



REPUBLIC OF KENYA



**State v Ogunyini & 11 others (Criminal Case E004 of 2020)
[2023] KEHC 742 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E004 OF 2020
RE ABURILI, J
JANUARY 20, 2023**

BETWEEN

STATE PROSECUTION

AND

**ERICK OCHIENG ALIAS OWILA OMUNYI 1ST ACCUSED
ONYANGO NYAWANDA 2ND ACCUSED
VINCENT NYAWANDA ALIAS NELLY YONA 3RD ACCUSED
ERICK ODUOR ALIAS OMULO OTUNGA 4TH ACCUSED
DAVID ODHIAMBO ALIAS JALAGO LAZARO 5TH ACCUSED
ELVIS OTIENO OBONYO 6TH ACCUSED
ODHIAMBO LAZARO 7TH ACCUSED
DAN AJIMBA 8TH ACCUSED
FANUEL NYAWANDA 9TH ACCUSED
KELVIN ODONGO 10TH ACCUSED
JOHN FELIX OTIENO 11TH ACCUSED
CHARLES NGONDE NYAWANDA 12TH ACCUSED**

JUDGMENT

Introduction

1. From the facts of this case, the deceased person Clinton Awino Omoke a youth and a student in one of the TVETs in Mombasa where he lived with his older brother, PW8 had just travelled home in the



month of August 2020 and arrived on 6th April 2020. That same night, on the morning of 7/4/2020, he was invaded from the house where he slept, pulled out and hacked to death by villagers who claimed that they had caught up with a thief. The villagers then set his body ablaze and in the full glare of the deceased's brother PW8, his mother PW5 and his father PW1.

2. The accused persons who are villagers and some members of the same family are 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 7/4/2019 at about 3am, at Chamakwaro village, Ndiga Sub Location within Siaya County, the accused persons jointly murdered one Clinton Awino Omoke.
3. All the accused persons pleaded not guilty to the charge against them and the case proceeded to full trial. The prosecution called a total of nine (9) witnesses in support of its case while the accused persons testified on oath and only accused No. 7 called one witness to support his alibi defence. The evidence as adduced is summarised herein below.

The Prosecution's Case

4. PW1 Nicholas Awino Omoke, the deceased's father, testified that on 6/4/2019 he left his home at about 6 am to attend a funeral of his sister's daughter (niece) in Sakwa. He testified that he received information from his wife, Sarah Adhiambo, that his son Clinton Awino was coming from college in Mombasa. PW1 further testified that on 7/6/2019 he was at his second home when he heard noises from his first wife's house saying they have found a thief "*Jakwo*." He got out and took a torch and lit it and went to where the screams were coming from where he met over 50 people assaulting and cutting his son Clinton Awino with *pangas*.
5. It was his testimony that he gained courage and moved close to the scene and saw how the assailants were cutting his son from the ground before they set him ablaze. He further stated that the time was 3am. PW1 testified that he managed to identify 22 out of the over 50 people, 11 of who were in court at the time he was testifying and stated that not all those who assaulted and killed his son were in court.
6. PW1 testified that he saw Owila, the first accused cut the deceased son on the chest with a panga. That he saw the 2nd accused Onyango, hit the deceased with a rungu on the head. That he also saw Nelly Nyawanda cutting the deceased on the left leg with a panga. He further testified that he saw Otieno, who went to bring the property of the deceased and started burning him. He testified that he also saw Odhiambo who had a panga and was also cutting the deceased in the stomach.
7. PW1 testified that he saw Obonyo cutting the deceased on his right leg with a panga. He testified that he also saw Odhiambo Lazaro cutting the deceased on his right leg, Ajimba cutting the deceased on the right leg using a panga. He further stated that he also saw the 9th accused, Nyawanda's son, cutting the deceased with a panga, and the 10th accused, a son of Ajimba, cutting the deceased using a panga. He testified that he saw the 11th accused, the son of Chief Otieno Lazaro. PW1 testified that the 11th accused carried a white container, a torch and a rungu and was the one who poured paraffin on the deceased and set him on fire. PW1 also testified that he identified Charles Nyawanda who was not in court, cutting his son on the chest with a panga.
8. It was his testimony that the 4th accused went to the house of the deceased, brought properties - clothes and laptop of the deceased and burnt the clothes but run away with the laptop. He stated that he knew all the accused persons for a long time as they were from his home area and some of them from different sub location. Further, that he identified all the accused persons to the police.



9. PW1 further testified that after witnessing the incident, he went and reported to the police but the police were biased and took too long to arrest the accused persons. He further testified that his son died after being decapitated and set ablaze and that he burnt beyond recognition.
10. PW1 testified that the body was removed by the police to Madiany Mortuary and that after a few days, he was called by the police to go and identify the body to a doctor for post-mortem. He testified that the deceased was buried on 16/4/2019.
11. PW1 testified that when 8 of the suspects were arrested after a long time, they were charged with the offence of Manslaughter before Bondo law Courts instead of Murder and that it was not until he appealed to the ODPP that the charge of murder was preferred against the accused persons.
12. It was his testimony that he wrote a statement recorded by CPL Ndiwa and a further statement concerning post-mortem and another statement following the late arrest of other accused persons namely: Dan Ajimba, Erick Ochieng, Peter Onyango and Vincent Nyawanda.
13. In cross-examination by Mr. Ayayo advocate for the 1st to 10th accused persons, PW1 reiterated his testimony and stated that his son was in Shanzu Technical Training Institute for two years before returning home and that the college documents which he had were burnt by the suspects. He reiterated that he was at the scene and saw the suspects take away the deceased's clothes, laptop and documents and all his other belongings.
14. He stated that although it was dark, he had a rechargeable Copa company torch which he used, although he had not brought the said torch to court. He stated that almost everybody had a torch at the scene.
15. It was PW1's testimony that the deceased had never been summoned by the police on allegation of any theft. He stated that he did not know the name of the person who set the deceased on fire but knew him physically. He identified him as the 11th accused person. He further testified that he did not attend an identification parade because he recognized the accused persons and led the police to their respective homes in arresting them.
16. In cross-examination by Mr. Oduor advocate acting alongside Mr Ayayo and also acting for the 11th accused person, PW1 stated that he identified 22 people in the crowd who were assaulting the deceased. He also stated that Omulo, the 8th accused, went and picked the deceased's belongings.
17. In cross-examination by Ms. Otieno advocate for the 12th accused person, PW1 reiterated his testimony and stated that to date, some of the people he had identified had not been arrested by the police.
18. In re-examination, PW1 stated that he identified the 10th accused person "Omulo" which is his father's name, as the one who took his son's electronics. He reiterated that in his statement to the police he stated that he knew the names of the deceased's assailants. He reiterated that he knew the names of the people who killed his son as well as by physical appearances and that he knew some by their parent's names because he had lived away from home for some time. He stated that Ochieng Lazaro was carrying a yellow jerry can.
19. PW2 Michael Ogedo Omoke testified that on the night of 7/4/2019 at night, he heard noises from outside as he was in his house. He stated that he got out with a torch and on arrival at the place where the noise was, he found people cutting Clinton who was his cousin, using pangas and that those people had torches that they shone at the deceased. He testified that he also shone his torch and saw the deceased and that after they cut the deceased, they stood nearby and started talking.



20. It was his testimony that from his house to the deceased's home is a distance of about 100 metres. He further testified that he knew the people who were cutting Clinton. PW2 testified that he saw Owila Omuny, the 1st accused who was cutting the deceased with a panga. He testified that he also saw Onyango the 2nd accused cutting Clinton with a panga. He testified that he saw Nelly Yona and Jalago Lazaro, all cutting the deceased with pangas. He testified that he knew the 4th accused as Jalago Lazaro.
21. PW2 testified that he also saw 'Asha Obonyo' known by this name, the 6th accused and Odhiambo Jaber who both had pangas and used them to cut the deceased. It was his testimony that he saw Dan Ajimba, the 8th accused, cut the deceased with a panga. He testified that he did not see the 9th accused. He further testified that he saw Odongo Ajimba cutting the deceased with a panga but never saw the 11th and 12th accused at the scene.
22. PW2 testified that other people heard screams and noises and that over 60 people went to the scene. He testified that he was standing about 5 feet away watching as the deceased was being cut. It was his testimony that the deceased was cut to death then his assailants left after they set his body ablaze. He testified that they tried putting off the fire but it was in vain. He testified that the police came and took away the body. It was his testimony that he knew the accused persons for over 40 years as he had grown up together with them and that he was neighbor to the accused persons. He also stated that the accused went away with their weapons after killing the deceased.
23. In cross-examination, by Mr. Ayayo, PW2 stated that the deceased was his brother. He testified that in his recorded statement with the police, he told them what each of the accused persons did, cutting the deceased including the names of the assailants and if the statement does not name the assailants the Court should not rely on it.
24. He restated his testimony and further stated that when he went to where the noises were from, he found the accused persons cutting the deceased. It was his testimony that he gave his statement in Dholuo and the police recorded it saying they would translate it. It was his testimony that it was at night and it was dark and there were many people crowding the place but that the accused lit their torches as they cut the deceased.
25. PW2 testified that he found the deceased lying on the ground still alive. He stated that the assailants had pangas and cut him severally. He further stated that there were other people at the scene who were not assaulting the deceased and one of them was George Alex, his cousin. He further stated that he later heard that accused persons had warned at a funeral that they would kill the deceased.
26. In cross-examination by Mr. Oduor advocate, PW2 reiterated his testimony and further stated that there were about 60 people at the scene. He stated that he did not tell the police about who cut the deceased where, when he arrived at the scene. He stated that at home, the 2nd accused uses the name Opiri Onyango. He stated that he had not attended any identification parade He further stated that he remained at the scene until around 3 am but did not see the person who brought petrol and lit the fire.
27. In cross-examination by Ms. Odoyo, PW3 stated that the deceased was a student who had been away in Mombasa for a year and on arrival, he was killed. He denied that there was no family dispute between the family of the deceased and the accused persons. He stated that the assailants had surrounded the deceased as they cut him all over the body. When cross-examined by Ms. Otieno, PW2 stated that he did not see the 12th accused person cutting the deceased and neither did he see him at the scene.
28. In re-examination, PW2 stated that he told the police that all the assailants had weapons which they were using to cut the deceased. He further stated that he saw petrol being poured and fire lit but did not see the person who brought the petrol.



29. PW3 Dr. Rita Aoko a medical Officer working at Bondo Subcounty Hospital testified that she conducted an autopsy on the body of the deceased Clinton Awino Omoke on 15th April 2019 at Madiany Sub County Hospital at 3pm. It was her testimony that the body presented before her was of a naked male African aged about 30 years, in good nutritional status, well-built and 17.8cm that had undergone postmortem changes as Rigor Mortis was present and the body preserved in formalin.
30. She stated that externally, the body had 85% severe burnt wounds on the bilateral lower limbs, dorsal and ventral surface, groin region, both buttocks, lower half of the back, ventral and dorsal surfaces of the lower limbs. It was her testimony that the body had deep cut wounds of 17cm in length and 15cm in depth extending from the right orbit to the right ear up to the occipital region as well as several cut wounds on the right arm, ventral surface, the longest being 15cm and 12cm in depth.
31. PW3 testified that on the right shoulder, there was joint dislocation, a penetrating wound 2cm x 2cm at the right hypochondriac. She testified that in the digestive system, there was penetrating wound of 2cm x 2cm on the anterior surface of the liver of 2cm in depth with minimal bleeding. It was her testimony that the wound did penetrate the whole thickness of the liver. She further testified that there was a deep cut wound extending from the right orbit, right parietal and temporal region to the right occipital region 17cm length and 15cm in depth and an obvious skull fracture and clotted blood on the nervous system. She testified that the spinal column was normal.
32. PW3 testified that as a result of her examination, she formed the opinion that the cause of death was hypovolemic shock due to more than 85% burns and haemorrhage secondary to multiple fractures and large vessel injury. She then issued a Death Certificate No 0893390 and signed the postmortem report on 15/4/2019. She produced the postmortem report as PEX 1.
33. In cross-examination, PW3 stated that she had been performing postmortems for six years and had not come across deceased persons with similar names though this was not unfamiliar. She stated that in such cases, witnesses came in handy and that in the instant case, she had two witnesses; Nicholas Awino Omoke and Sara Awino who told her that the deceased's name was Clinton Awino Mark Omoke.
34. PW4 Tonny Okoth Gero testified that on the 7/4/2019 at about 3am whilst in his house, he heard screams, took a torch and proceeded to where the screams were coming from, about 500 meters away where he found people whom he knew cutting the deceased whom he also knew well. He testified that the people had torches and he also had a torch and further that there was light coming from a nearby home. He testified that the people were armed with *Pangas*, Spears and *Rungus* while others came with torches. He further testified that the assailants cut Clinton, speared him, poured petrol on him then they set him ablaze.
35. It was his testimony that he saw Onyango Opir, the 2nd accused, who he has known since birth, with a panga which he used to cut the deceased. He testified that he also saw Nelly Yona, the 3rd accused cutting the deceased. He testified that other people were carrying pangas but standing aside. PW4 denied seeing the 1st accused at the scene. He testified that he saw Jalango Lazaro, the 5th accused (this Court observed that the 5th and 4th accused persons had changed sitting positions and the witness was pointing at the 4th accused as he mentioned the 5th accused in his testimony). He stated that he also saw the 6th accused, Asha Obonyo, cutting the deceased. He testified that he did not see the 5th accused (4th in the sitting arrangement and positioning in court) cutting the deceased but saw Odhiambo Lazaro, the 7th accused, Dan Ajimba and Tabu Ajimba the 10th accused. He testified that he did not see the 9th accused and 12th accused. He testified that the person who speared the deceased was not in court but he knew him by name. It was his testimony that he also saw other people clubbing the deceased but that mostly they used pangas to cut the deceased.



36. PW4 testified that he saw petrol being poured on the deceased and fire being lit after which the accused ran away. He stated that the suspects left the scene with pangas. He further testified that the people who were assaulting the deceased were about 20 but some had not been arrested.
37. In cross-examination by Mr. Ayayo and Mr. Oduor PW4, reiterated his testimony in chief and further stated that he had no blood relation with the deceased. It was his testimony that he did not leave the scene before the deceased was set ablaze and that the accused persons walked away after killing the deceased. When cross-examined by Ms. Otieno, PW4 reiterated that he did not see the 12th accused at the scene.
38. PW5 Sarah Adhiambo Awino, testified and stated that she was the mother to the deceased. She recalled that on the 7/4/2019 at about 3am, she was at her home when she heard people enter, hitting her door and roof asking her to open the door which she did and they entered asking for the deceased. She stated that she knew the two accused persons who were from her village and that they lived together as villagers. She added that the people who were outside the house lit the torch at her asking her to reveal where Clinton was then they lit the torch at Owila and asked her if she knew him and she said yes, he was Owila. PW5 testified that the 1st and 2nd accused entered her bedroom and that they were armed with pangas. That the people also lit the torch at Onyango who stood behind Owila and asked her if she knew him and she said he was Onyango. That Owila then said that he had been with Clinton. That she was standing and they threatened to kill her if she did not say where Clinton was. She however did not know those who were lighting torches at her. She reiterated that she only knew Owila and Onyango, the 1st and 2nd accused persons herein.
39. She testified that after telling them that the deceased slept at his brother's house, they proceeded there saying that they wanted to kill him and that they told her to enter the house and sleep.
40. It was her testimony that she could not sleep and that she heard screams and sound and moved closer to the road where she saw fire burning with her son groaning like a cow which was being slaughtered. It was her testimony that the people who killed her son moved away laughing. PW5 testified that on 15/4/2019, she went to Madiany Mortuary and witnessed the postmortem on the deceased's body which she identified as that of her son. She testified that the deceased was very young, aged about 21 years old having been born in 1998.
41. In cross-examination by Mr. Ayayo, PW5 reiterated her testimony and stated that her other son Marcos was in his house and he went to her after the killers had left. It was her testimony that she heard the crowd shout *Choma! Choma! Choma!* and on moving closer, she saw that the deceased was on fire. When cross-examined by Mr. Oduor, PW5 reiterated her testimony and when cross-examined by Ms. Otieno, PW5 stated that she did not see the 12th accused at the scene.
42. PW6 no 216771 Chief Inspector Francis Gomre testified that in 2019 he was Inspector In charge of operations at Rarieda. He testified that on 7/4/2019 at about 3.45am he received an unknown call of an incident of lynching at Chamakwaro village, Ndiga Sub Location and rushed to the scene where he found a suspect burning. He testified that the fire was harsh so they waited for it to subside after which they took the body to the Madiany Mortuary. He testified that they did not get the information on why the deceased was burnt.
43. In cross-examination by Mr. Ayayo, PW6 stated that the people at the scene appeared surprised at the happening and were not excited but were calm. He testified that he never heard the people saying a thief had been killed and that the police had no documented information that the deceased was a known criminal. He further reiterated his testimony in chief when cross-examined by Mr. Oduor.



44. PW7 Syphrose Langi Okumu the Assistant Chief of Ndiga Sub Location testified that on the 7/4/2019 at 3am she received a call from a person who identified himself as a police officer and who asked her if she had heard what was happening at Chamakwaro village. She testified that she called the village elder who said he knew nothing after which she received a call from Inspector Gomre who told her that he was already at a scene where one Clinton was burnt. She testified that she and the chief went to the scene and a vehicle from Aram Police Station collected the body to the morgue.
45. It was her testimony that she knew the deceased and his parents and that she once received a complaint from the Polytechnic that their books were stolen and that they suspected the deceased. She testified that they recovered the books from some kitchen store and the Polytechnic manager took the books to Madiany Police Station.
46. In cross-examination by Mr. Ayayo, PW7 testified that sometime in 2019 police from Ndiga AP Post went requesting her to lead them to the deceased's home. She stated that she was not aware that the police were looking for Clinton at the time he was killed. She further stated that she had no information of people who wanted to attack or kill Clinton.
47. When cross-examined by Mr. Oduor, PW7 reiterated her testimony and stated that she knew some of the accused persons as they were residents of her area. In response to cross-examination by Ms. Otieno, PW7 stated that one could only identify the deceased's body by using a torch.
48. PW8 Fidel Ochieng Awino Marcos, the deceased's brother who also serves as a prison's officer testified that on the 7/4/2019 at around 3.00 am, he was at home having travelled with the deceased from Malindi on the 6/4/2019. It was his testimony that he got out for a short call and before he could return to his house, he saw many spot lights then suddenly, rowdy people surrounded the home with some at the gate, others around the fence and some at his mother's house. He testified that some entered into his mother's house where they commanded his mother to tell them where Clinton was and after she told them that he was at his elder brother's house, they responded that if they missed him there, they would still return and do what they were determined to do to him.
49. PW8 testified that he knew some of the people like the 1st accused because they schooled together and were village mates. That he also saw Onyango Nyawanda the 2nd accused whom he schooled together and were village mates. He further testified that he also saw Nelly Yona, the 3rd accused whom he schooled together with, that he also saw the 7th accused Nyawanda, the 9th accused person Nyangi Nyawanda, Dan Ajimba the 8th accused person, Ochieng Lazaro the 11th accused person and Moi Nyawanda the 12th accused person.
50. PW8 testified that the other people in court were known to him as they were his village mates but that he did not know their names and these included the 4th, 5th, 6th, 9th and 10th accused persons. He testified that he saw the 1st accused in the company of the deceased Clinton in the evening before the incident. It was his testimony that the 1st accused had a panga and used it to break the door to his elder brother's house, got into the house then held the deceased by his waist.
51. PW8 testified that the 2nd accused hit Clinton with a rungu as did the 3rd accused, who had a rungu, was kicking the deceased on his tummy. PW8 testified that the 4th accused helped the rest to restrain Clinton from leaving the house while the 5th accused took the deceased's laptop bag from the house where the deceased had slept. It was his testimony that the 6th accused stood near the door where the deceased was, looking for space to hit him with a rungu which he carried. He testified that the 7th accused had a Somali sword which PW8 saw him stab the deceased on his left side. It was his testimony that Dan Ajimba cut the deceased's hands using a panga.



52. PW8 testified that the 9th accused had a panga and used it to cut the deceased while the 10th accused despite having a panga, PW8 did not see him do anything. PW8 testified that the 11th accused tied the deceased's right hand with a rope and dragged him out of the house saying they should not kill him inside the homestead but finish him from outside. He further testified that Moi Nyawanda the 12th accused cut the deceased on his shin with a panga. He testified that the deceased pleaded with them not to harm him but they dragged him out of the compound. PW8 testified that at about 6 am, he went to the scene and found the deceased's body burnt. He testified that the police arrived and removed the deceased's body.
53. In cross-examination by Mr. Ayayo, PW8 reiterated his testimony and stated that he did not attend any identification parade. He further stated that he could not tell who burnt the deceased's body. He stated that he only recorded one statement with the police which was handwritten and that he did not describe to the police exactly who was doing what as stated in court. Further, that from his mother's house to his elder brother's house was 6 metres while PW8's was about one meter from his brother Clinton who was being assaulted. He further stated that the accused were assaulting the deceased in turns, giving each other the opportunity to assault and that he was resisting and so he was dragged 20 meters away.
54. When cross-examined by Ms. Otieno, PW8 stated that he had known Moi Nyawanda for more than 15 years though he did not know his official names. He further stated that on the fateful night, there were many people and that although he could not tell their number, he identified those he saw. It was his testimony that he did not narrate what each of the accused persons did in his statement as he was informed that he would tell the court what he saw each person do to the deceased.
55. PW9 No. 238629 Inspector Osborn Gundu Omega the Deputy Officer Commanding Station (OCS) Aram Police Station testified that he took over this case from the investigating officer Inspector Francis Amugune who retired from the service in June 2021. He testified that Corporal Benard Ndiwa was the initial investigating officer and that from the file, on the 7/4/2020, there was a call received from the Assistant Chief of Ndigwa sub-location, who reported of an incident where a mob had attacked and killed somebody. PW9 testified that Corporal Ndiwa and other officers rushed to the scene with Inspector Gomre from Madiany AP Camp and found a dead body of Clinton Omoke, who had been killed by unknown people which they removed to Madiany sub-county mortuary.
56. He further testified that on 2/3/2020 at around 2320 hours, Chief Inspector Kher with Senior Sergeant Shile, Sergeant Owino, Police Constable Kimeu, Police Constable Koech, Police Constable Muriithi, Police Constable Makhanu, Police Constable Muchiri, Police Constable Chrispus and Police Constable Enock boarded a GK vehicle and proceeded to Ndigwa sub-location accompanied by the deceased's father Mr. Nicholas Awino Omoke and Michael Ogondi who helped the police identify suspects Eric Ochieng alias Owila Omunyi, Peter Onyango alias Onyango Nyawanda, Vincent Nyawanda alias Nelly Yona, Eric Oduor alias Omullo Otunga, David Odhiambo alias Jalago Lazaro, Elvis Otieno Obonyo; Odhiambo Lazaro, Dan Ajimba and arrested them and subsequently charged them with murder.
57. He further testified that on the 9/7/2021 Corporal Ouma, Corporal Koome, Police Constable Matiko, Police Constable Barasa, Police Constable Dr. Nyang'au and himself proceeded to Ndigwa sub location, Chamakwaro village, accompanied by the deceased's father Mr. Nicholas Awino Omoke who assisted them in identifying and arresting Fanuel Nyawanda alias Nyangi Nyawanda, Kevin Odongo alias Tabu Ajimba, John Felix alias Ochieng Lazaro.



58. PW9 further testified that on the 12/8/2021, Corporal Koech Geoffrey and Police Constable Kone Ole Time of Ndigwa Police Post arrested Charles Ngonde Nyawanda alias Nyawanda as identified by Nicholas Awino Omoke the deceased's father.
59. PW9 testified that another suspect, Simon Akula, was at large after escaping to unknown destination while another witness George Omondi Onuko had also not come to court despite service of bonds. He further testified that after the suspects were arrested, they were escorted to Jaramogi Oginga Odinga Teaching and Referral Hospital (J.O.O.T.R.H) for mental assessment and were all found fit to plead.
60. In cross-examination by Mr. Ayayo, PW9 stated that he did not have weapons used in the commission of the offence and that he also did not have any spotlight recovered from the accused or anything to show the presence of solar light at the victim's home. He further testified that the deceased's father positively identified the suspects so there was no need for identification parades.
61. On cross-examination by Ms. Otieno, PW9 stated that they had no information of any family dispute between the accused's family and the deceased only that it was suspected by the accused that the deceased was a thief, and that no land dispute issue arose between the 2 families.

The Defence Case

62. DW1 Erick Ochieng Ogunyi a resident of Chamakwar, Ndigwa sublocation testified that on the 7/4/2019, he was in Kisumu where he works. He stated that he knew nothing concerning the charge and the events stated in the different dates given in the prosecution evidence. In cross-examination by the prosecution counsel, DW1 stated that he knew the deceased and his father. He reiterated his testimony and further stated that he used to live with his friend, Michael Miguya, in Kisumu. In re-examination, he reiterated that on 7/4/2019 he was in Kisumu.
63. DW2, Peter Onyango Nyawanda testified on oath and denied knowing who Onyango Nyawanda was. He testified that on the 7/4/2020 he was in Sakwa. He further stated that he did not know the person who was killed on 7/4/2020. It was his testimony that on 7/6/2019 he was in Sakwa. He stated that he was arrested on 2/3/2022 and that he did not see any Identification parade.
64. In cross-examination, DW2 stated that he knew Clinton and his father. He denied telling the police that he reached Sakwa at 9 am in the morning and stated that he was walking on foot and did not know what time he reached Sakwa.
65. DW3 Vincent Nyawanda Otieno a resident of South Uyoma, Chamakwar village denied knowing Nelly Yona. He testified that on the 7/4/2019, he was at home and in his house not at the scene where Clinton Awino Omoke was being killed. He further testified that on the 7/3/2020 and 7/4/2020 he was at home. He testified that he did not know if anybody was killed on 7/4/2020 or on 7/6/2019. He further testified that he was not aware that the deceased was burnt on 16/4/2019. In cross-examination, DW3 admitted to knowing the deceased and his father who were his village mates.
66. DW4 Erick Oduor Arundo testified that he worked in a quarry and a farmer testified that he lived in Nyabera Sublocation, Magare village did not know who Omulo Otunga was. He testified that on the 7/4/2019, 7/6/2019 and 7/4/2020 he was at home. He testified that he was arrested on 2/3/2022. It was his testimony that on the 2/3/2020, he was in custody having been arrested on the same day. He testified that he did not know who was killed and burnt on 16/4/2019. In cross-examination, DW4 stated that he did not know the deceased and his father.
67. DW5 David Odhiambo Olaka a resident of Magare testified and denied knowing who Jalango Lazaro was. He testified that at the time of arrest, he did not have his identity card. It was his testimony that



- on the 7/6/2019 and 7/4/2020 he was in the lake fishing whereas on the 2/3/2020 he was at home. He further testified that the evidence tendered against him was not true and that between 7/4/2019 and 26/10/2020 he was in his home and used to go to the lake, fish and return home.
68. In cross-examination, DW5 stated that on 6/4/2019, he went to the lake from 8 pm and returned at 7 am the following day. It was his testimony that on the 7/4/2019, they were four people namely; John, Jazambu, Onyango and himself. He stated that they used to meet at the lake. He however stated that he had no contacts of those people. In re-examination, he stated that he did not have contacts of his fishing mates.
69. DW6 Elvis Otieno Obongo a resident of Nyabera testified that his name is Elvice and not Elvis. He testified that he was arrested on 2/2/2020. He further testified that on 7/4/2020, he was in custody at Kodiaga and that on 2/3/2020 he was at his home having been given bond on 7/6/2019. He further stated that on 16/4/2019, he was at home. He testified that he was arrested alone at home and taken to Aram Police Station.
70. DW7 Jack Odhiambo Lazaro from West Uyoma, Nyabera Sublocation testified that he was arrested on 2/3/2020. He further testified that he had not been charged in respect of this case but for another case. He testified that on the 7/4/2019, he was at his home in Uyona. He denied murdering the deceased and that he did not know him. He further stated that nothing was done by the police to identify him, as the suspect. DW7 testified that on the 7/6/2019 and 7/4/2020 he was at home. He termed the prosecution witnesses testimonies as false.
71. In cross-examination, DW7 stated that he did not tell the police that he knew the deceased but that he said that he had heard from women who went to buy fish at Misori say that the deceased had been killed. He further stated that on 6/4/2019 at night he was in his home from 7.30 pm with his wife Jackline Atieno Osee and his children. He stated that he heard of Clinton's death on 7/4/2019.
72. DW8 Dancan Ochieng Ajimba testified that he worked in a quarry and that he did not know who Dan was. He testified that he was arrested on 2/3/2020 and that they were eight of them on the date of arrest. He further testified that the police did nothing to verify his correct names before he was arrested and charged with the offence. It was his testimony that on the 7/4/2019, 16/4/2019, 7/4/2020 and 2/3/2020 he was in his home.
73. In cross-examination, DW8 denied being Dan but conceded that the charge was read to him as Dan Ajimba and he responded. He further stated that he had been responding to the name Dan Ajimba. That he knew Clinton Awino and his family as they live in the same area. He stated that he was at home with his wife and children when Clinton was killed.
74. DW9 Fanuel Ogony Nyawanda testified that he was a farmer and resided in Uyoma, Nyabera sublocation. He recalled that on the 7/4/2019 he was at his home. He testified that he was arrested alone but found one of the suspects in the vehicle. It was his testimony that the police never did anything to identify him. He further testified that on the 7/4/2020, he was at home looking after his animals and that on the 2/3/2020, 7/6/2019 and 16/4/2019 he was at home. DW9 testified that he was not aware if anybody was killed on 7/4/2020 or the body taken to the morgue on 2/3/2020. He further testified that he was not aware of who was killed on 7/6/2019 or 16/4/2019. He testified that the evidence adduced was not true and that his name was not mentioned by any witness.
75. DW10 Kelvin Odongo testified that he was a farmer and lived in Chamakwaro He stated that on the 7/4/2019, he was at Bondo and that he was not present where Clinton was being killed. It was his testimony that the police never asked him for an identity card for identification. He further testified that on the 7/4/2020 he was in Bondo and that on the 2/3/2020 he was at home. He testified that



he did not know who was killed on 7/4/2020 or body taken to the morgue on 2/3/2020. He testified that on the 7/6/2019 and 16/4/2019 he was in Bondo. He testified that the Prosecution witnesses gave false evidence against him.

76. In cross-examination, DW10 stated that in 2019, he was at home farming but went to do business in Bondo which business he could do when maize was available. He stated that in April 2019, he was in Bondo doing business though he had no witness to that effect.
77. DW10 testified that he knew the deceased and the witnesses in this case as they came from the same village. He testified that he had never had any disagreement with the witnesses who testified that they saw him on the material day that the deceased was killed.
78. DW11 John Felix Ochieng Otieno testified that he was a resident of West Uoma, Nyabera Sublocation, Magare village. He stated that he was not aware of anybody that was killed on 7/4/2019, 7/4/2020 or 16/4/2019. He testified that on the 7/4/2019, he was in his home with his wife and children. He testified that he never heard of any mob injustice and that the Prosecution witness referred to him by a name that he did not know. He testified that he was arrested on 9/7/2021. He further testified that from April 2019 to July 2021, he was at his home. It was his testimony that he was never identified by the police when they arrested him.
79. DW12 Charles Ngode Nyawanda testified that he was abodaboda rider and a farmer. He stated that on the night of 7/4/2019 he was at his home. He further testified that on the 6/4/2019, he was in his home. It was his testimony that prior to his arrest, he never spoke to the deceased's father. He testified that he was arrested on 28/8/2020 and that the arresting officer never explained to him why he took too long to arrest him. He testified that there was no procedure used to identify him.
80. DW13 Jackline Atieno Osee testified as a witness for DW7 who she stated was her husband. She testified that on the 7/4/2020 she was at home in the house. She testified that she was not aware that anybody was killed on 7/4/2020, 7/4/2019 or 2/3/2020. She testified that on all those dates, she was with her husband at home. She further testified that on the 7/6/2019 and 16/4/2019 she was in her home with her husband and their children.
81. In cross-examination, she stated that on the 7/4/2019 she never heard of anybody killed by a mob in their village. DW13 further stated that after DW7 was arrested, she was then informed the reason for the arrest. She denied knowing the deceased. She stated that she has 5 children who were all at home on 7/4/2019, the oldest being 12 years. She stated that there were other houses of family members in that homestead. It was her testimony that her husband woke up, milked and left at 7 am.

Submissions by counsel for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th accused persons

82. On behalf of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th accused persons, Mr. Ayayo advocate filed written submissions urging this court to acquit the accused persons named on account that the prosecution had not proved its case against them beyond reasonable doubt.
83. According to the defence counsel, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Accused persons all stated that they were not identified as required by law. That they were neither requested to produce their National Identity cards or any other identification to confirm that they are the correct suspects in respect to this case. That they were neither taken through identification parade immediately after the offence was alleged to have been committed or when they were arrested after over 1 year.
84. It was submitted that that it is not clear why the prosecutor did not produce the OB extract record to show that the accused persons were the suspects who were reported at the first instance and why



- the accused persons were not arrested for over 1 year before being charged with the alleged offence of murder.
85. Further submission was that all the accused persons were charged with different names or Alias names which they claimed that they did not know, which, according to counsel, cause a lot of doubt as to the credibility of the report and the actual persons charged before the honourable court.
 86. It was further submitted that the prosecution did not avail or produce any single spotlight or torch used by either the complainant, witnesses or the accused at the time of the alleged offence of murder.
 87. That the prosecution failed to produce any single weapon of the offence alleged to have been used by the accused persons, neither was the Jerican alleged to have been used to carry kerosene or petrol produced by the prosecution.
 88. It was submitted that it would have been prudent to produce an expert report to confirm that the chemical alleged to have been used to burn the deceased was kerosene or petrol. Further, counsel submitted that the prosecutor and his witnesses failed to discharge the burden of proof that the deceased was killed by the accused on 7th April 2019. That the charge sheet refers to the deceased as Clinton Awino Omoke while the investigating officer referred to Clinton Mark Omoke, which are two different people. Counsel submitted that the accused denied being at the scene on 7th April, 2019.
 89. Further, that there were contradictions in the prosecution's case in that the charge sheet stated that the deceased Clinton Awino Omoke was killed on 7th April 2019, while the investigating officers and their record in their testimony stated that the deceased was killed on 7th April 2020 and taken to the mortuary on 2nd March 2020. Further, that the other prosecution witnesses stated that the deceased was killed on 7th June 2019 and deceased body burnt on 16th April 2019, which contradictions, according to the accused's counsel, creates a serious doubt as to who killed the deceased and/or when the deceased was killed.
 90. Further submission was that these contradictions raised another unanswered question as to how many people were killed according to investigating officers and the prosecution witnesses; who killed these people if any, on the stated dates.
 91. It was further submitted that PW9 Inspector Osborn Gundu Omega who took over from the investigating officer inspector Francis Gomre stated that corporal Bernard Ndiwa was the initial investigating officer stated that from the file, on 7th April 2020 there was a call received from Assistant Chief of Ndigwa sub-location madam Sphyrose Langi Okumu (PW7) reporting of an incident where a mob attacked and killed somebody. That in the testimony of PW9, or evidence on record is that they removed the body to Madiany sub-county mortuary on 2nd March 2020 at around 23.20hours, the date, the deceased the body is said to have been taken to the mortuary on 2nd March 2020 at around 23.20hours, which date was date before even the deceased was reported to have been killed on 7th April 2020.
 92. It was submitted that the above testimony contradicts the entire evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, and PW8 that the deceased was killed on 7th June 2019 and body burnt on 16th April 2019 (see evidence of PW1, PW2, PW4, PW5 on date which PW5 went to the mortuary for post-mortem and PW3 evidence On 15th April 2019 contradicts the details given in the police by investigating officer's testimony or evidence much later with over a period 1 year and not even corresponding dates.
 93. It was further submitted that PW6, Chief Inspector Francis Gomre's evidence also contradicts the evidence of investigating officer regarding the date and time of death of the deceased, in that he stated that the deceased was killed on 7th April 2019 at about 3.45am while the investigating officer PW9



stated the deceased was killed on 7th April 2020 and the body removed from the scene of crime an earlier date of 2nd March 2020 at around 23.20hours.

94. Further submission was that PW6 and PW8 also gave evidence contradicting dates of 7th April 2019 as supposed to line investigating officer's dates of 7th April 2020 where the deceased was supposed to have been killed according to the investigation file and evidence presented in court.
95. That the deceased 's body could not have been removed to Madiany sub-location on 2nd March 2020 even before the date the investigating officer had given the evidence and neither the deceased's body could have been removed from the scene or the crime almost 1 year after the deceased was killed.
96. It was therefore submitted that the prosecution has not proved the case beyond reasonable doubt and failed to discharge the burden of proof. Counsel urged the court to acquit the accused persons under section 214 of the [criminal Procedure code](#).

The 11th Accused person's Submissions

97. The 11th accused person send to court written submissions in his own name. It was submitted that the prosecution had not sufficiently proved the offence of Murder contrary to section 203 as read together with section 204 of the [Penal Code](#) and as set out in the case of [Anthony Ndegwa Ngari v Republic](#) [2014] eKLR as cited in [Republic v Henry Obisa Auko](#) [2018] eKLR.
98. It was submitted that this was a case of gross misidentification by PW1 and PW 8 as he was not a son of Chief Otieno Lazaro as claimed but a son to Samuel Otieno Owino. Reliance was placed on the case of [Wamunga v Republic](#) [1989] KLR as cited in [Geofrey Hagggar Samuel v Republic](#) [2022] eKLR, where it was held inter alia that Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.
99. It was submitted that the direct evidence of PW 8 was uncorroborated contrary to the provisions of Section 124 of the [Evidence Act](#) and as was held in the case of [Baraka Kabindi v Republic](#) [2019] eKLR as quoted in [Duka Ndegwa Kombo v Republic](#) [2021] eKLR.
100. The 11th accused submitted that PW5 and PW8 who were present at the scene of the crime at the same time provided two different accounts with PW5 stating in cross-examination that she did not see the 11th Accused among the persons who drugged the deceased from the house and neither did she see him as part of the mob standing outside.
101. It was submitted that PW1 in his testimony, claimed that the 11th accused person was a person well known to him however, he was unable to mention him in the first instance when he recorded his statement with the police and thus the identification of the 11th accused was sketchy and the accuracy in PW1's identification of the 11th accused questionable considering the fact that the deceased was lynched in 2019 yet the 11th accused person was arrested in 2021.
102. It was submitted that the court held in the case of [John Kamau Wamatu v Republic](#)- Criminal Appeal No. 68&69 of 2008 that Identification Parades are essential mainly because, an Identification Parade tests the correctness of a witness's identification of a suspect whereas in this case all the accused persons made it clear to the court that an Identification Parade was entirely excluded.



The 12th person's submissions

103. The 12th Accused person's counsel Ms. Loice Otieno framed the following issues which she submitted on:

Whether the prosecution has proved its case beyond reasonable doubt.

104. Counsel submitted that the burden of proof in criminal justice lies with the prosecution which must prove its case beyond reasonable doubt. She further submitted that Article 50 (2) of the Constitution of Kenya provides for presumption of innocence until the contrary is proved. In defining what constitutes proof beyond reasonable doubt, counsel relied on the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372-373 as cited in the Republic v Silas Magongo Onzere [2017] eKLR where the court stated that:

“That degree is well settled. It need not reach certainly, but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubtful but nothing short of that will suffice.”

105. The court in the above case further emphasized that:

“In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person.”

106. It was therefore submitted that the prosecution has not sufficiently proved the offence of Murder contrary to section 203 as read together with section 204 of the Penal Code beyond reasonable doubt against the 12th Accused person. The case of Anthony Ndegwa Ngari v Republic [2014] eKLR as cited in Republic vs Henry Obisa Auko [2018] eKLR on the essential elements of murder was cited.

107. It was submitted that the death of the deceased is not in dispute as there are undisputed post mortem and medical reports to this effect. It was however contended that the prosecution failed to establish the elements that the death of the deceased was caused by unlawful act on the part of the 12th accused person and with malice aforethought.

108. Counsel submitted that the prosecution failed to adduce sufficient evidence which places the 12th Accused person at the scene of the crime. More particularly, that the key witnesses namely, PW 2, PW 4, and PW 5 who were physically present at the scene of the crime, did not identify the 12th accused person as one of the assailants.

109. Further, it was submitted that PW 5 and PW 8 who live in the same homestead and alleged to have witnessed the mob drugging the deceased out of his house prior to being lynched, provided two different accounts and their testimonies completely differed from each other. Further, that the direct evidence of PW 8 was not corroborated by any of the testimonies by other witnesses. She relied on Section 124 of the Evidence Act (Cap 80 Laws of Kenya) which provides that an accused person ought not to be convicted unless the evidence against him is corroborated by material evidence. Further,



reliance was placed on the case of *Baraka Kabindi v Republic* [2019] eKLR cited in *Duka Ndegwa Kombo v Republic* [2021] eKLR, where it was established that:

“In so far as the appellant case was concerned, the only direct evidence against him was that of the complainant. The learned trial Magistrate ought to have applied the cautionary proviso under Section 124 of the *Evidence Act* that in his judgement in convicting the appellant he found the complainant to be a truthful and honest witness supported with reasons for that believe. A reading of the trial record on the alleged offence leaves this court with a reasonable doubt why he acted on it without corroboration. The failure by the Learned Magistrate not to warn himself on the application of the provision of section 124 of the *Evidence Act* to me renders the decision reached unsatisfactory and breach of the above provisions. While I understand that a fact can be proved by a single witness in a case, in the same way it does not lessen the duty of addressing such other independent evidence to discharge the burden of proof beyond reasonable doubt. What corroboration in criminal proceedings does it excludes any possibility of the evidence being tainted or connived to the complainant’s advantage regardless whether the accused committed the offence or not?”

110. Counsel for the 12th accused person argued that from the different testimonies of PW8 and PW5, PW 5 in cross-examination stated clearly that she did not see the 12th Accused person among the persons who dragged the deceased from the house and that neither did she see him as part of the mob standing outside while PW 8 in his testimony confirmed that he and PW5 were present at the scene of the crime at the same time.
111. It was submitted that PW1 in his testimony, claimed that the 12th accused person was a person well known to him however, he was unable to mention him in the first instance when he recorded his statement with the police. Reliance was placed on the case of *R. v Turnbull and others* [1976] 3 All ER 549 as cited in *Republic v Valentine Maloba & 2 others* [2021] eKLR, where Lord Widgery CJ stated as follows:

“Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.”

112. With regard to the evidence of PW1, it was submitted that the identification of the witness was sketchy and this was evident in his testimony. That he had recorded his statement more than once and despite his claims of knowing PW 1, he did not mention his name to the police in the first instance. Further,



that the accuracy in his identification of the 12th accused person is questionable considering the fact that the deceased was lynched in 2019 yet the 12th accused person was arrested in 2021.

113. Counsel relied on the case of *John Kamau Wamatu v Republic*- Criminal Appeal No. 68&69 of 2008, where it was observed that Identification Parades are essential mainly because, an Identification Parade tests the correctness of a witness's identification of a suspect. In relation to this it was submitted that no identification parade was carried out on any of the accused persons despite the fact that, the deceased person met his death at the dead of night and proper identification evidence was very crucial. Further reliance was placed on *Kamau Njoroge v Republic* (1982-1988) 1KAR 1134 as cited in Hassan Abdallah *Mohammed v Republic* [2017] eKLR observed where it was held that:

“ A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade”.

114. It was therefore submitted that there is a huge risk of misidentification which the prosecution had a mandate of mitigating and failed to do so. That the varying accounts by witnesses who were at the scene points towards mistaken identity and the innocence of the 12th accused person who was vindicated by the testimonies of PW 2, PW 4, and PW 5.

Analysis and Determination

115. The 12 accused persons are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Particulars of the offence are as per the consolidated Information dated 25th October, 2021 which are that on the 7th Day of April, 2019 at Chamakwaro village, Ndigwa Sublocation in Rarieda Sub County within Siaya County, the accused persons jointly with others not before the court murdered one Clinton Awino Omoke.
116. All the accused persons took plea on 26/10/2021 and denied committing the offence charged. The prosecution called nine witnesses while the accused persons testified on oath with each denying the offence and stating that they were not at the scene where the deceased was allegedly murdered. The seventh accused person also called his wife as his witness. She testified as DW13.
117. I have considered the Information, the evidence as adduced by 9 prosecution witnesses and the evidence for the defence as well as the written submissions filed by the accused persons.
118. In my view, the main issue for determination is whether the prosecution proved its case against all or any of the accused person beyond reasonable doubt. In other words, were all the elements of the charge of murder established against the accused persons beyond reasonable doubt?
119. There are other important questions and issues raised by the accused persons in their defence and submissions which I will deal with. The questions raised by the defence include: contradictions, lack of identification parade, lack of corroboration, failure to produce murder weapons or torches and evidence of what chemical was used to burn the deceased, alibi defence and use of alias names among others as discussed in this judgment.
120. On whether all the elements of murder have been established by the prosecution evidence beyond reasonable doubt, Section 203 of the *Penal Code* defines the offence of murder and requires proof of the following elements beyond reasonable doubt: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the accused person and that the unlawful killing was with malice aforethought.



121. On proof of the fact of death, from all the detailed evidence that I have reproduced in this judgment as adduced by the prosecution witnesses, it is without doubt that there is proof of death as demonstrated by the testimonies of PW1, PW2, PW4, PW5, PW6, PW7, and PW8 who all saw the body of the deceased Clinton Awino Omoke at the scene. His mother also told the court that the deceased had another name, Mark hence the names in the post-mortem report Clinton Awino Mark Omoke.
122. As to the cause of death, PW3 Dr Rita Aoko a medical Officer then working at Madiany Sub County Hospital testified and produced a post mortem report on the deceased as PEX 1 and confirmed that she carried out an autopsy on the body of the deceased on 15/4/2019 and established several injuries among them, 85% severe burnt wounds all over the body as well as multiple fractures and deep cuts on the body and formed the opinion that the cause of death was hypovolemic shock due to more than 85% burns and haemorrhage secondary to multiple fractures and large vessel injury. The body of the deceased was identified to the doctor by PW1 and PW5 who are his parents.
123. As to whether the death of the deceased was unlawfully caused, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. In addition, Article 26 of the Constitution guarantees every person the right to life and therefore unless authorized by the Constitution or other written law, any act or omission on the part of any person that leads to the death of another person is unlawful. See Republic v Boniface Isawa Makodi [2016] eKLR citing with approval the case of Gusambizi Wesonga v Republic [1948] 15 EACA 65 where it was held that:
- “Every homicide is presumed to be unlawful except where circumstances make it excusable or it 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.”
124. The evidence on record as adduced by the prosecution witnesses PW1, PW2, PW4, PW5, PW6, PW7 and PW8 was that the deceased met his death after being assaulted and fatally injured by a group of known villagers who were in a mob that dragged him from where he was sleeping and administered severe ‘mob justice’ on him by cutting him with pangas, others clubbing him, others spearing him and finally, setting his body ablaze to the extent that according to PW3 Dr Rita, the deceased suffered 85% burns of his body.
125. “Mob justice” is nothing but a form of extra judicial punishment in which a person suspected of wrong doing is humiliated, beaten and in many cases, killed by a mob of people. Such act is criminal, pure and simple. Any person who is found and or proved to have participated in such an act or omission commits an offence and must invariably be held criminally responsible for the consequences of his unlawful action or omissions.
126. In this case, there is no dispute that the deceased Clinton Awino Omoke was a victim of mob injustice perpetrated by a group of villagers who executed him for allegedly being a thief. From the evidence on record, his killers set upon him with all manner of weapons before dousing his body on fire and burning his body 85% which resulted in his demise. Those kinds of injuries could not have been self-inflicted. I therefore have no doubt in my mind that the prosecution proved beyond reasonable doubt that the death of Clinton Awino Omoke was unlawfully caused.
127. On whether the 12 accused persons were positively identified to have been among the people responsible for the unlawful killing of the deceased, this case therefore turns on the identification of the 12 accused persons as to whether the prosecution has established beyond reasonable doubt that the 12 accused persons or any of them was positively identified or recognized to be the person or persons who unlawfully caused the death of the deceased.



128. All the twelve accused persons testified and denied being at the scene of the alleged murder. They all raised defences of alibi. They also testified and submitted that no identification parade was conducted to positively identify them as the alleged incident took place at night. Further, that there were material contradictions in the evidence of the prosecution witnesses and that no murder weapons were produced. In addition, it was submitted that none of the torches allegedly used by the accused persons or by the witnesses who went to the scene were produced to demonstrate the amount of light available at the scene for the witnesses who allegedly saw and identified the accused persons. Further, that there was no evidence of what chemical whether petrol or kerosene was used to burn the deceased as the container used to ferry the said chemical was not produced as an exhibit.
129. The burden of proof in criminal cases lies on the prosecution throughout the trial to prove beyond reasonable doubt that it was the accused persons who were positively identified or recognized to have unlawfully killed the deceased. That burden does not shift except where the law provides. This is because the right to a fair hearing includes the right of the accused persons to be presumed innocent until proven guilty and the accused persons have the guaranteed right to remain silent, not to testify or give any self-incriminating evidence although they enjoy the guaranteed right to adduce and challenge the evidence adduced by the prosecution witnesses against them. Should the accused persons opt to remain silent, no adverse inference can be made against them as they are under no duty to exonerate themselves from criminal culpability.
130. On what beyond reasonable doubt is, our courts have adopted the position stated by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 as cited by Ms Loice Otieno counsel for the 12th accused person. The position in the *Miller v Miller* (supra) case was adopted by the Court of Appeal in in *Moses Nato Raphael v Republic* [2015] eKLR that:
- “What then amounts to “reasonable doubt”” This issue was addressed by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:
- “That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
131. On identification of each of the accused persons herein and whether an identification parade was necessary in the circumstances of this case, PW1, the father of the deceased testified that on the 7/4/2019, he had gone to attend a funeral of his nephew when he received information from PW5 his wife that the deceased Clinton Awino was coming from college in Mombasa.
132. He then stated that on 7/6/2019, which date the court observes was exactly two months from 7/4/2019, he was at his second wife’s house when he heard noises from his first wife’s homestead, of people saying they had found a thief so he picked his torch and got out of the house and proceeded to the scene and on arrival, he found over 50 people beating up and cutting his son the deceased Clinton Owino with pangas. That he gained courage and moved closer and saw how the people were cutting his son before setting him ablaze as he lay on the ground.



133. PW1 stated that from the crowd, he managed to identify 22 people and that others whom he knew and saw were not in court. He stated that he saw Owila the first accused cut the deceased on the chest with a panga. That he also saw the second accused Onyango hit the deceased with a rungu on the head. That he also saw Nelly Nyawanda who is the 3rd accused cut the deceased on the left leg with a panga. He further stated that he saw Otieno who went and brought the property of the deceased and started burning the deceased. The witness further stated that he saw Odhiambo with a panga which he used to cut the deceased in the stomach. That he then saw Obonyo who was cutting the deceased on his right leg with a panga, Odhambo Lazaro named as the 7th accused cut the deceased's right leg with a panga and Ajimba cut the left leg using a *panga*.
134. PW1 further stated that he saw the 9th accused Nyawanda's son cut the deceased with a panga and the 10th accused the son of Ajimba cutting the deceased using a panga. He further stated that he saw the 11th accused who is the son of a Chief Otieno Lazaro who carried a white container, a torch and a rungu and that he is the one who poured paraffin on the deceased and set him on fire. That he also identified Charles Nyawanda cutting the deceased with a panga on the chest. He narrated how the 4th accused went to the house of the deceased, brought out properties including clothes and a laptop of the deceased and burnt the clothes but ran away with the lap top.
135. He stated that he is the one who identified all the accused persons to the police and that they are all from his home area and some of them are from different sublocations but he has known them for a long time.
136. PW1 stated that after witnessing the incident, he went and reported to the police who were biased and that they took too long to arrest the accused persons. That the body of the deceased was burnt beyond recognition. It was removed by the police to Madiany Hospital for postmortem and that 8 accused persons were arrested and charged with manslaughter before Bondo Law Courts which was after he had pursued their arrest in vain and that when he complained is when the charge of murder was instituted against them. He stated that the deceased was buried on 16/4/2019. He recorded his statement with the police and a further statement after more suspects were arrested. He stated that he had a torch and that at most, every accused person had a torch at the scene adding that he did not require an identification parade because he is the one who recognized the accused and identified the attackers to the police at the point of arresting them after almost one year after the incident.
137. PW1 was categorical that he knew the accused persons very well as they worked in a quarry and that when he was constructing his house, he paid them so he knew them well. He also stated that he was just a metre from the deceased so he saw the assailants whom he knew well. He also stated that most of the suspects were his clan relatives and that when he went to report to the police, he named to the police the people whom he saw assault and kill his son and that he knew them by names although for some suspects, he knew them by their father's names because he had stayed away from home for a long time.
138. At this stage, I must address the question of some contradictions in the evidence of some of the prosecution witnesses which contradictions are apparent and determine whether those contradictions are material and therefore whether they go to the root of the prosecution's case. Before I do that, the question is what does the law say on contradictions?
139. In *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6, it was held that it is not every contradiction that warrants rejection of evidence. The Court stated as follows:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

140. In the case of *Erick Onyango Ondeng' v R* [2014] eKLR, the Court held as follows, concerning contradictions in evidence:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”

141. In *Dickson Elia Nsamba Shapwata & Another v The Republic*, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded that:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

142. Now onto the apparent contradictions, the Information facing all the 12 accused persons reads that the offence occurred on 7/4/2019. PW2, PW4, PW5, PW6, PW7 and PW8 all testified that the incident took place on 7/4/2019. PW1 also stated that the deceased was buried on 16/4/2019 while PW3 carried out an autopsy on the body of the deceased on 15/4/2029 which body was identified by PW1 and PW5 the father and mother of the deceased respectively.

143. From the above evidence, I find that although PW1 stated in his testimony that it was on 7/6/2019 which was two months after the fact, I find that the contradiction was occasioned by time lapse from the time that the incident took place to the date of testifying which was about two years hence the witness who stated that he was 60 years old could have forgotten the exact date as he commenced his testimony in anxiety.

144. Having considered the evidence on record as a whole, I find that contradiction is cured by the rest of the evidence on record which is clear that the deceased was attacked and killed on 7/4/2019.

145. Further, although Mr. Ayayo Advocate in his submissions focussed on 16/4/2019 claiming that the evidence of PW1 was that the deceased was burnt on the latter date, my perusal of the record of proceedings shows that the witness stated that the deceased was buried on 16/4/2019 and not burnt on 16/4/2019. I observe that Mr. Ayayo requested for and was supplied with the typed uncertified court proceedings which had typing errors where the word buried as handwritten was typed as burnt hence the submission. I find nowhere in the testimony of PW1 where he stated that the deceased was burnt on 16/4/2019.

146. The other contradiction that appears apparent is in the testimony of PW9 who testified on behalf of the investigating officer who had since retired from service in June 2021. I observe that the witness stated that from the file, on 7/4/2020 a call was received from the Assistant Chief of Ndwiga Sublocation of an alleged mob injustice leading to the death of somebody and that in response, CIP Ndiwa and other officers rushed to the scene with Inspector Gomre of Madiany AP Camp and found the body of Clinton Omoke which they removed to Madiany Hospital Mortuary.

147. Concerning this date of 7/4/2020, I observe that the witness was not the investigating officer and further, that even going by the testimony of PW7 Syphrose Langi who was the Assistant Chief, she stated that she received a call from a police officer concerning the incident on 7/4/2019 at 3am asking



her if she knew what had happened at Chamakwaro village and that she called the village elder of that area and asked him if he knew what was happening in his village as reported to her but he denied any knowledge then she received a call from Inspector Gomre who told her that he was already at the scene where one Clinton was already burnt and she proceeded there and saw what had happened and the police removed the body of the deceased to the morgue then she returned to her home.

148. From the above circumstances with IP Gomre testifying as PW6 and restating what PW7 stated, I am inclined to find that the discrepancy in the date as stated by PW9 is not material or fatal to the prosecution's case as the same was cured by the evidence adduced by PW6 and PW7 on the information they received on what transpired on 7/4/2019 at 3am and not 7/4/2020. Moreover, the two witnesses PW6 and PW7 testified and I have no reason to doubt their testimonies that on that very 7/4/2019, they went to the scene and found the body of the deceased which was burnt. This corroborates the testimonies of PW2,4,5 and 8 on what they saw take place on that material night of 7/4/2019.
149. Mr Ayayo advocate also led his clients to testify on the other alleged discrepancies in the dates when the incident is said to have taken place as well as the issue of how many people were killed and who was killed on the material date of alleged incident Counsel also submitted on the same at length. The dates in issue are 2/3/2020 and 7/3/2020. he also cast doubt on the name of the deceased and the alias names given to the accused persons.
150. I have re-read the court proceedings as recorded by this court and I find that the date 2/3/2020 is the date that PW9 testified that from the police investigations file, CIP Kher with others went in the company of PW1 and Michael Ogondi, and arrested some of the accused persons named in his testimony as identified by PW1 and Michael Ogondi. DW4, DW7 and DW8 also testified that they were arrested on 2/3/2020.
151. PW9 also testified that other witnesses were arrested on 9/7/2021 and 12/8/2021 according to the police investigations file. I therefore find no contradiction in respect of those two dates which counsel significantly referred to in his submissions and led his clients to testify on.
152. Mr. Ayayo's clients too raised the issue of why the accused persons were arrested over one year after the alleged killing of the deceased. The answer lies in the testimony of PW1 that the police were unwilling to arrest the accused persons and that after the initial arrests, the charge preferred was manslaughter but after the deceased's father had complained to ODPP, the charge of manslaughter was dropped and the current charge of murder was preferred against the accused persons. I find no contradiction or prejudice suffered by the accused persons in that due process.
153. The other major contention was on the alias names of some of the accused persons as well as the spellings which differed from what the accused gave as their correct names. Regarding spelling mistakes, it is my humble view that that is not material contradiction as spellings and sometimes pronunciation of names depends on the person recording, their own dialect or community. For example, the name Ogutu may be spelt and pronounced as Okutu by some people. This is what this court found in the case of Bernard *Odongo Okutu v Republic* [2018] eKLR where the appellant claimed that his name was Ogutu and not Okutu as stated in the charge sheet.
154. In the above case before this court, the question was whether the charge sheet was fatally defective, with the appellant claiming that the charge sheet was defective because his last name was Ogutu and not Okutu. This court addressed the above issue as follows:

“The charge sheet names the accused person as Bernard Odongo Okutu. The appellant in his defence introduced himself as Bernard Odongo Ogutu. Throughout the trial, the appellant did not raise any objection as to how his name was written or pronounced. In my humble



view, the purported defect as to the name of the accused is one that is not fatal and is an error that is curable as it does not substantially affect the charge in any way by lack of essential ingredients. Two cases are pertinent: the case of *Yosefa v. Uganda* [1969] E.A. 236 – a decision of the Court of Appeal – and *Sigilani v. Republic* [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. In *Sigilani v Republic* [2004] 2 KLR it was held:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”

70. Section 382 *CPC* provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this *Code*, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceeding.”

71. Based on the above provisions of the law and case law cited, I hold that the error on the third name of the accused was curable and did not occasion any injustice to the appellant. In my humble view, the error was one of spelling and pronunciation of Okutu instead of Ogutu which is a common error on names depending on the person who authored the charge sheet. In some dialects K is written and pronounced as G and G is written and pronounced as K. Furthermore, the appellant knowing that his name was Ogutu and not Okutu never altered it in his petition of appeal. Accordingly I find that there was no material defect in the charge sheet that would vitiate the trial of the appellant herein.”

155. In this case, DW6 Elvis as stated in the information for murder testified that he was Elvice and not Elvis and even showed to court his national identity card. He however did not deny the other two names attributed to him. In my view, the spelling error was not prejudicial to the accused person and neither was it fatal to the prosecution’s case.

156. In the same vein, I find that the reference to DW8 as Dan Ajimba and not Dancan Ochieng Ajimba was not prejudicial to the 8th accused person or fatal to the prosecution’s case as there is no evidence that the person charged with the offence was different from the accused herein. The same applies to accused



persons who were charged by not only their names but also by the alias names. I say so because whereas alias names may not appear in one's national identity card, it is not uncommon to find that people are known more by their alias or nick names than their official names and this case is no exception. The witnesses who referred to the accused persons by their alias names stated that those are the names they knew the accused persons by in the village and in some instances, the witnesses stated that they knew the accused by their father's names.

157. I observe that throughout the trial, the court called out all the accused persons by the names contained in the Information which in the case of the 1st, 2nd, 3rd, 4th and 5th accused persons, their names have aliases but none of the accused persons refused to respond on account that they were not the ones charged before court. They neither resisted being called by those names. If that had been the case, this court would have inquired into the identities of the accused persons before allowing evidence to be tendered against them. I therefore find that no prejudice was occasioned to the accused persons who were charged in their names Elvis instead of Elvice, Dan instead of Dancan and in the case of accused 1-5, including the alias names to their other names as given or their fathers' names.
158. Further submission by the accused persons' counsel was with regard to how many persons were killed and or whether the deceased was the person allegedly killed in view of the additional name of Mark contained in the post mortem report produced by PW3. From the evidence on record which I have assessed, I am satisfied that the subject of the charge of murder is only one Clinton Awino Omoke who also bore the name Mark as per the post-mortem report and confirmed by PW5 his mother that he was also known as Mark. PW5 and PW1 identified the deceased as their son's body, to the doctor, PW3 who performed an autopsy. I therefore find that the contention is without any merit.
159. From the submissions by Mr. Ayayo advocate, it was also argued that contradictions identified raises another unanswered question as to how many people were killed according to investigating officers and the prosecution witnesses; who killed these people if any and on the stated dates.
160. The evidence by the prosecution witnesses who were at the scene and the post-mortem report are clear that only one person, Clinton Awino Omoke was killed on the material date of 7/4/2019 and not on any other date. I have already pointed out that the discrepancies identified in the dates given by PW1 and PW9 are cured by other independent evidence which showed without any doubt that the deceased was killed on that material night. As to who killed the deceased is what is subject of these proceedings, the testimonies of eye witnesses and as analysed in this judgment.
161. Further contention on contradictions was raised by the 11th and 12th accused persons that the evidence of PW8 and PW5 who testified that they were at the scene was contradictory. I have perused that evidence and I find no contradiction that is material for reasons that PW5 testified that she was in her house when she heard her door and roof being knocked by people who demanded that she opens which she did and she switched on her electric lights then two of them being Accused 1 and 2 whom she knew very well entered her house. That the people were asking for her son Clinton and they threatened to kill her if she did not reveal his whereabouts. She told them where he had gone to sleep but before they left, the other people who stood outside her house lit torches at the 1st and 2nd accused asking her in turns whether she knew them to which she responded in the affirmative by stating their names before they left for the place where the deceased slept.
162. On the part of PW8, he stated how he had gone out for a short call and in the process, he saw spotlights and that suddenly, people who were very rowdy surrounded their home with some at the gate, others at the mother's house and others at the fence. Although PW8 stated that he saw and identified all the 12 accused persons and what each was doing or carrying that night, as opposed to what PW5 stated, I find no contradiction in the evidence by the two witnesses when compared as PW5 was clear that



- she only saw and identified those two people who entered her house and not those who were outside her house. It is worth noting that PW8 was outside the house and only observed the happenings from outside where the majority of the attackers were while PW5 was inside her house and only mentioned the crowd that she only recognized the two accused persons whom she knew very well.
163. This court warns itself of the dangers of relying on the evidence of identification especially in the circumstances where the conditions favouring positive identification may be absent. However, from the testimonies of PW1, PW2, PW4, PW5, PW8, I am satisfied beyond reasonable doubt, having had the opportunity to hear and see the witnesses testify, that the accused persons as named, and identified by recognition by each of the witnesses were not strangers to the witnesses.
164. From the testimonies of PW1,2,4,5 and 8, I am satisfied that the identification by the witnesses of the accused persons was that of recognition and that it was made in circumstances that favoured a positive recognition, as opposed to identification of strangers. PW8 stated that he was very close to the accused persons and he named each one of them and what each did to the deceased in his full view as the attackers who were known to him, some of whom he schooled with and others being village mates and had torches.
165. PW2 stated how he went to the scene with his torch and that the attackers too had torches which they lit at the scene and on the deceased as they cut the deceased and that after cutting him, stood by talking. Further, PW2 stated that he had known the accused whose names he gave to the police, for over 40 years. PW5 on the other hand stated that she only recognized the 1st and 2nd accused who entered her house as there were electric lights which she had switched on and the other attackers shone torches at her asking her if she knew the two to which she said yes and even gave their alias names.
166. PW4 stated that he had a torch and so were the attackers and that there was light from a nearby home so he was able to see the attackers whom he knew and named. PW1 stated how close he was to his son who was killed by the attackers whom he knew as fellow clansmen and village mates for a long period of time. In addition, from the evidence of the prosecution witnesses who were at the scene, the incident did not take a minute, it took a while as the attackers who were may cut the deceased one by one before bringing fuel and his belongings and burning them.
167. Although the defence claimed that no torch was produced to indicate the amount of light at the scene, according to PW1, almost all the attackers had torches and after the burning of the deceased, they went away. There is no evidence that the attackers left their torches at the scene to be used as exhibits against them. Further, failure to produce the torches which the witnesses stated that they had is not fatal as it is not the only source of light that the witnesses said they used to see the attackers and recognize them. The witnesses were clear that the attackers had torches which they lit at the scene and were also talking as they stood by. The attackers were not only related to the victims' family but were also fellow villagers and some went to school together with PW8.
168. On the contention that the alleged murder weapons and the jerrycan used to bring fuel were not produced as exhibits or that the chemical used to burn the deceased was unknown, I find this argument not merited as failure to produce murder weapon is not fatal to the prosecution's case, considering that the accused were arrested after a while following the attack on the deceased and therefore having walked away with their weapons, they had ample opportunity to dispose of their murder weapons. Further, the fact that there was no production of the jerrycan used to bring fuel and or which fuel was used to burn the deceased is not fatal to the prosecution's case for reasons that the postmortem report which was not contested is that the deceased sustained 85% body burns.
169. I find no reason to doubt the testimonies of the witnesses who stated that they saw the accused persons and what each one of them was doing as the witnesses knew the accused persons very well as



fellow villagers, using the light that was available from the torches wielded by the accused persons, the witnesses, flashing at the scene and light from the house of PW5.

170. Although PW1, PW2, PW5 and PW8 were close family members of the deceased, PW4 stated that he was not related to the deceased. That aside, I find no evidence of the family members of the deceased designing to frame the 12 accused persons with the offence of murder of the deceased.

171. Still on the question of alibi, and whereas I take cognizance of the principle that by setting up alibi defences, the accused persons do not assume the burden of proving the alibi- see *Ssentale v Uganda* [1968] EA 36 and in the case of *Charles Anjare Mwamusi v R*, CRA No. 226 of 2002 where the Court of Appeal stated as follows:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him 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 *Kiarie v Republic* [1984] KLR 739 at page 745 paragraph 25.”

172. In *Wang’ombe v Republic* [1976-80] 1 KLR 1683 it was stated that:

“The prosecution always bears the burden of disproving the alibi and proving the appellant’s guilt.”

173. However, this defence should also be raised at the earliest opportune time as was held in the case of *R v Sukha Singh S/O Wazir Singh & others* [1939] 6EACA 145 that:

“if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there’s naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

174. And in the case of *Victor Mwendwa Mulinge v Republic*, the Court of Appeal rendered itself on the issue of alibi thus:

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja vs Republic*, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought.”

175. I find that in this case, the defence of alibi was afterthought and a prank.

176. I further find that although the defence counsel claimed that the witnesses did not give names of the accused persons to the police at the first report, PW1 and PW2 stated that they gave to the police the names of the attackers whom they recognized and some of whom were their clan relatives as well as all being neighbours in the village.

177. PW1 testified how he reported to the police and gave names of persons who had killed his son but that the police were biased and hesitant to arrest them. That when the accused were later arrested,



they were charged with the offence of manslaughter and it was not until he complained to the ODPP that the charges of manslaughter were dropped and the charge of murder preferred against the accused persons. In these proceedings, it is worth noting that there are two files that were availed being Bondo PM Cr 346 of 2020 and Siaya PM CR Case No. 143 of 2020 showing the case of manslaughter first commenced at Siaya Law Courts before it was transferred to Bondo Law Courts by this Court *vide* HC MISC CR Application No 18A of 2020 in the ruling made on 20th March 2020 and Mr Ayayo advocate was appearing for the accused persons in the lower court hence he is very much aware of how the charge of murder was initiated from the initial charge of manslaughter.

178. I hasten to add that there was no delay in the initiation of these proceedings and that failure to give names of the attackers at the time of initial report in itself is not fatal to the prosecution's case. In *Athman Hamisi Mwaviadzo & another v Republic* [2014] eKLR the High Court considered whether failure to give names of attackers to the police at the time of reporting was fatal to the prosecution's case. The Court stated as follows and I agree that:

“At this stage we will deal with one of the grounds of appeal raised being that the witnesses in the first report did not give the police the names of the appellants. The OB report for 10th August, 2005 was sought for as additional evidence in this appeal and a copy of the same was availed to court. We have perused the relevant OB entry No. 53 of 10th August, 2005 and note that indeed the names of the attackers was not recorded in the OB. However, this does not prove that the attackers were not known to the witnesses. A case is determined on the evidence adduced in court and not on the basis of the OB report. The failure to provide the names of the robbers is not fatal to the prosecution case. The OB report is merely a synopsis of a report made to the police and does not necessarily include all pertinent facts of the case. We therefore find no merit in this ground of the appeal and the same is hereby dismissed.

179. In *Anjononi v Republic* [1980] KLR 2 the Court held that evidence of recognition was “more satisfactory, more assuring and more reliable than identification of a stranger because it depends on personal knowledge of the assailant in some form or other.”

180. In *Kevin Omondi Nyando v Republic* [2011] eKLR, the Court of Appeal at Kisumu considered a similar situation where the issue of identification of the robbers was in issue. The Court stated as follows, after examining the evidence as recorded by the trial court and the first appellate court

“The trial magistrate based the appellant's conviction on recognition. It was his view that both the complainant and his brother knew the appellant well before and with the aid of electric lights in the complainant's homestead, the two were able to clearly observe and recognize the appellant. He therefore believed them and held that the appellant was one of the people who attacked and robbed the complainant. He was not oblivious of the fact that the robbery was committed at night time and in that regard the learned trial magistrate rendered himself thus:

“It is a fact that the complainant and PW2 in this case are brothers, this incident took place at their home, after midnight. It is inconceivable that one would expect an independent witness at that hour in somebody's home. I have warned myself as to the danger of mistaken identity as was envisaged in the case of *Paul Etole & Another v Republic* C.A. No 24 of 2000 where it was observed that:

“the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the



circumstances in which the identification by each witness came to be made finally, it should remind itself of any specific weakness which had appeared in the identification evidence.”

The trial magistrate then cited with approval this Court’s decision in *Anjononi & Others v Republic* [1980] KLR 59 and concluded that:

“I am satisfied that the circumstances of that instant case are significantly the same and I would find that there was no mistake in the identity of the accused.”

The High Court, on first appeal like the trial court, relied on the case of *Paul Etole & Another v Republic* (*supra*) and after rehashing the evidence of the complainant and PW2, rendered itself thus:

“So that, the identification of the appellant, was through recognition, which is more reliable than identification of a stranger, although mistakes are still prone to occur. However, in this instance PW1 and PW2 recognised the appellant as a person previously known to them. They indeed both knew his name. The Court is convinced that the illumination was bright enough to enable PW1 and PW2 recognise and identify the appellant.”

The Court then went on to consider other evidence which in its view connected the appellant to the commission of the offence, and the other grounds the appellant had raised to challenge his conviction. In the end that court was satisfied that the appellant’s conviction was well founded and dismissed his appeal and thus provoked the appeal before us.

We earlier set out the appellant’s grounds of appeal and observed that his main complaint was the issue of his identification. In his submissions before us Mr James Mwamu, for the appellant stated, inter alia, that the High Court did not re-evaluate the evidence against the appellant which, had that court done so, would have come to the conclusion that the evidence against the appellant was insufficient to sustain his conviction. He took us through the evidence of identification and sought to poke holes in the prosecution case. His main point was that both PW1 and PW2, in their initial reports to the police did not give his name, in his view, suggesting that they did not recognize him as they alleged.

This was not a case of a single identification witness in difficult circumstances. Both courts below recognized this as they alluded to the circumstances at the locus in quo. In addition, the High Court Judges (Karanja and Aroni, JJ.) appreciated their duty as a first appellate court, namely, to reconsider, analyse and re-evaluate the evidence which was before the trial court, and the need for it to draw its own conclusions from it giving allowance to the fact that they did not see or hear the witnesses testify as to fully assess their credibility. In this regard the learned Judges cited the often cited case of *Okeno v Republic* [1972] EA 32. The case, to our minds, was not cited perfunctorily. The learned Judges did consider the circumstances at the scene, cautioned themselves of the possible dangers of mistaken identification, but were satisfied, the appellant’s identification was free from the possibility of a mistake. PW1 was categorical that he recognized Kevin, a person he knew before. His brother who unlike PW1 who said he panicked when he saw the five boys, did not panic. He was able to observe those boys before they threatened to attack him. It is noteworthy that PW1 is the person who arrested the appellant with the assistance of PW4. It is clear evidence that he knew the appellant was one of his attackers. PW2 on the other hand walked to where the appellant and his accomplices were and asked them what was going on. He engaged in a conversation



with them. In view of that he had ample opportunity to observe them. It is instructive that he recognized more people than PW1; because unlike PW1 he was not under comparable stressful circumstances.

It is true as submitted by Mr Mwamu that no recovery was made of any of the items which were stolen from the complainant. That alone, in our view, would not weaken an otherwise clear case of recognition. Had any recovery been made it would only have served to strengthen the case against the appellant.

The initial reports to the police by both PW1 and PW2 were raised by Mr Mwamu as a ground for discrediting the two witnesses' evidence on recognition. The question we ask ourselves is what did the two witnesses tell the police? PW1 testified that his report was that he had been robbed by Kevin Omondi. The trial magistrate has noted in the recorded proceedings that the name of the appellant is missing from that report. PW2 testified that he wrote the appellant's name in his statement to the police. PC Edwin Mahera (PW1) of Kisumu Police Station, Crime Branch Section, testified that he received the complainant's report on the robbery. His evidence under cross-examination, in that regard was as follows:

“The complainant made a report on 25th July 2009. He was with other members of the public. I visited the scene. He mentioned the names of Mzee Ndege, Cyrus and Kevin Omondi. You were arrested by members of the public. No relevancy was made. The statements were recorded after your arrest. I conducted interrogation. You were recognized by the complainant and another witness. He is a brother of the complainant.”

In his judgment the trial magistrate considered the aforesaid evidence. He did not think a failure, if at all, of PW1 and PW2 to mention the name of the appellant was fatal to the prosecution case. In our view, PW2 was categorical that he mentioned the appellant's name, and PW6's evidence bears him out. In view of this, we have no basis for faulting both courts below.

Besides the other issues which Mr Mwamu raised for instance the age of the complainant's injuries as found by the doctor who examined him, are of no consequence. We say so advisedly. The robbery occurred at about 12.30 a.m. on 25th July 2009. Doctor Baraza Chris (PW5) testified that he examined PW1 on 26th July 2009 at 3.30 p.m. If we compute the time lapse since the robbery, it was about 40 hours. The doctor assessed the age of the injuries as 48 hours. The difference is about 8 hours. The assessment was not an exact assessment of the age. We agree with Mr Kiprop, State Counsel, that the difference is insignificant.”

181. In the end, I find and hold that the prosecution evidence against the accused persons proved beyond reasonable doubt that the accused persons herein were positively identified as being part of the mob of people who assaulted and killed the deceased in what is known as “mob justice” on the morning of 7/4/2019.



182. As to whether the accused persons had malice aforethought when they unlawfully killed the accused persons, in *John Mutuma Gatobu v Republic*, Criminal Appeal No. 78 OF 2013, the Court of Appeal stated as follows:

“That leaves the question of malice aforethought. With respect to the appellant’s learned counsel, malice aforethought in our law is used in a technical sense properly defined under Section 206 of the *Penal Code* thus;

“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 cause 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.”

There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought.

We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited.”

183. From the evidence on record showing the conduct of the accused persons and the weapons used in assassinating and executing the deceased and the manner in which they executed the act of eliminating the deceased, including burning his body after torturing him to death in the full view of his mother, father and brothers, I find that their ultimate goal was to eliminate him leave alone causing grievous harm. I therefore find that malice aforethought was proved against all the 12 accused persons beyond reasonable doubt.

184. In the end, I find and hold that the prosecution proved its case beyond reasonable doubt against each of the 12 accused persons. I find all the accused persons guilty of the offence of murder of Clinton Awino Omoke as charged and I hereby convict them of the said offence.

185. Sentence shall be pronounced after record and mitigations.

186. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 20TH DAY OF JANUARY, 2023

R.E. ABURILI



JUDGE

In the presence of:

Mr. Kadenyi Prosecution Counsel h/b for Mr. Kakoi Senior Principal Prosecution Counsel for the State

Mr. Ayayo Advocate for the 1st to 10th accused persons

Ms Loice Otieno Advocate for the 12th accused person and h/b for Mr. Oduor Adv for the 11th accused person.

CA: Ms Rosemary Odera and Ms Modestar

