Whether the prosecution proved its case against any or all accused persons; and
- c. Whether the offence of murder was proved against any or all the accused.

16. In offences committed by a mob, at least three categories of people within the mob present themselves. One is that of the overzealous mob who lynch the suspect or suspects oblivious of the consequences; the other is comprised of sympathetic people who would prefer the handing over of the suspects to the law enforcement agencies, and the third is of people who are noncommittal to the cause but also indifferent as to the results. The latter two stand watching but do nothing to support or condemn the act. In this case, the evidence that has been tendered has confirmed this position. While analyzing the evidence of each witness, I will bear this fact in mind.

17. Whenever a rowdy mob is involved in an offence, especially one that leads to the killing of another human being, it is not expected that the witnesses would give the same account of the incident due to obvious reasons such as the position from where one made the observations, the mental attitude of the witness at the time of the observation as well as possible obstruction of the view. Therefore, it would be unfair to conclude that some witnesses are untrue if the evidence does not fit as tenon and mortise with that of others. Equally, the court should ensure that an accused person is not condemned through suspect evidence. The prosecution has to prove their case to the required standards of a criminal case, i.e. beyond any reasonable doubt.

18. The prosecution called one purported eyewitness to support its case in count one. It is trite law that a fact may be proved by the evidence of a single witness. The Court of Appeal in *Kiilu & Another vs Republic* [2005] 1 KLR 174 held:

Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of



identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

I will be guided by this age-old principle in the instant case.

19. Christopher Bosire Mayaka (PW11) testified that he is the son of Sindege Mayaka, deceased. On the 17th day of October 2021, at about 11 a.m., he was at his mother's home. A group of about eleven young men went there. He recognized all of them and named them as Amos Nyakundi (identified as accused 1), Vincent George Maseme (not in court), Hesborn Gichana (accused 7), Peter Kwang'a (identified as accused 3), Chrispine Ogeto (identified as accused 2), Ronald Ombati whom he identified as accused 6, Justine Akiya Tumbo (identified as 9) and Justine Morara (identified as accused 5). He said others were not in court.
20. All the eleven entered into his mother's house. Justine Morara Chweya came out with a bottle with some paraffin. Others started to remove items from the house. When he asked them what was the matter, Amos Nyakundi and Justine Akiya went to him. Justine Akiya held his hand while Amos Nyakundi cut him on the head with a machete.
21. The first issue that crosses one's mind is whether this witness could identify the eleven people who visited the home. In court, he called accused 3 Peter Kwang'a, whose name on the charge sheet is Peter Angwenyi Gwanga. There was no attempt to reconcile the two names. He said the sixth accused is Ronald Ombati, but the charge sheet identifies accused six as Justine Morara. He identified Justine Morara as the fifth accused. The Court of Appeal in *Lesarau v Republic* [1988] KLR 783 stated:

Where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name.
22. I do not doubt that this witness did not know some people he purported to recognize before the incident.
23. The second issue about this witness is his credibility. This witness testified twice. On the 1st day of March 2022, before the matter was ordered to start de novo, he testified that on the material day, he had gone to his mother's home to assist her in spraying acaricides on her cows. After the task, he returned the pump to his home. He did not testify if he returned to his mother's home but proceeded to narrate what transpired there. The prosecution did not elicit evidence to connect his leaving the house and return if he returned.
24. In the evidence of the 1st day of March 2022, he said that Amos Nyakundi went from the crowd and cut him with a machete. He fell unconscious. He did not tell the court that Justine Akiya held his hand before he was cut, as he did in his evidence of the 7th day of October 2024.
25. When Christopher Bosire Mayaka (PW11) was cross-examined on the 1st day of March 2022, he conceded that he had not known the fifth and the sixth accused persons. So, when he purported to identify them on the 7th day of October 2024, he was not truthful. The Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (*Madan, Miller and Potter JJA*) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.



26. PW11 cannot be relied upon to base a conviction on his evidence. The prosecution has, therefore, failed to prove their case against any of the accused in count one. Each of them is acquitted of the offence charged therein.
27. Rael Sigara Onkware passed away at the age of 93. Despite her advanced age, her death was anything but peaceful. She met a brutal and horrific end at the hands of her fellow villagers, who accused her of being a witch. Her two sons, Peter Monari Onkware (PW9) and Tom Onkware (PW10), recounted the details of her death in court.
28. In his evidence, Peter Monari Onkware (PW9) told the court that he was picking coffee from his garden on the 17th day of October 2021 when he saw a big crowd of about fifty people. These people asked him to show them the home of Rael Sigara, his mother. They told him that they wanted to ask her something. After he had directed them, they proceeded there. He followed them from behind. When Chrispine confirmed she was the one, they alleged that, together with others, she had made Chrispine “walk at night”. When his brother Tom (PW10) requested to fetch a motorcycle to take her to the police, they punched him, and he fell. They took the old lady from him. The first accused, also known as Sonko, hit the deceased on the head with a hoe he had.
29. Peter Monari Onkware (PW9) identified Amos Ondieki (accused 1) and Chrispine Ogeto (accused 2) among the people present. He observed the first accused pulling the deceased away from Tom (PW10).
30. Tom Onkware (PW10), for his part, testified that about five people inquired about his direction to Sigara Onware’s house. He directed them and followed them. Out of the five were Sonko (accused one) and Chrispine Ogeto (accused two). They said they wanted his mother, for she had made Chrispine “walk at night.” When he requested them to look for a motorcycle to take her to Chrispine’s home for identification, they agreed and asked him to walk in front of them with her. It was at this juncture that he saw a big crowd approaching. They snatched her from him and tore her clothes. Samuel Chogoro butted him with his head, and he fell unconscious.
31. During cross-examination, he admitted that he had not mentioned in his statement that Sonko beat his mother. He also stated that he met his brother, Peter Monari Onkware (PW9), on the way. Additionally, he acknowledged that he did not refer to Chrispine in his statement.
32. In his earlier testimony in court on the 1st day of March 2022, Tom Onkware (PW10) testified that Sammy Chogoro kicked him thrice on the head, and he fell. It was not clarified how he could be kicked on the head while standing. He also told the court that after his mother was taken away and beaten by a considerable crowd. During cross-examination, he conceded that in his statement, he did not indicate that his brother Peter (PW9) was at home when their mother was killed.
33. Peter Monari Onkware (PW9) testified initially on the 1st day of March 2022. In this evidence, he placed himself in his mother’s compound before the incident turned ugly.
34. The two witnesses have not proven themselves credible in court. Their evidence is self-contradictory and contradicts each other. Additionally, there are no other witnesses to link any of the accused to the offence in the second count. Therefore, each accused person is acquitted of the murder charge on that count.
35. Evans Ogeto Okari’s home was the epicentre of the unfortunate activities that claimed four lives of some matriarchs in the village of Nyagonyi in the Mbanda sublocation. We can recreate a semblance of the scene from the witnesses’ narration. Outside the house of Evans Ogeto Okari was a cross made of sticks with a red shirt hung on it. Chrispine Makworo Ogeto was lying on a mattress; his father was nearby crying. The villagers the village elder had summoned were expecting to be informed of what



was happening. A pastor referred to as Akama was nearby with a Bible. This scenario kept on changing as the events unfolded. This was a case of two rival spiritual kingdoms being implored to offer solutions in collaboration. This was a fatal mistake.

36. Some common facts cut across the evidence of J.M.M. (PW1), J.K.O. (PW2), Z.A.M. (PW3), M.N.M. (PW4), C.B.O. (PW5), E.K.M. (PW6), R.M.O. (PW7), and M.K.M. (PW8). These witnesses testified that they were attracted to the home of Evans Ogeto Okari (accused 11) by a whistle blown to summon the villagers. When they arrived, they found Chrispine Makworo Ogeto lying on a mattress outside their house. It was alleged that some witches had made him walk at night. A pastor offered prayers. Those present were asked to “greet” Chrispine Makworo Ogeto. I will recap what each witness described as I analyze their evidence, for details differed from one witness to the other.
37. Some witnesses were protected, and we used pseudonyms not to endanger their lives.
38. J.M.M. (PW1) testified that after Joseph Abuga (accused 14) had called upon Jemimah Nyang’ate to greet Chrispine when she was about to do so, the latter stood and kicked her. She fell. Amos Nyakundi, aka Sonko (accused 1), took a machete and started to cut her. Many people joined him in battering her, alleging she was a witch. Henry Angwenyi (accused 16) brought a tyre, and Evans Ogeto Okari (accused 11) asked Ong’ondi Gichana (accused 7) for some fuel. He (accused 11) got a matchbox and set the tyre on fire. While Jemimah was burning, Chrispine alleged that Agnes Moraa Ototo was another witch. He went for a hoe and chased Agnes. He hit her with it. Sonko then dragged her to the road and placed her where Jemimah was burning, and the two continued to burn.
39. PW1 returned home and found Sonko (accused 1), Evans Ogeto Okari (accused 11), and Joseph Abuga (accused 14). They removed items from the house, including clothes and a mattress. When she returned to the road, she found Henry Angwenyi (accused 16).
40. In the course of her cross-examination, it emerged that her statement does not include Joseph Abuga (accused 14) and Henry Mbabane Ototo (accused 16) as people who participated in beating Jemimah. She conceded that she recorded that it was Chogoro Ochoki who kicked her.
41. The version of J.K.O. (PW2) was that when Jemimah Mironga's turn to greet Chrispine came, he stood, held and started to beat her. Jemimah ran away, but Joseph Abuga knocked her down. He beat her with a stick in the company of Sonko. Ong’ondi Kiraiko (accused 7) threw some books into the fire, burning Jemimah. Sonko (accused 1) dragged Agnes Moraa Ototo into the fire that was already burning Jemimah.
42. Z.A.M. (PW3) testified like PW2, but her version was that when Jemimah greeted Chrispine, he refused to release her hand. This is when Sonko went and pulled Jemimah and started to beat her. Others joined him in beating her. Ong’ondi (accused 7) and Sonko dragged her to where a tyre was placed on her body and set it alight. Ong’ondi was the one who provided the fuel used to ignite the tyre.
43. Chrispine and Sonko beat Agnes Moraa before she was dragged and tossed into the fire that was burning Jemimah.
44. During cross-examination, she conceded that Ong’ondi’s name was not in her statement, which she had recorded with the police. She also acknowledged that she was at Jemimah’s home when she learned that another witch, Agnes Moraa, had been found.
45. M.N.M.’s (PW4) evidence is that when Chrispine refused to release Jemimah, Abuga (accused 14) went and pushed her near some thorns. Some young men beat her while Sonko (accused 1) and Ong’ondi (accused 7) dragged her to the road. Ototo (accused 16) and Ong’ondi (accused 7) brought a tyre. Henry (accused 10) brought a matchbox, which he gave to Sonko, who set the tyre on fire. The



- tyre started to burn Jemimah. Sonko, Ong'ondi, Mecha and Angwenyi took clothes and a mattress and put them in the fire, burning Jemimah.
46. When Jemimah mentioned Agnes Moraa, Chrispine hit her with a hoe. Sonko, Ong'ondi and others joined him in beating her. Finally, Sonko pulled her to the fire.
 47. During cross-examination, she conceded that she did not mention the third accused in the statement she recorded with the police.
 48. PW5 was C.B.O. Her evidence was that when Chrispine (accused 2) refused to release Jemimah's hand, Abuga declared her a witch and embarked on beating her. He asked Sonko to beat her. Sonko (accused 1) dragged the deceased to the road, where they continued to beat her. Sonko was beating her together with Ong'ondi Keraiko (accused 7). Her evidence was that it was Chogoro (accused 8) who brought the tyre which was used to set Jemimah ablaze by Sonko after Evans had brought the matchbox. Her evidence was that Chrispine chased and hit Agnes Moraa with a hoe.
 49. During cross-examination, this witness testified that Ong'ondi (accused 7) supplied fuel from his motorcycle to ignite Jemimah.
 50. The evidence of E.K.M. (PW6) was that while Jemimah was running away, Abuga (accused 14) hit her with a stick. He then ordered his youth to finish her. This is when Sonko (accused 1), accused four, accused five, and accused seven joined in beating her. Henry Matoke (accused 10) brought a tyre, and the seventh accused brought fuel to set Jemimah alight.
 51. R.M.O. (PW7) testified, like the other eyewitnesses, except that the people she saw beating Jemimah were Mecha (accused 4), Ombati (accused 5) and Tiba (accused 15). Her evidence was that Angwenyi (accused 3) and Ong'ondi (accused 8) brought fuel. She also said she witnessed Chrispine hit Agnes Moraa.
 52. M.K.M. (PW8) was eight years old when the incident occurred. He testified differently from the other witnesses. His evidence was that when Jemimah went to place the Bible on the head of Chrispine as directed by Abuga, Chrispine stood and started to chase her. Abuga joined in the chase and hit her with a stick. Henry, Josephine, Chogoro and Mellen joined in beating her. He identified Josephine as accused 12, Chogoro as accused 8, and Mellen as accused 13. Whereas he said that Ong'ondi poured fuel on the tyre, He was not in court. His other evidence was that Sonko went for the tyre from Evans's home. Though he claimed to have been present when the incident was unfolding, during cross-examination, he said he did not see a pastor or hear any prayers.
 53. This witness's evidence raises the issue of his age at the time of the incident and his ability to recollect what transpired accurately. Since he cannot accurately identify the people he names in court, relying on his evidence would be unsafe.
 54. All the eye-witnesses testified that Amos Nyakundi Ondieki alias Sonko (accused 1) was present in the home of Evans Ogeto Okari (accused 11), where the events that led to the deaths of Agnes Moraa and Jemimah Nyang'ate Minga started. Some described him as the apparent leader of the mob. These witnesses are J.M.M. (PW1), J.K.O. (PW2), Z.A.M. (PW3), M.N.M. (PW4), C.B.O. (PW5), F.K.M. (PW6) and R.M.O. (PW7). Though their evidence differed in some aspects, they placed this accused at the scene. Their differences do not dent their credibility. They also gave details of his participation in the deaths of Agnes Moraa and Jemimah Nyang'ate Minga. From the evidence, we gather that he beat each of the deceased and dragged them to where their bodies were set on fire.
 55. These witnesses were familiar with the first accused, Amos Nyakundi Ondieki, also known as Sonko, as they were from the same area. Their testimony contradicted his claim that he was 20 kilometres from



the incident scene. I am convinced by their evidence that the first accused was involved in the murder of the two deceased individuals.

56. Chrispine Makworo Ogeto (accused 2) is the man around whom the happenings that led to the deaths of the elderly ladies revolve. According to the prosecution witnesses, when the villagers were asked to greet him, the tragic drama started when Jemimah Nyang'ate Minga greeted him as everyone present had been asked to do. When she greeted him, according to the evidence of PW2, PW3, PW5 and PW7, he refused to release her. The angry mob, which included some of the accused persons, set on her with all manner of weapons. PW4 testified that when Jemimah greeted him, he fell and refused to release her. This was when the mob descended on her. PW6 said that she ran away when Chrispine wanted to get hold of her.
57. These minor variations explain the fluidity of the situation and the position from which each witness made the observation.
58. It emerged from these witnesses that after Jemimah was beaten, she mentioned Moraa Ototo. This is when the second accused proclaimed that she was a witch. He chased her while armed with a hoe and hit her on the head. Others joined in beating her before she was dragged where Jemimah was burning and tossed into the fire.
59. In his defence, Chrispine Makworo Ogeto (accused 2) said he went to bed on the 16th day of October 2021 as usual. The following morning, he was surrounded by people and unable to talk. He was told he was in church. His father (Evans Ogeto Okari (accused 11) contradicted this defence. His evidence places the issue of going to the church after Jemimah and Agnes Moraa had been attacked by the mob.
60. Though the second accused contended that he was too sick to know what was happening, the evidence of his participation in attacking Jemimah and Agnes Moraa contradicts his contention. He was aware of his surroundings, prevailing circumstances, and actions. He participated in the killing of the two elderly ladies.
61. Peter Angwenyi Gwanga (accused 3) was implicated by the evidence of M.N.M (PW4). Her evidence was that the 3rd accused went to the home of Jemimah in the company of other people. She did not implicate him in any way in the deaths of Jemimah Nyang'ate and Agnes Moraa. We know from the evidence that some of the people in the mob were curious spectators and had gone to the scene in response to the whistle.
62. Another witness who implicated this accused in the deaths of the victims in counts three and four is R.M.O (PW7). Her evidence was that, together with Ong'ondi, they brought some fuel from their motorcycles. However, her version was contradicted by PW1, PW3, and PW4. They said that Ong'ondi had taken fuel from his motorcycle, which had been used to ignite the fire. I find that this witness's evidence cannot be relied upon. I acquit the third accused in counts three and four.
63. Brian Mecha Nyakundi (accused 4) was mentioned by M.N.M (PW4), who testified that he accompanied others to Jemimah's home, where they set her house on fire. They returned to the scene with clothes and a mattress and tossed them to the fire, burning Jemimah.
64. R.M.O. (PW7) also implicated the accused. Her evidence was that she saw him beating Jemimah. When this witness testified, she gave her age to be 18 years. When she recorded her statement dated the 20th day of October 2021, she said she was 17 years old. While recording her statement, she said she did not know who was instructing people to lift the Bible, but in court, she said it was Joseph Abuga accused 14. In her first statement with the police, she did not give any names of suspects, but she did this in her statement dated the 26th day of September 2022. Though she explained that she feared to



provide names during her first statement, one cannot rule out the possibility of collusion. The glaring contradictions in her evidence do not inspire confidence to take her as a truthful witness.

65. Given the circumstances prevailing at the time of the commission of the offences, the evidence of M.N.M (PW4) ought to be corroborated. In the absence of corroboration, convicting the 4th accused is unsafe. He is acquitted in both counts three and four.
66. The fifth accused is Ronald Ombati Onyonka. He was implicated by the evidence of J.M.M. (PW1). This witness said he joined others in beating Agnes Moraa after she fell. This was not in his recorded statement with the police, which also did not contain the accused's name. No other witness implicated him. I accordingly acquit him of the offences on both counts.
67. Justine Morara, accused 6, Justine Akiya Tumbo, accused 9 and Roselyne Nyanchama Omweri, accused 13, were not implicated by any witness in counts three and four. I acquit each of them.
68. Hesborn Ongondi Gichana, accused 7, was implicated by J.M.M's (PW1) evidence and that of C.B.O. (PW5). In court, J.M.M. said that the accused joined others to beat Jemimah; however, in her statement, which she recorded with the police, she named seven people, but the accused was not one of them. PW5 said he saw the accused beat Jemimah in the company of Sonko. I find the evidence of this witness suspect for the accused's name appears in her statement dated the 26th day of September 2022, but that dated the 17th day of October 2021, she did not mention him. These two witnesses cannot be relied upon as truthful witnesses.
69. Z.A.M. (PW3) and M.N.M. (PW4) testified that this accused was involved in dragging Jemimah to the road. They also said that he provided the fuel that was used to set the body on fire. Therefore, the evidence of these witnesses displaces the defence of the accused. I find that he participated in the killing of the two ladies in counts three and four.
70. Nelson Chogoro Tumbo, accused 8, was implicated by J.M.M.'s (PW1) evidence. Her evidence in court and her statement to the police was that he joined others in beating Jemimah. The evidence of F.K.M. (PW6) was that he was the one who provided the Bible that was used. There was nothing unlawful with this action, but it only placed him at the scene. The damning evidence against him was that of R.M.O. (PW7). This evidence was that it was the accused who put the tyre around the neck of Jemimah. However, this contradicted the evidence of Z.A.M. (PW3), who said that:

“Jemimah was dragged and taken to some fire. Ong’ondi and Sonko carried her up while holding her hands and legs. They took her to the road. They placed the tyre on her neck. They brought a mattress from Jemimah’s home. Ong’ondi brought some petrol, poured it, and lit the fire. It was Ong’ondi who lit the fire”.

Though the accused was at the scene, with the contradictions pointed out, it is doubtful if he participated in the offences. I acquit him on both counts.

71. M.N.M.'s (PW4) evidence was that when Jemimah was about to be set on fire, Henry Amwoma Matoke, accused 10, provided a matchbox. This contradicted the evidence of PW5, PW6 and PW7, whose evidence was that Evans Ogeto Okari (accused 11) did so. Without any other evidence against him, the prosecution did not prove its case against him. I acquit him for offences in counts three and four.
72. Evans Ogeto Okari, accused 11, is the father of the second accused and whose home was the nucleus of the unfortunate deaths. The evidence of J.M.M. (PW1) was that he asked Ong’ondi Gichana (accused 7) to fetch fuel that was used to set Jemimah on fire. PW5, PW6, and PW7 said that he was the one who



had fetched a matchbox that was used from his house. His defence was that when Jemimah ran away at the time Chrispine (accused 2) stirred, she was chased by the mob, and he later learnt that she had been killed together with Agnes Moraa. This assertion contradicted the evidence on record and cannot be accurate. The prosecution proved their case against him to the required standards. He participated in the killing of Agnes Moraa and Jemimah Nyang'ate Minga.

73. Josphine Moraa Nyankienya, accused 12, was implicated by J.M.M. (PW1), who said that she joined in beating Jemimah. Care must be taken in an incident like this to avoid erroneously convicting a person. The fact that the other witnesses did not purport to have seen her raises reasonable doubts. The same is resolved in favour of the accused. I acquit her on both counts.
74. Joseph Abuga Mironga is the 14th accused. C.B.O. (PW5) said that he told the crowd that Jemimah was a witch, while J.M.M. (PW1) testified that he joined others in beating her. The evidence of R.M.O (PW7) was that he was the one who ordered those present to queue and greet Chrispine while lifting the Bible. When Jemimah greeted him, he refused to release her hand, saying she was the witch who made him walk at night. The accused held Jemimah by the neck and said she was the one who troubled their child at night. He was joined by others who beat the old lady.
75. This evidence contradicts the other evidence on record, making it unsafe to rely on it. I acquit the accused because there is no evidence against him.
76. Vincent George Maseme, accused 15, was implicated by the evidence of R.M.O (PW7), who said that he beat Jemimah using a hoe stick. The other witnesses who were present did not testify against him. His alibi defence was not displaced. I acquit him on both counts.
77. M.N.M's (PW4) evidence was that Henry Mbambane Angwenyi alias Ototo, accused 16, in the company of Ong'ondi (accused 7), brought the tyre that was used to set Jemimah on fire. This contradicted the evidence of Z.A.M. (PW3), who testified that it was accused 7 who brought the tyre and that of C.B.O. (PW5), who said it was brought to the scene by Chogoro (accused 8). This evidence against this accused is unreliable.
78. The evidence of PW1 that this accused joined the other people in beating Jemimah is suspect, for no other witness testified to the same effect. I, therefore, find that the prosecution has not adduced any evidence to warrant a conviction. I acquit the accused on both counts three and four.
79. To convict for the offence of murder, the prosecution must prove the existence of malice aforethought based on the evidence on record. In Black's Law Dictionary, 10th Edition, malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

80. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

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.

81. All the necessary ingredients of the offence of murder were established against accused one, two, seven and eleven. Section 21 of the Penal Code, Cap 63, provides as follows:-

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

82. The Court of Appeal, in the case of Eunice Musenya Ndui v Republic [2011] eKLR stated:

... we consider the Singapore case of Vihay s/o Kahevasan and others v Public Prosecutor [2010] 4 SSLR 1119 extremely persuasive and to the point. In this case, the Supreme Court held that the doctrine of common intention included consideration of four ingredients, namely:

- (i) The criminal act
- (ii) The common intention
- (iii) Whether the criminal act was done in furtherance of the common intention; and
- (iv) Whether there was the requisite participation of the accused in the criminal act.

Although section 21 of the Kenyan Penal Code has five ingredients of common intention and the Singaporean Penal Code has four the law as regards the equivalent ingredients is the same.

83. The ingredients under section 21 of the Penal Code are:

- a. There must be two or more persons;
- b. They must form a common intention;
- c. The common intention must be to prosecute an unlawful purpose in conjunction with one another;
- d. An offence must be committed in the process; and
- e. The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.



84. In the instant case, I am satisfied that the common intention was proved against accused one, two, seven and eleven. I find each guilty of the offences of murder in counts three and four and convict each of the offences charged therein.

DELIVERED AND SIGNED AT KISII ON THIS 19TH DAY OF DECEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

