



REPUBLIC OF KENYA



**Republic v Julo & another (Criminal Case E006 of 2020)  
[2023] KEHC 24633 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24633 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E006 OF 2020  
A. ONG'INJO, J  
OCTOBER 30, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**KWEKWE MADZIKO JULO ..... 1<sup>ST</sup> ACCUSED**

**MWANGO JIMBALE NYAWA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons Kwekwe Madziko Julo and Mwangi Jimbale Nyawa face a charge of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*.
2. Particulars of the offence are that Kwekwe Madziko Julo and Mwangi Jimbale Nyawa on the 14<sup>th</sup> day of August 2020 at Banda village, Mbunguni Location in Matuga sub-county within Kwale County jointly with others not before the court murdered Madziko Julo Lele.
3. The prosecution called 11 witnesses to support its case that the accused persons committed the offence herein and they were placed on their defence.

**Prosecution Case**

4. PW1, Imam Mbiti Maguo, the brother of the deceased identified the body on 16<sup>th</sup> August 2020 for purposes of postmortem. He said he received information of his brother's murder on 15<sup>th</sup> August 2020 but he did not witness the murder.
5. PW2, Zini Mungara Ngati, the sister of the deceased testified that the deceased went missing on 13<sup>th</sup> August 2020 on a Thursday and his body was found in a thicket. That she did not see him on Friday of 14<sup>th</sup> August 2020. PW2 further testified that the deceased quarreled with his wife and daughter



and a report was made to the chairman but his wife and daughter refused to attend on three different occasions. That the deceased also reported the dispute at the police in Kwale and again they defied to respond to the summons on three consecutive occasions. PW2 further said that she thought the problem was over and in August 2020 the deceased was killed and a neighbor went to report to her. She said that the 1<sup>st</sup> accused alleged that the father was a witch and she hired the 2<sup>nd</sup> accused to kill the deceased.

6. In cross examination by Ms. Lozi advocate, she said she was not present when the deceased, his wife and daughter were quarreling but the deceased informed her about the quarrel and the matter was reported to the Chairman. PW2 further said that her brother's wife Halima and the daughter Kwekwe quarreled with the deceased but she did not witness the deceased being killed. She also told Mr. Nabil Advocate that she did not witness the murder and that the deceased only told him about the quarrel with his wife Halima and daughter Kwekwe and not the 2<sup>nd</sup> accused.
7. PW3, Mwachidudu Mwarango, Chairman of Nyumba Kumi testified that on 15<sup>th</sup> August 2020, they received a phone call from Nzee Nguta who instructed him to go to his home and on arrival, he was told that a dead body had been seen in a thicket. That when they went to the thicket, they found the dead body had been burnt and he identified the dead body as that of Madziko. PW3 made a phone call to the Chairman of Bora Community Policing as well as the Chief. PW3 said that the deceased had reported that he had a quarrel with his wife and daughter who alleged that he was a witch but when the community policing members called them, they defied to attend and also defied attending to the police at Kwale and it is subsequent to this refusal to attend that the deceased was killed.
8. PW3 testified that the deceased feared for his life as killing of people alleged to be witches was rampant in the area. He said that the chief made a phone call to the police who came and removed the body after taking photographs. He said that during burial when the deceased person's house was broken into, talimbo and panga were recovered. That although he did not know who killed the deceased, the 1<sup>st</sup> accused person herein was suspected as she disappeared from her home together with her mother and siblings after the murder and nobody knew where they were. He further testified that the first accused was traced at Mzee Chikoza Nyundo's home. That the 1<sup>st</sup> accused person together with Mr. Chikoza and his son were arrested and taken to Kwale Police Station.
9. PW3 in cross examination said he saw the body of the deceased had been placed on a mattress and burnt. He further said that people are paid to kill those who are alleged to be witches and that whenever one is alleged to be a witch, their lives are in danger. He said he did not see the letter summoning the 1<sup>st</sup> accused person but that she defied three summons. He said that when they found the deceased wife and children had deserted the home after the murder, they suspected that they are the ones who had committed the murder. In cross examination by Mr. Nabil, PW3 said that he did not know the 2<sup>nd</sup> accused person. He said that the deceased reported that he had a dispute with his wife and his child the 1<sup>st</sup> accused. He also said he knew the deceased person's wife but she was not in court. He said that allegations of witchcraft in their community exposes one to danger and so he referred the deceased to the Chairman of community policing and to the police. He said the 2<sup>nd</sup> accused led the police to where the metal bar was recovered in the 1<sup>st</sup> accused person's house.
10. PW4, Nguta Nyika, testified that on 13<sup>th</sup> August 2020, he was with the deceased until late in the evening but he did not see him the following day which was a Thursday. That on Saturday, a herdsman went to him and asked that he should accompany him and when they went to the deceased person's land, they saw a dead body that had been placed on a mattress and burnt. He also said he saw maize and bananas at the scene. That when he called Mzee Mwakidudu at the scene, they identified the body as that of Madziko, the deceased herein. He said the scene was not far from the deceased's house where he lived



with his wife and children. He said the deceased informed him of the dispute between him and his wife and children but he did not give the details.

11. PW5, Ndeme Mung'aro Ndeme, Chairman of Community Policing at Banga village testified that in January 2020, the deceased reported that his daughter Nuru had threatened his life on allegations of being a witch. He summoned Nuru, the 1<sup>st</sup> accused, her husband and mother but they defied the summons and in February 2020, he accompanied the deceased to the police station where it was reported that the 1<sup>st</sup> accused had alleged that her father was a witch and threatened to kill him.
12. PW5 stated that when summons were issued for the attendance at the police station, they did not attend and CPL Sirma contacted Nuru through phone and said that her child had been sick and they were given another date but again they did not attend. That everything was quiet between March due to the Corona Pandemic but on 15<sup>th</sup> August he learnt that a dead body had been seen 1 km from the deceased person's home. That police were called and they removed the body from the scene. PW5 said that he saw that the body had been burnt. He also saw maize, bananas and a stick at the scene. There was also a knife with a metallic handle. He also saw that there was a mattress and a bottle that was smelling of petrol. PW5 said they identified the body as that of Madziko Julo, the deceased herein.
13. It was the evidence of PW5 that after the death of the deceased, his wife, the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and Modi who is the son of the 1<sup>st</sup> accused went underground and they suspected that their disappearance must have been connected to the death. That when the 2<sup>nd</sup> accused person returned, he revealed that he had been hired to kill the deceased because he was a witch and Nuru who hired him promised to give him a phone, money and also employ him. That what he said was recorded and the police were called to arrest him. He said that the 2<sup>nd</sup> accused person on arrest led the police to the 1<sup>st</sup> accused person's house where he had hidden a rod that was used to kill the deceased.
14. In cross examination, PW5 said that he accompanied the deceased to the police station and they were given an appointment to go back. He said that the 1<sup>st</sup> accused person declined to attend to his summons or the summons by the police. He said the 1<sup>st</sup> accused and her mother did not attend the burial of the deceased and he is the one who identified the body for postmortem before the body was returned home for burial. He said that after the deceased had made a report, he did not pursue the complaint because of Corona and that crowds were not required at the police station. He said that allegations of witchcraft result into one being killed and such disputes are always referred to the police station.
15. PW6, Dr. Abdalla Mzungu Chimera, Medical Officer at Kwale Sub-County Hospital produced the postmortem report in respect of the body of the deceased herein which was conducted on 21<sup>st</sup> August 2020. He was of the opinion that the death of the deceased was from traumatic brain injury with multiple severe burns.
16. PW7, Bora Mwaiwe, a member of the community policing in Banga village received a phone call from Mwachidudu who reported to him that a dead body had been seen in a thicket in Banga Village. He made a phone call to Chief Amdala Salim Nagalale and the OCS Kwale Police Station and informed them of the dead body. That since it was late in the evening, he went to the scene the following morning and confirmed that indeed there was a dead body in the thicket. That the OCS and the CID officers went to the scene in two vehicles, took photographs and removed the body to Kwale Hospital Mortuary. He said that he saw the body looked like it had been burnt, that the clothes that the deceased was wearing was also burnt, one side of slipper was burnt and that there was banana and maize at the scene. He said that the deceased's home was approximately 100-200 m from the scene.
17. PW7 said he did not know who killed the deceased as he had a good relationship with his neighbours but he had informed him of the dispute between him and the daughter, the 1<sup>st</sup> accused herein who



- claimed the deceased herein was a witch. The claim that the deceased was a witch was reported to the police station and the 1<sup>st</sup> accused was summoned and PW7 said he was shown summons from the OCS by 1<sup>st</sup> accused person when he went to her home. He said that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons are his neighbours and that they had been his neighbours for close to 6 years.
18. PW8, Rama Ngethe Garero, testified that on 15<sup>th</sup> August 2020, he was herding livestock in the forest when the animals which were ahead of him suddenly started running and when he went to see what they were running from, he saw something scary. He went and called Mzee Nguta who went to the scene and identified that what PW8 had seen was the body of a dead person and the body of the deceased herein. He said that the 2<sup>nd</sup> accused Jimbale is the one who had killed the deceased as he had been hired to do it for a pay. That Jimbale also told him that min and Mohamed killed the deceased using a panga and tarimbo and petrol. He also said further that when the deceased died, Jimbale disappeared and when they met, the 2<sup>nd</sup> accused told him that he was at Jomvu. That the 2<sup>nd</sup> accused asked if he had any information about the deceased person's death.
  19. PW8 said that when he got information about the deceased person's death, he went and reported to Ndeme - PW5. He also said that apart from him, he informed many people that he had committed the murder. In cross examination by Ms. Lozi Advocate, PW8 said that the 2<sup>nd</sup> accused was his friend, he knew his home and his parents and that they had not differed. He said he was not present when the 1<sup>st</sup> accused hired the 2<sup>nd</sup> accused to kill his father but he believed what the 2<sup>nd</sup> accused told him that the 1<sup>st</sup> accused hired him to kill her father. He said that the 2<sup>nd</sup> accused told Garero and PW8 that he had killed the deceased. PW8 said that Mohamed who was in the company of the 2<sup>nd</sup> accused when they killed the deceased was a son to the 1<sup>st</sup> accused.
  20. PW9, CPL Shadrack Sirma, of Kwale Police Station testified that on 12<sup>th</sup> January 2020, a complaint by Madziko Julo booked vide OB No 21/1/2020 at 1241 hrs was minuted to him for investigations. The deceased had reported that his daughter Kwekwe had claimed that he was a witch and the deceased wanted the said Kwekwe to be summoned to the station for interrogation. That summons was issued for the 1<sup>st</sup> accused and delivered by the community policing members who had accompanied him to the police station but the 1<sup>st</sup> accused person did not attend. That he made a phone call to the 1<sup>st</sup> accused person, he saw that she was sat Msambweni Su-County Hospital where her mother had been admitted. That the 1<sup>st</sup> accused suggested a date for the next meeting but both the 1<sup>st</sup> accused and the deceased did not attend. That the deceased then made a phone call and told CPL Sirma that his daughter had disappeared from home and instructed to call him any time that she is seen.
  21. PW9 further said that on 16<sup>th</sup> August 2020 at 8.00 am when he reported on duty, the OCS instructed him to proceed to a scene of crime in Banga village and he was accompanied by a driver and a crime stand-by officer together with personnel from scenes of crime. That the scene was processed and the body was removed to the mortuary. CPL Sirma said that Kwekwe did not attend to the summons from January to August 2020 when the deceased was killed. In cross examination by Mr. Nabil Advocate, Mr. Sirma said the deceased did not mention the 2<sup>nd</sup> accused but only complained about his daughter the 1<sup>st</sup> accused. He said that he was supposed to investigate claims of witchcraft made by the 1<sup>st</sup> accused as the same would have exposed the deceased to danger on his life. He said the 1<sup>st</sup> accused person left home one day prior to when she was supposed to attend to the police and the community policing members were supposed to arrest her upon being traced. However, she was not see until the deceased was murdered.
  22. PW10, SP Chitibwa Mwadzombo Said testified that on 18<sup>th</sup> September 2020, CPL Muli requested him to take the statement of a suspect known as Mwango Jimbale Nyawa. He said that the suspect looked like he was underage and told him that he was 16 years. That he interrogated him and got the name of



the mother as Sidi Kombo of telephone number 074591XXXX. That he contacted the mother of the suspect and she arrived at the office at 11.40 am and the statement of the suspect was recorded from 12.50 pm. PW10 said that all the procedures and information required to be given to the suspect was given to him. That the officer who understood Kiduruma interrogated the suspect in the presence of his mother and that after interrogating him and recording the statement, he signed and the mother also signed it. That he took 1 hour 45 minutes to record the statements with a break of 15 minutes in between. He said that he recorded a 12-page statement and that the suspect and the mother signed on every page and the accused wrote his name. The statement that was written in Kiduruma was translated to Kiswahili and a certificate issued to that effect. The statement and certificate were produced as PExh 2 (a), (b) and (c).

23. PW10 said that the suspect said he had not been paid by the 1<sup>st</sup> accused who had hired him to kill her father. He said the suspect was normal though he did not conduct any tests to confirm if he was under the influence of alcohol or drugs. He said he had cautioned the suspect before he took his statement and had the mother attend by paying her transport. In response to Mr. Nabil Advocate's cross examination, he said that the suspect did not have legal representation when his statement was being taken but his mother was present and the environment was conducive for taking his confession. He said the suspect was not threatened to record the statement. He also estimated the age of the 1<sup>st</sup> accused as 16 years and said the suspect led to the recovery of the iron bar that they had hidden.
24. PW11, CPL Stephen Muli, was the Investigating Officer in this matter and he testified that on 15<sup>th</sup> August 2020 while working in the DCIO's office in Matuga, he was instructed to proceed to Bogoni are where a case of murder had been reported and he proceeded to the scene in the company of PC Sirma, PC Mole and PC driver Morisa where members of the public showed them the body of the deceased that had bumps on the head and the whole body. That photographs were taken and body taken to Kwale Hospital Mortuary where postmortem was conducted on 17<sup>th</sup> August 2020. That on 20<sup>th</sup> August 2020 while recording statements of witnesses, he learnt that on 21<sup>st</sup> January 2020, the deceased had reported that his daughter, the 1<sup>st</sup> accused, had claimed he was a witch and CPL Sirma summoned her but she did not attend.
25. PW11 said that on 2<sup>nd</sup> September 2020, the 1<sup>st</sup> accused person was arrested, investigations conducted and she was charged when the 2<sup>nd</sup> accused person confessed that she had hired him and her son Mohamed Juma to murder her father. He testified that upon the death of the deceased, the 1<sup>st</sup> accused and her son fled away from the home but the 2<sup>nd</sup> accused person on arrest led to the recovery of the murder weapon. PW11 also produced the metal bar that was allegedly used to kill the deceased. In cross examination by Ms. Lozi advocate, PW11 said that the deceased did not have any other dispute apart from the one with the 1<sup>st</sup> accused person. PW11 said the 2<sup>nd</sup> accused was arrested from his house upon members of the public informing the police. He said that the panga that was used by the 2<sup>nd</sup> accused person was not recovered but the iron rod that was used by the 2<sup>nd</sup> accused person was recovered when he led the police to where he had kept it.

## **Defence Case**

26. When the accused persons were placed on defence, the 1<sup>st</sup> accused person said in her sworn statement that she did not allege that the deceased was a witch. That on 10<sup>th</sup> January 2020, the deceased person came home and she told him to call her siblings so that they could get money to take her mother to hospital but he declined and that is why he told him that he had a heart of a witch. That the father started quarreling and left. That when she called her uncle and informed her about her mother's situation, he instructed her to put her mother on a motorbike and take her to her uncle's place. That she sold two chicken and got Kshs 1000 which she used to transport her mother to Mariakani on a



- Friday and she remained there for 4 days. She said that when she went to Mariakani, she left her phone at home and she did not receive any summons from the village elder or Nyumba Kumi elder. She said that on 20<sup>th</sup> January 2020 when she returned home, the deceased suffered a crisis because he was diabetic and hypertensive when a neighbor alerted her, she took him to hospital and stayed with him at her home until she recovered.
27. The 1<sup>st</sup> accused testified further that on 16<sup>th</sup> August 2020, she was at Ngombeni Hospital where her son Shaban was sick and while returning home on a motorbike, she found a crowd of people at the junction to her father's home. That people in the crowd started telling her "pole, pole." That when she arrived at her home, she found another crowd and when she inquired, she was told her father had been picked having been burnt. She was told that there were police officers at her home and she got confused and feared as she did not know what could happen. That some people in the crowd advised her that she would be arrested if she doesn't leave and she decided to go to Jomvu where she stayed for 2 weeks.
28. The 1<sup>st</sup> accused said that on 2<sup>nd</sup> September 2020, she left Jomvu at 3.00 pm and when she crossed the ferry, a motorbike rider took her to Mzee Kikoza's home to wait for him as he was taking two passengers to checkpoint before coming to pick her. That the rider did not return up to 8.00 pm and she was forced to sleep in that home. That on 3<sup>rd</sup> September 2020, 8 police officers and community policing members arrived and asked who Nuru was and when she responded that she was the one, she was hit on the left shoulder plate and asked why she killed her father and escaped and she told them she did not kill her father. That on interrogation, she denied having killed her father and on 8<sup>th</sup> September 2020 when she was taken to court. That she was released on bond to attend to the police station on 18<sup>th</sup>, 25<sup>th</sup> and 30<sup>th</sup> September 2020. That on 25<sup>th</sup> September 2020 when she went to the police, she was placed in the cells and on 8<sup>th</sup> October 2020, she was arraigned in court and charged with an offence she did not commit. The 1<sup>st</sup> accused said that she knew the 2<sup>nd</sup> accused as they come from the same village and that he was brought to court in October and charged with her.
29. The 2<sup>nd</sup> accused person testified that on 14<sup>th</sup> August 2020, he was at home and went about his business as usual and that the following day on 15<sup>th</sup>, he got information that someone had been killed but nobody knew who he was. That he went to the scene and saw that the body had been burnt and that the police removed the body to the mortuary and returned it the same day for burial. He said that the police officers who returned the body of the deceased went to the shopping center where he had also gone to buy some things and on his way back while traveling on a motorbike, they came across a vehicle that was coming towards their direction but whenever they gave their motor vehicle way, the motor vehicle moved towards their side and he told the rider to stop.
30. The 2<sup>nd</sup> accused person said that two people came from the vehicle and held him by the hands and legs and that the rider jumped off the motorbike. That he was told that he was being arrested for not having a helmet plus he told them that he was not the owner of the motorbike. That a third person came from the vehicle and slapped hard that he would know why he was being slapped ahead. That he was handcuffed and placed in the motor vehicle where the people continued beating him.
31. The 2<sup>nd</sup> accused said that they arrived at the police station and placed in the cells and the next day at 7.30 am, he was taken to the OCS office and the OCS started interrogating him. That when he asked why he was being arrested, a police officer told him that he was too argumentative and he was told to admit so that he could be released. He said the investigating officer went to the OCS office with two rungus and told him to disclose what happened. That two police officers hit him on the knees and urged him to disclose. That as they were beating him they kept on writing. That he could not say what he did not know. That when a 3<sup>rd</sup> officer came with a pistol and placed it on his head threatening to



shoot, he realized that his life was in danger and that he said he was the one. That was the time he was left and taken back to the cell.

### **Analysis and Determination**

32. In consideration of the evidence of 11 prosecution witnesses and in consideration of the defence witnesses' sworn statements, this court is to determine whether the ingredients of the offence of murder as provided for under Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya have been proved beyond reasonable doubt by the prosecution.

33. Section 203 of the *Penal Code* Chapter 63 of the Laws of Kenya under which the accused persons were charged provides as follows: -

'Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.'

34. The said provision creates elements of the offence of murder that must be proved by the prosecution beyond reasonable doubt as held in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR to include: -

- i. That the deceased died;
- ii. That the death was caused by an unlawful act or omission;
- iii. That the accused person directly or indirectly participated in the commission of the alleged offence; and
- iv. That there was malice aforethought.

### **Death of the deceased**

35. There is no dispute as to the death of the deceased.

### **Death was caused by an unlawful act or omission**

36. According to Dr. Abdalla Mzungu Chimera, he observed that the deceased had 2<sup>nd</sup> degree burns on the head with two deep cut wounds on the temporal region near the left ear involving skull fracture and access to the inner skull. That there was also a slightly depressed skull on the upper side of the temporal bone. He also observed that the torso had also 3<sup>rd</sup> degree burn on the right side of the axillary region extending on the right side flank. There was a second degree deep burn on abdomen on the left side, 4<sup>th</sup> degree burns on the fingers of the right hands, and 2<sup>nd</sup> degree burns on the left arm. These injuries are obviously not accidental or self-inflicted. They were inflicted by a third party and were therefore unlawful.

### **Whether the accused persons participated in the commission of the offence**

37. PW8, Rama Garero is the one who discovered the charred body of the deceased person lying in a thicket and he called Mzee Nguta – PW4, who proceeded to the scene and identified the body as that of Madzigo Julu, the father of the 1<sup>st</sup> accused person. PW8 said that after the deceased had died, the 2<sup>nd</sup> accused person disappeared and when he met him after some time, the 2<sup>nd</sup> accused person told him that he was at Jomvu. That the 2<sup>nd</sup> accused asked if he had any information about the death of the deceased and he went ahead to tell him that he and the 1<sup>st</sup> accused person's son, Modi are the ones who were



hired by the 1<sup>st</sup> accused to kill the deceased. That the 2<sup>nd</sup> accused told PW8 that they used a panga, a metal rod and petrol to kill the deceased.

38. PW5's evidence corroborated that of PW8 that the 2<sup>nd</sup> accused and the son of the 1<sup>st</sup> accused are the ones who committed the murder as after the death of the deceased, they together with the 1<sup>st</sup> accused and wife to the deceased went underground and on return of the 2<sup>nd</sup> accused, he revealed that he was hired to kill the deceased on consideration of a phone, money and employment. It is upon this confession by the 2<sup>nd</sup> accused that the police were called and they arrested the 2<sup>nd</sup> accused person and SP Chitimba Mwadzombo Said recorded his confession on how the offence was committed. In the confession, the 2<sup>nd</sup> accused person says that 1<sup>st</sup> accused had taken them to a witch doctor after they committed the offence at Mzee Kikozza's place in Mbunguni and indeed the 1<sup>st</sup> accused person was arrested at Mzee Kikozza's place on 3<sup>rd</sup> September 2020.
39. The 2<sup>nd</sup> accused person's defence was that he was coerced and beaten into confessing that he committed the offence but PW10, the officer who took the confession outlined the procedures followed including cautioning the 2<sup>nd</sup> accused and calling his mother to be present before the confession was taken. The said officer was cross examined and he said that the 2<sup>nd</sup> accused person was normal and not under the influence of any drugs at the time that he was giving his confession and said that the suspect was bitter as he had not been paid by Mama Nuru after she had hired him to kill her father. PW10 said that the 2<sup>nd</sup> accused was honest and did not hide anything from him. The 1<sup>st</sup> accused person had claimed that his father, the deceased herein was a witch and threatened to kill him and when the matter was reported to PW5 and to the police, the 1<sup>st</sup> accused person, her mother and husband defied the summons only to plan for the killing of the deceased person. The confession of the 2<sup>nd</sup> accused person to PW5, PW8 and PW10 coupled with the reports made to community policing agent – PW5 and the police as well as the disappearance of the accused persons together with the 1<sup>st</sup> accused's son and mother after the offence is a strong indicator that the accused persons committed the unlawful act that led to the death of the deceased.

### **Malice aforethought**

40. Section 206 of the [Penal Code](#) defines malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.



41. On the element of malice aforethought in respect to Section 206 of the *Penal Code*, the court held as follows in the case of *Isaac Kimathi Kanuachobi v R* (2013) eKLR: -

“There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused killed in further course of a felony (for example rape, a robbery or when resisting or preventing lawful arrest) even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought.”

42. The elements to prove malice aforethought were settled in the case of *Ernest Asami Bwire Abanga alias Onyango v R* (CACRA No 32 of 1990) where the Court held:

“the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased.”

43. From the confession by the 2<sup>nd</sup> accused person, they waylaid the deceased and when the deceased sensed danger and started running towards his home through the shamba, they pursued him, hit him and cut him on the head with metal rod and panga and when he had fallen, they took the sack that he was carrying, put it on his chest, poured petrol and set him on fire and left him to die. The weapons and force used including the setting on fire using a flammable liquid was intended to make sure the deceased could not survive. There was obvious and clear intention on the part of the assailants to get rid of the deceased as per the instructions given by the 1<sup>st</sup> accused. No other inference can be made other than that the assailants were actuated with malice aforethought in the commission of the offence.

44. In conclusion, this court find that the prosecution has proved its case beyond reasonable doubt. The accused persons are found guilty of the offence of murder and convicted in accordance with Section 322 of the *Criminal Procedure Code*.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 30<sup>TH</sup> DAY OF OCTOBER 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the State

Ms. Lozi Advocate for the 1<sup>st</sup> Accused

Ms. Lozi Advocate H/B for Mr. Nabil Advocate for the 2<sup>nd</sup> Accused

Accused persons present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

Mr. Ngiri: I don't have previous records

Ms. Lozi: We can take a date for mitigation



Order: Mention on 13.11.2023 for Victim Impact Statement, Mitigation and Sentence. Production order to issue.

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

30.10.2023

