



REPUBLIC OF KENYA



KENYA LAW
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**State v Rono alias Malakwen & 2 others (Criminal Case 27 of 2018)
[2023] KEHC 26219 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE 27 OF 2018
RE ABURILI, J
NOVEMBER 28, 2023**

BETWEEN

STATE PROSECUTION

AND

ISAAC KIPTOO RONO ALIAS MALAKWEN 1ST ACCUSED

PIUS KIPKORIR MOSONIK 2ND ACCUSED

JULIUS KIPYEGON MENGICH 3RD ACCUSED

JUDGMENT

Introduction

1. The three accused persons herein were 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 17th November 2018 at Jepkechei Village, Nyangone Location, Muhoroni sub-county, within Kisumu County jointly with others not before court, they murdered one George Anyango Obala alias Bengo.
2. The accused persons pleaded not guilty to the charges against them and the matter proceeded to full trial, partly before my processor F.A. Ochieng J and partly before me.
3. The prosecution called a total of fourteen (14) witnesses in support of its case which is summarised below. At the close of the prosecution case, the 2nd accused person was acquitted under section 306(1) of the Criminal Procedure Code upon being found to have no case to answer while the 1st and 2nd accused persons herein were found with a case to answer and were placed on their defence.



The Prosecution's Case

4. PW1, a protected witness testified that on the 17th November 2018 at around 2pm, he was walking around Nyangore area near the farm of Effie Owuor who testified as PW3's when he saw 3 tractors, a prado car and a saloon car in the far. He testified that two of the tractors were red and the 3rd one was green while the prado was grey and the saloon car was white in colour. He testified that the saloon car was far away and so he did not see its registration number.
5. PW1 testified that he saw Paul in the Prado driving towards the police lines having been injured. He stated that before Paul drove away from the farm, PW1 had witnessed a fight between Malakwen, Cheberaria, Mengich, Paul and George. He testified that all 5 of them are well known to him.
6. PW1 testified that the fight took place in the farm and that he saw Malakwen cutting Paul with a panga. He stated that Malakwen was dressed in a red T-shirt and jeans trouser. He testified that he saw Mengich who was also armed with a panga threaten to cut Paul. PW1 testified that Cheberaria cut George with a panga and that he saw Paul lifting his hands while he was kneeling down next to Malakwen, Cheberaria, Mengich and George. It was his testimony that he saw Mengich and Malakwen walk away from where Paul was and to where George was where Malakwen cut George into pieces until George died. He testified that Chebararia and Mengich also cut George. He reiterated that Malakwen was the first to cut George followed by Mengich and Chebararia.
7. PW1 testified that he was about 50 metres from the scene of crime and could clearly see what was happening in the farm. He testified that Malakwen, Chebararia and Mengich were armed with long pangas while both Paul and George were not armed. He testified that Paul managed to drive away from the scene towards Chemilil but that he was bleeding on the head and hand but that George had been killed at the farm.
8. PW1 testified that he later recorded his statement with the police. He identified Malakwen as the 1st accused and Mengich as the 3rd accused. He testified that Chebararia was not in court and that although the 2nd accused Kirongos was known to him, he did not see the 2nd accused, on the material date.
9. In cross-examination, PW1 reiterated his testimony in chief and further stated that Mengich ran away before George was killed.
10. PW2 Paul John Owuor testified that he hailed from Kendu Bay but lived in Kibos in Kisumu. It was his testimony that he worked for Sukari Estate which manages the sugar cane estate owned by his mother, Retired Justice Effie Owuor in Miwani, Kibos and Nyamure farms.
11. PW2 testified that he managed the farm from 2002 unto 2007 when they experienced the effects of Post-Election violence and their properties in the farm were vandalized and damaged. He testified that after 2007 they decided to lease out the farm and that he was responsible for the management of the farm with the assistance of a farm manager George Anyango Obala alias Bengo, the deceased herein.
12. PW2 testified that the deceased was the one who would lease the portions of the property to locals on their behalf and that the deceased had worked with their family for over 20 years. It was his testimony that around 2016 -2017 the tenants started to vandalize and destroy the property and that some locals brought their cows to feed on the crops. He testified that they had reported the matter to the police and the District Commissioner-DC had called for a meeting on the farm to sort out the issues.
13. PW2 testified that prior to the DC's meeting, a previous meeting by the locals had been held in his absence which meeting was confirmed by the Chief and attended by the 1st accused who said that he



would take the land for free. PW2 testified that his family had not agreed to let 1st accused use their land for free.

14. It was his testimony that after the DC's meeting took place, it was agreed that no farm would be taken for free and that the family declined to lease small portions to the locals. He testified that on the 9th November 2018 the Chief, Maurice, called him and informed him that there were tractors ploughing their fields and further that the 1st accused and one Koros, also known as Kirongos, were at the shamba. He testified that the Chief advised them to report the matter to the police which he did in the company of the deceased on the morning of the 17th November 2018 at Chemilil Police Station.
15. PW2 testified that Sergeant Chumba who took their statement asked them to get the registration numbers of the tractors that were ploughing the fields and so at about 2:00pm, PW2 and the deceased proceeded to get the registration numbers of the tractors on the farm. He testified that at the farm, they found some 3 tractors. He further testified that they parked on the side of the road near where the tractors were and walked about 200 metres into the farm where they found 3 tractors ploughing the fields, 2 of which were red and the other one was green.
16. PW2 testified that they tried talking to one of the tractor drivers who did not listen and that there were about 10 other people clearing the farm and burning rubbish. It was his testimony that the deceased had a camera phone and PW2 asked him to take pictures of the tractors which he did. He testified that as they were taking pictures, a tall man came running towards them from the Toyota Corolla and even though PW2 did not recognize the said person, the deceased informed PW2 that the man was Marakwen. He testified that Marakwen was dressed in a red short sleeved shirt and black trouser.
17. He testified that the tall man shouted at the deceased and stated that the deceased had been disturbing him for long and further that the man threatened to kill the deceased. PW2 testified that the tall man then took a panga from one of the people that was clearing the farm and advanced towards them so he advised the deceased to go behind PW2 as PW2 was a licensed firearm holder. He testified that he decided to whip out his firearm after he sensed danger to scare away the tall man who was threatening the deceased.
18. PW2 testified that he was walking facing the tall man as the deceased held PW2 by his shirt as he walked backwards. He testified that when he realized that the tall man was still coming towards them, he shot once in the air to scare him away which made the people in the farm to run away but did not scare the tall man who was running in a zigzag manner as he approached them. He testified that he shot twice in the direction of the tall man but did not shoot him.
19. PW2 testified that the tall man was whistling loudly as he came towards them and suddenly, the deceased left PW2 and ran towards their car. He testified that the tall man arrived where PW2 was and cut PW2 on the left hand forcing PW2 to bend then the tall man cut him on the back of the head twice. He testified that he did not see the person that cut him on the left side of stomach as he fell down after he was cut on the head.
20. PW2 testified that while he lay on the ground, the tall man cut him on the hand a second time and then ran towards the direction of the deceased. He testified that though he shot 4 times, he did not shoot anyone and that his gun jammed. He testified that the tall man also cut him twice on the left side of the stomach. It was his testimony that from where he lay on the ground, he could not see the deceased and that a man came over to where he lay and after the tall man talked to the man, the man ran back towards the direction that George had gone. He testified that the man hit PW2 on the head once before he ran away and asked PW2 where the gun was and despite the man looking for it, he did not find it.



21. PW2 testified that he walked to the car which was about 10 metres away, got into the car and drove towards where the deceased was. He testified that he saw the deceased being attacked by a group of people who were armed with pangas and that one of the attackers included the tall man that had attacked PW2 and that there were 2 other people. He testified that the deceased lay on the ground as he was being attacked and that he was bleeding profusely.
22. It was his testimony that he recognized the tall man because he had a bright red shirt. He testified that he also recognized Mengich, someone he had seen in the area around the farm prior to the incident, as the man who came to him and attacked him asking for PW2's gun. PW2 identified the tall man as the 1st accused and Mengich as the 3rd accused. He also identified the sharp panga which he said he saw the 1st accused was armed with, firearm Taurus, belt holder, magazine for the gun and 12 rounds of ammunition as well as the certificate authorizing him to hold a gun.
23. PW2 testified that when he got into the car, he could not see too well because he was bleeding a lot from the head and that he realized that the deceased was lying on the ground with some people around him. He testified that he drove about ½ kilometers away and stopped to stop the bleeding with his clothes and thereafter he drove on for about 4 to 5 kilometers where he found a tractor belonging to Chemelil Sugar Company and hooted to attract attention and eventually he was assisted and taken to Chemelil dispensary before being transferred to Aga Khan Hospital Kisumu and eventually to Nairobi Hospital. He testified that on the way to hospital, he called his family, friends and the police and informed them about the incident.
24. PW2 testified that following his discharge from hospital, on 30th January 2019 at 11:00am police officers Odemba and Langat summoned him to Kondele police station to identify a suspect that had been arrested. He testified that he went to a parade of about 4 or 5 people where he was able to identify Mengich, the 3rd accused who had asked for PW2's gun when they were attacked. PW2 further identified Malakwen as the 1st accused. He testified that he knew the 2nd accused as Kirongos. He testified that he saw the 2nd accused on 17th November 2018 at the farm and on 30th January 2019 when recording his statement.
25. In cross-examination, PW2 reiterated his testimony in chief and further stated that no identification parade was carried out in respect of the 1st accused. He further stated that the 3rd accused hit him once on the back of the head then walked away. He admitted that he did not see the 3rd accused attack the deceased. PW2 admitted that there had been skirmishes between the 1st accused's family and his family. It was his testimony that Kirongos was unknown to him before 17th November 2018. He further stated that legitimate tenants on their farm used to plough their land with tractors. He stated that the 1st accused came out of the white Toyota Corolla car parked on the farm. He stated that he only drew out his gun when he the 1st accused threatened PW2 and the deceased. He identified the panga which he stated looked like the one the 1st accused was armed with.
26. PW3 Effie Lolombo Owuor a retired Judge of the Court of Appeal of Kenya testified that she had farms in Nyangeta, in Chemelil and in Miwani and that the farm in Chemelil was in Nyangore area. She testified that she was the registered owner of the piece of land in Chemelil which had previously been registered in the name of her late husband George Owuor and that the land measures about 260 acres. PW3 testified that the farm was managed by her two sons Paul Owuor and Allan Majisu and previously by her manager the deceased.
27. It was her testimony that the deceased had lived with them since the late 1970s and that he had worked for them upto 2015 when they parted ways but that he used to still visit the farm and carry out the management of her properties. PW3 testified that in 2007, her farm was invaded and property



- destroyed so she moved most of her workers away from it. She testified that the deceased George would still go there as they had leased part of the farm and cultivated part of it. She testified that even after 2007, people whom she did not know still returned to invade the farm and those of her neighbours. She further testified that in 2013, she had leased part of her farm to a person known as Mwalimu who had planted sugarcane but that at one time, he went to the farm and was killed and his brother injured.
28. PW3 testified that 3 months before November 2018, the local provisional administration informed her that some people had invaded the land and were ploughing. It was her testimony that her son George had made various reports to the police about the invasion. She testified that on the 17th November 2018, she received a report from her son Allan at about 11am that her son Paul and the manager George had been killed at the farm. It was her testimony that prior to that, Paul had informed her that he was going to the farm having received information that some people had invaded the farm and were ploughing.
 29. It was her testimony that thereafter, she was informed that George had been killed and that Paul who had been seriously injured was taken to Aga Khan hospital. She testified that she received information that the person that killed George and injured Paul was one Malakwen. PW3 testified that on the 18th November 2018, she travelled to Kisumu and visited her son at Aga Khan hospital where she found him in a lot of pain. It was her testimony that Paul informed her that they had been attacked and George was killed. She testified that later Paul was transferred to Nairobi hospital for further treatment.
 30. PW3 testified that she found police at Aga Khan hospital who informed her that no arrests had been made and that she later recorded her statement on the 25th November 2018 after George had been buried. She testified that she did not know any of the accused persons and that later, the police called and informed her that a man called Malakwen had been arrested
 31. In cross-examination, PW3 stated that she was not at the scene of crime and did not know the person who killed the deceased.
 32. PW4 Mary Atieno Anyango testified that the deceased was her husband and that he used to work as a manager in Justice Effie Owuor's farm in Nyangore area. She testified that in 2015, the farm was invaded by some people without the permission of the owner and that in 2017, the chief Maurice, called the deceased and requested him to team with him so that they could plough 10 acres of that land but George refused.
 33. It was her testimony that in February 2018, the Chief called the deceased and informed him that some people had invaded the farm and told him to go and record a statement but the deceased told him that he had already reported the matter to the police. She testified that on the 17th November 2018, which was a Saturday, while they were at home, the deceased was picked by Paul so that they could go to the farm in the morning. She testified that at around 1pm, she called the deceased but there was no response.
 34. PW4 testified that at about 2pm one Job, an employee of Effie Owuor called her and asked her to go to the farm because there was a fight between George and some people at the farm but she didn't go and instead went to Chemelil police station where the police told her that they had not received any information from the farm. She testified that she returned to her shop and while there, her brother in law called and informed her that George had been killed so she returned to Chemelil police station where she found Chief Maurice.
 35. PW4 testified that she accompanied 3 police officers and Chief Maurice to the farm at Nyangore where she noticed that about 40 acres of the farm had been ploughed. She testified that she saw her husband's body which had severe injuries. She testified that there were no people on the farm when they arrived



- and that the Police collected the body and removed it to Aga Khan hospital mortuary. She testified that the police took photographs before the body was removed from the farm.
36. PW4 testified that a postmortem on the body of George was conducted at Aga Khan hospital mortuary after it was identified by her aunt Benta Akumu. She testified that she knew the 1st accused, who had once bought a mattress from her shop. She further testified that the 2nd accused used to buy goods from her shop and that she used to see the 3rd accused at Chemelil roundabout shopping centre.
 37. PW5 Josephat Kimutai Koech, the Chief of Kapsisiwa location, Nandi County testified that he had been Chief since 2018 and that he knew the 1st accused. He testified that on the 19th November 2018 he met a certain lady, wife of the son of Kimutai, who informed him that there was a visitor at the home of Alice Ayuma, the home of the deceased Kimutai Busieneri. He testified that together with a village elder, Benjamin Tanui, they proceeded to the said home where they found the 1st accused sat on the Eastern side of the homestead in the company of Kiptoo, the son of that home.
 38. PW5 testified that the 1st accused was drinking soup from a cup and so he greeted him and asked him to identify himself. He testified that the 1st accused informed him that his name was Shadrack Kipkosgei but on seeking to see his national identity card, the 1st accused informed him that he did not have the identity card. It was his testimony that the 1st accused was unable to name the leaders from where he came from and only managed to name the governor of Uasin Gishu County, Jackson Mandago, where he claimed to come from.
 39. PW5 testified that as the 1st accused could not properly identify himself, PW5 decided to have him arrested but when he tried to handcuff the 1st accused, the 1st accused stood and resisted. He testified that he and his two village elders then handcuffed the 1st accused and proceeded to his office where he interrogated the 1st accused. He testified that the 1st accused revealed to him that he was the person who was wanted in Kisumu as he was the one who killed the workman in Kisumu. It was his testimony that the 1st accused asked him to let him go to Tanzania but he refused and assured him he was in safe custody.
 40. PW5 testified that he called the DCC Mr. Nyamache and informed him that he had arrested a suspect of high profile and when the DCC later arrived at PW5's office, PW5 handed over the 1st accused to the DCC who left with him. He testified that on the 21st November 2018, a homicide team from Nairobi went to his home and led him to the home where he had arrested the 1st accused. He testified that he recorded his statement after narrating to them of what he knew. PW5 identified the 1st accused in court.
 41. In cross-examination, PW5 stated that when he arrested the 1st accused, the 1st accused was dressed in a black cotton/nylon trouser but he could not recall the colour of his shirt. He stated that the shirt had buttons and was bluish in colour. PW5 further stated that the 1st accused had a jacket, shoes and socks and generally appeared clean. He testified that he did not see if he carried spectacles and could not see any blood on his clothing. PW5 stated that the 1st accused was not assaulted.
 42. In re-examination, PW5 testified that he only recalled the black trouser that the 1st accused wore not the colours of the other clothing.
 43. PW6 Maurice Otieno Opiyo, the Chief Chemelil Location testified that he had been a Chief for the last 13 years. It was his testimony that on the weekend of 17th November 2018, he received a phone call from Walter Abiero, the Assistant Chief of Kibigori asking him if he had received some information of what was happening in Effie Owuor's farm where there were fights. He testified that he went to the police station but before reaching the police station, he found the police Land rover on the road



- and the OCPD who was in it called out to him to enter the vehicle so that he could take them to Effie Owuor's farm where the Manager of the farm had been killed.
44. PW6 testified that he called the 1st village elder who directed him on the route to follow to the crime scene and that at the scene, they found the manager lying down in a ditch with his head cut from the neck in a pool of blood. He testified that the deceased wore a T-shirt and a white sport shoes. He testified that they did not find any other person at the scene.
 45. It was his testimony that investigations into the murder of the deceased started and on the 18th November 2018, a security team meeting was convened near Effie Owuor's farm where people were asked to volunteer information on the suspects. He testified that they started looking for the suspect who was being mentioned adversely as Isaac Kiptoo among other names and that later, he received information that the suspect, Isaac Kiptoo has been arrested. He testified that he knew Isaac Kiptoo because he was a brother to the Nyangori village elder, Mr. Simon Kibet. He further stated that he also knew Pius Kipkorir Musonic who was a farmer and owned tractors for ploughing farms. PW6 testified that he did not know the 3rd accused and did not know why he was arrested. In re-examination, PW6 reiterated his testimony.
 46. PW7 Raphael Okal Oloo, a field Assistant at Chemelil Sugar Company for 10 years testified that he managed a tractor for his brother Kennedy Obuya and that he started managing it on 18th October 2018 when the tractor was bought. He testified that the tractor was driven by one Daniel Ochieng Onyango while the turn boy was Shem Odhiambo Mamwang.
 47. It was his testimony that on the 6th November 2018, Daniel the driver called and informed PW7 that his friend a driver had informed him that his friend wanted a disc plough to go and plough his farm. He testified that he eventually called the alleged owner of the land one Malakwen and was subsequently taken to the farm where Malakwen directed them where to plough, an area of 2 acres after which Malakwen paid him Kshs. 9,000 in cash the cost of ploughing.
 48. PW7 testified that he subsequently ploughed one acre for a friend of Malakwen called Kibet on the same farm, 2¹/₂ acres for another friend of Malakwen after which Malakwen gave them another portion to plough. He testified that they ploughed several portions until 10th November 2018 as Malakwen kept asking them to go and plough though they did not plough on 11th, and 12th November 2018. He testified that on the 13th November 2018, they went and ploughed another parcel different from the other pieces of land they had ploughed previously and that on the 14th November 2018, Malakwen again called them to go and plough the bigger farm until 15th November 2018.
 49. It was his testimony that on the 17th November 2018, Malakwen called him saying there was more land to plough so he sent the driver and turn boy in the morning then followed them at about 10.00am. He testified that on arrival, he found when they were ploughing the land and that at 1pm, he went to buy lunch for the turn boy as the driver was still ploughing so the turn boy went back to the farm to assist the driver. He testified that since work was more, he and the turn boy went to buy fuel at the Polopolo trading centre and that is when the tractor driver called PW7 saying that they should not go to the farm because people were fighting and that he had left the farm. He testified that the following morning, he was called by an officer called Martin requiring him to go to Rugaa Police Patrol Base to record a statement. It was his testimony that he went to the Chief who escorted him to the camp where he recorded his statement.
 50. PW7 identified Malakwen as the 1st accused who gave him ploughing work. He testified that he did not know the 2nd and 3rd accused



51. In cross-examination, PW7 stated that he was not present when the murder incident occurred. He further stated that Malakwen informed him that the farm they were ploughing was his.
52. In re-examination, PW7 testified that prior to the incident, he knew the farm belonged to Malakwen who also leased it out to various people to plough but after the incident, he learnt that the farm belonged to Effie Owuor.
53. PW8 Habil Charega Asichi testified that he was a driver at Chemelil Sugar Factory for 26 years. He testified that on the 17th November 2018, he left his house and reported on duty at 7am, took the tractor and a turn boy and took seed cane for planting on A16 Section of nucleus. He testified that at about 1.30pm, a white prado passed by going towards Rugaa farm but that it returned shortly moving slowly. He testified that he saw a hand being raised thrice from the prado and on approaching, he was shocked when he saw the occupant driver who had been cut on the head severally, on his hands and had his intestines oozing out. He testified that the vehicle's inside was bloody all over.
54. PW8 testified that the driver only said one word 'mwenzangu ameuawa.' He testified that he never asked the driver occupant of the Prado any question and that he used a cloth to tie the injured's intestines after removing him from the vehicle, to avoid the intestines spilling out then placed him in the vehicle and drove him to Chemelil Hospital.
55. PW8 testified that the doctors only put him on a drip and then placed him in an ambulance and drove him to Kisumu Hospital. He testified that later in the evening, he received a phone call from one, Allan who told him that the person he had assisted was Paul, his brother. He testified that Paul had a gun which he saw as he was tying him. He testified that it was in his trouser. PW8 testified that he did not know the 3 accused persons in the dock. In cross-examination, he stated that he did not witness the incident.
56. PW9 Samson Kipsirem Keiya testified that in 1985, he was employed by Justice Effie Owuor as her watchman on her farm. He testified that he cared for her animals and sugarcane until 1990 when he left after the demise of his employer George Owuor and due to lack of pay. He testified that he lives across the river from Judge Effie's farm. He testified that he was the one who employed the deceased. He further testified that he used to farm part of the lower farm as workers were allowed to farm part of it and that later, Malakwen and his brother also came and started cultivating part of it.
57. It was his testimony that the deceased leased a part of the farm to Charles Tanui. He testified that some people from the area invaded the land and started cultivating and demanded to subdivide and share it. He testified that they reported the invasion to the District Commissioner who called for a Baraza at Chepkechei where the Manager told the residents who were invading that the land could only be leased and not invaded to be shared but Malakwen and his group did not want to hear that and subsequently formed a gang and invaded the farm by force wherein they destroyed Charles Tanui's cane worth 1.5 million.
58. He testified that sometime in 2018, he received a call that the Manager of Effie Owuor had been killed and that there was war. He testified that he went to the scene and found Bengo had cuts on the neck and hands. PW9 identified Malakwen as the 1st Accused person whom he knew as the elder brother of Malakwen was married to the sister inlaw of PW9. He stated that Pius Kipkorir was his neighbour from Nandi County and that he knew Julius Kipyegon Mengich is from my village. PW9 identified photographs taken at the scene and he also identified the body of the deceased lying.
59. In cross-examination PW9 stated that he was not present when the fight broke out at the farm.



60. PW10 number 114160 PC Benard Rono testified that in November 2018, he was at Nyangori Patrol Base which was under Chemelil Police station in the company of Corporal David Sang, PC Caleb Koech and PC Joseph Macharia carrying out patrol duties as usual in the area. He testified that he went to watch video with Joseph Macharia at the Chepkechei centre where he met Malakwen who became his friend and they exchanged phone numbers.
61. He testified that on a certain day, some cattle were found at the police patrol base and that the 1st accused called him and requested him to have the animals released which he did. PW10 testified that on the 17th November 2018, he was in the camp with his colleagues and on his way to Chepsweta centre to buy food, he received a call from Corporal Sang who informed him that somebody had been killed on the farm that Malakwen had been ploughing and thus asked PW9 to return to the Base which he did.
62. PW10 testified that the 1st accused called him and told him that he, the 1st accused had killed two people and that they should collect their bodies from the sugar cane plantation. He testified that on inquiry as to why he had killed them, the 1st accused told him that he had killed them but he was going to surrender to the nearest police station.
63. He testified that they went to the scene and found one person killed in the farm. He testified that the deceased wore a red striped T-shirt and had cuts on the neck, chest and abdomen. PW10 identified Malakwen as the 1st accused. He testified that he knew Mengich, the 3rd accused as he met him often at work, on the road and at the video show.
64. PW11 Richard Kimutai Langat a Government Analyst at Kisumu Government Chemist testified and produced a report done by his colleague Dalmas Kipsang Kibet who was on leave. He testified that from the report, on 3rd December 2018, Dalmas received a police exhibit memo form from Vincent Langat a police officer, Homicide Unit. He testified that the complainant was George Anyango Obala alias Bengo (deceased) and John Paul Owuor a victim whereas the accused was indicated as Isaac Kiptoo Rono alias Malakwen.
65. He testified that the memo form forwarded the following items for DNA genetic relations:
- a) White Grey Shirt stripped 'IKR' (A)
 - b) Plain Navy blue long trouser IKR (B)
 - c) Grey Jacket IKR (C)
 - d) Navy blue trouser and a belt IKR (D)
 - e) Panga - blood stained IKR (E)
 - f) Red collar T-Shirt IKR (F)
 - g) Buckle swab from the suspect IKR (G)
 - h) Black jeans trouser from the deceased GAO (A)
 - i) A black boxer from the deceased GAO (B)
 - j) A black underwear from the deceased GAO (C)
 - k) A pair of black/grey striped socks from the deceased GAO (D)
 - l) A pair of black stained shoe – white/black/red colour GAO (E)
 - m) Wrist band and sunglasses both of them were blood stained GAO (F1 and F2) respectively.



- n) Cartilage from the deceased George Anyango in a container marked G.
 - o) 2 empty Brookside mild packets ½ litre each marked NR 2.
 - p) Pistol swabs marked JPO i-v.
66. PW11 testified that on the 7th February 2019, John Paul Owuor a victim was brought to the Government Chemist and a buckle swab was taken from him 'JPO'. He testified that on preliminary examination it was found as follows: -
- i. The panga which was blood stained marked IKR (E) and the black boxer from the deceased GAO (B) were tightly stained with blood of human origin.
 - ii. The white/grey stripped shirt item IKR (A), the Grey jacket IKR (C), the black underwear GAO (C) and a pair of black/grey stripped socks GAO (D) a, the wrist band GAO (F1) and sun glasses GAO (F2) were all moderately stained with blood of human origin.
 - iii. The black jeans trouser GAO (A), left leg shoe GAO (E) were heavily stained with human blood.
 - iv. The Navy blue trouser IKR (D) and red collar T-shirt IKR (F) and the 2 empty Brookside milk packets NR2 had no profiles.
67. He testified that DNA profiles were generated from the listed items as above and extracts subjected to DNA analyzer where DNA profiles were generated except for the items which had no profiles and a table was made giving the results. He testified that from the DNA profiles generated, the results were as follows:
- i. The DNA profile generated by the blood stained white/grey stripped T-shirt IKR (A) and the Grey jacket IKR (C) matched the DNA profile of the accused person Isaac Kiptoo Rono.
 - ii. The DNA profile generated from the swabs of piston JPO I - v matched the DNA profile of the victim John Paul Owuor.
 - iii. The DNA profile generated from the blood stains on the panga IKR (E) and the blood stains on the black jeans trouser of the deceased GAO (A) and the black underwear of the deceased GAO (C) and the black boxer from the deceased GAO (B) and a pair of socks GAO (D) and the left leg shoe item GAO (F) and the wrist band GAO (F1) and wrist band GAO (F2) matched the DNA profile of the deceased George Anyango Obala.
68. PW11 testified that the report was written on 8th March 2019 and he produced it as P. Exhibit 1(a) and the exhibit memo dated 7th February 2019 as P. Exhibit 1(b).
69. PW12 Dr. Dickson Muchana, a Government Pathologist based at Kakamega County Referral Hospital and in charge of Western and Nyanza Region testified that he did an autopsy on the body of George Anyango Obala the deceased at Aga Khan Mortuary on 19th November 2018 at Kisumu. He testified that two witnesses identified the body of the deceased being Mary Atieno Onyango and Benta Akumu.
70. He testified that externally, the body was bloody of a male adult of about 40 years, well nourished, 183cm in height, well preserved in the fridge, 2 days after death. He testified that the nails, lips and tongue were bluish in colour (cyanosis).
71. It was his testimony that there was a decapitation of the head on the right side, held by a small skin on the left side, that there was an abrasion collar on the back side. He further testified that the deceased



had a deep cut on the right lower jaw, twice, sharp choppings on the right shoulder, the right humerus - arm was slashed into two, two cut wounds - sharp on the right hand (defence cuts) 3 cuts on the right mid chest going down and one cut on the right mid chest and deep. PW12 testified that there was a cut below the chest cavity and that the blood vessels were severed at the parts named above following the deep cuts. He testified that in the abdomen, there was swelling of mesentery (supports intestines) and that there was little food in the stomach. He testified that the spine and spinal code was cut at the level C12.

72. PW12 testified that he found the cause of death to be decapitation secondary to force trauma following assault. He testified that he took some soft part of the rib (cartilage and handed to the Investigating Officer for further DNA analysis. He testified that he signed the Postmortem form on 19th November 2018 and issued Burial Permit No. 0110519. PW12 produced the postmortem Report as P. Exhibit 2.
73. PW13 No. 235215 Chief Inspector Abel Onyapidi attached to DCI Kisumu in charge of Crime Scenes Investigations testified that he had a crime scene photographic report of 28th March 2019 done by Chief Inspector John Songa of Scenes of Crime Kisumu who had been transferred to DCI Malaba.
74. He testified that the report covered 124 photographs taken on various dates from 17th November 2018 at around 1730 hours at Chemelil within Muhoroni Sub-county. He testified that other photographs were taken at Chemelil Police Post on the 21st November 2018 at 16.30 hours within Nandi County, Chesomey Sub-county; on the 23rd November 2018 at 18.00 hours at Nyangori village in Muhoroni Sub-county within the Banks of River Kundas.
75. PW13 testified that the report narrated what was captured in the photographs of a dead body with multiple injuries, motor vehicles including 2 tractors, mobile telephone, a panga and blood stains. He testified that the photographs and report related to a murder case. He produced the Report and certificate as P. Exhibit 3(a) and the photographs as P. Exhibit 3(b) (1-124).
76. PW14 No. 85366 Cpl Fredrick Odemba attached to DCI Headquarters Homicide Investigations Department, Nairobi, the investigating officer in this case testified that on 19th November 2018 at about 7am, he was heading to his office when he received a call from his then in-charge Mr. Martin Nyugutto who instructed him to return to his house and prepare his personal items to go and take over investigations of a case in Kisumu, Muhoroni in a farm of Retired Justice Effie Owuor where her farm Manager George Bengo had been hacked to death and her son Paul Owuor had been hacked but was still alive.
77. He testified that he proceeded to Kisumu Regional office at 5pm and was received by DCI Mr. Barasa, the Regional Coordinator who briefed them and told them about issues around farms in Chemelil area affecting the Retired Justice Owuor's farm and reports by the now deceased farm manager. He testified that as they were still being briefed, Mr. Barasa received information that DCI Chemelil had already booked in one Isaac Kiptoo Rono alias Malakwen who had been arrested around Kipsisiya area in Baraton, in Kapsabet.
78. PW14 testified that the suspect was brought to Kisumu Regional Office and that he was dressed in a whitish stripped shirt and a bluish trouser and looked very tense so they gave him a seat and told him to go easy then started interrogating him.
79. He testified that the suspect explained to them that after the incident, he ran to his house near the scene, changed his dressing, crossed a river into Nandi and went to Kaptumo area where he spent a night then travelled to Kapsisiya where he was arrested by the area Chief and village elders and taken to Kapsabet Police station and the latter connected him to Chemelil DCI who collected him.



80. PW14 testified that as they were interrogating the suspect, they noted some blood spots on his clothing and so they arranged to get him different clothing then they took possession of the clothes that he was wearing, sampled them and forwarded to the Government Chemist for Analysis. He testified that later in the evening, the DCI team from Muhoroni made several arrests of the people who were allegedly at the farm of the alleged incident specifically Pius Kipkorir Mosonic, Stanley Kipkorir, Antipas Kipruto Choge, Samson Kosgei Rotich, Eric Okumu Otieno and John Kipkemboi Kogo. It was his testimony that they presented the arrestees to Tamu Law Courts vide a Miscellaneous Application and got an order to hold the suspects pending investigations.
81. He testified that on the 21st October 2018 they proceeded to the scene at the farm of Rtd. Justice Effie Owuor, led by officers from a police post established next to the farm where they saw freshly ploughed portions of the land, the place where the deceased's body was found lying on the farm near a sisal plant. He testified that they walked through the farm and saw young growing sugarcane plantation which they learnt was planted by Isaac Kiptoo Rono and freshly ploughed land ready for planting cane.
82. PW14 testified that they embarked on recording witness statements after which they got in touch with the family of John Paul Owuor who was admitted at Nairobi Hospital and so PW14 returned to Nairobi on 24th November 2018 and visited John Paul Owuor in a Nairobi Hospital ward undergoing treatment where they took his statement. He testified that they managed to get a statement recorded by the deceased on 17th November 2018 at Chemelil Police station which he produced under Section 33 of the *Evidence Act* as P. Exhibit 10.
83. He testified that they found when the Chemelil team had already recovered a panga by the river bank, 200 metres from the homestead of Isaac Kiptoo Rono, the 1st accused which Paul, PW2, positively identified as the one which was used by Isaac Kiptoo Rono, the 1st accused, to cut PW2. PW14 produced the panga as P. Exhibit 11.
84. PW14 testified that on the 26th November 2018, they went back to the river bank where the panga was recovered after being informed that Malakwen crossed it dressed differently after showering in the river. He testified that they did a thorough search and recovered a trouser which Malakwen wore at the time of the attack and left it at the river. He testified that they also recovered a red T-shirt which Malakwen wore when he attacked the deceased and Paul. He produced the trousers and belt as P. Exhibit 12(a) and (b) and the red T-shirt as an P. Exhibit 13.
85. It was his testimony that after recovering these items, they proceeded to Chemelil Police station where they met the suspect Isaac Kiptoo Rono who led them to Kapsisiya where he had escaped to and they met the area Chief and the village elders and people who explained to them the circumstances under which the 1st accused was arrested after which they recorded their statements and returned to Chemelil area to continue with investigations.
86. He testified that by 22nd January 2019, they got information on the other suspects but there was a lot of tension in the area so they summoned several people to Rugaa Police post among them Mengich and Chepararia but later learnt that Chepararia had already flown to West Pokot. He testified that they learnt that Mengich was the one who cut Paul on the head then Paul fell down so they brought him to Kondele police station where they organized for a police identification parade on 30th January 2019 where Paul positively identified Mengich as the one who cut him. He testified that on the same day, Pius Mosonic was also arrested and they charged the three with the offence of murder. He testified that three tractors were taken to Chemelil Police station, two belonging to Pius Mosonic and another belonging to Yogo.



87. PW14 testified that from their investigations, they established that there was a lot of invasion of farms in Chemelil to a point where farm owners had entered into agreements with invaders to allow the latter plant subsistence crops at the river banks or where tractors could not reach but the invaders did defy the arrangement and invaded the whole land/farms. He testified that they interviewed Retired Justice Effie Owuor who gave them documents of ownership of the farm in issue that was registered in the name of the husband of Rt. Justice Effie Owuor. He produced the title document as P. Exhibit 14.
88. PW14 testified that they also got a copy of the two discharge summaries of John Paul Owuor the survivor which he produced in evidence, the discharge summary dated 18th November 2018 from Aga Khan Hospital as P. Exhibit 15(a) and the discharge summary from the Nairobi Hospital showing admission on 18th November 2018 and discharge on 9th January 2019 as P. Exhibit 15(b). PW14 also produced the identification parade form for Julius Kipyego Mengich dated 30th January 2019 as P. Exhibit 16, the inventory of the items recovered at the scene and handed to them by police from Chemelil on 2nd December 2018 as P. Exhibit 17, inventory of items recovered at the river bank dated 29th November 2018 as P. Exhibit 18 and the inventory dated 24th November 2018 of items recovered on the body of the deceased George as P. Exhibit 19.
89. He testified that on the 1st December 2018, they took Isaac Kiptoo Rono alias Malakwen to JOOTRH for DNA sampling in order for them to submit to the Government Chemist with the other recovered items. He produced the DNA sampling form as P. Exhibit 20. He also produced the firearm pistol owned by Paul with S/No. G/P00279 as P. Exhibit 21; the magazine as P. Exhibit 22 and the firearm holster as P. Exhibit 23. It was his testimony that he also recovered a firearm holder certificate for Paul John Owuor TIP002279 issued on 28th July 2015 and produced it as P. Exhibit 25. PW14 identified all the accused persons in the dock.
90. In cross-examination, PW14 stated that when Malakwen was handed over to him, his clothes seemingly had some blood stains but from a naked eye of a person who was not an investigator, they could not see. He testified that the DNA analysis report gave them a positive result. He stated that there was no DNA link of the clothes to the accused.
91. PW14 stated that Paul fired the gun in the air during the attack and that he was shooting to scare away the attackers. He stated that in this situation, Malakwen was the attacker and was not defending himself from the words he uttered as he moved towards his victims. He further stated that there were noticeable blood stains at the scene where Bengo was found. He stated that the riverbank was far from the farm and that the clothes were thrown in the river side and were too muddy and thus they could not get blood on it. He stated that Chepararia was a nick name for the suspect who was at large and whose home area was in West Pokot. He stated that the locals in Chemelil called him by his home area name, Chepararia.
92. The prosecution then closed its case and in the court's ruling on whether the accused persons had a case to answer, the court found that only the 1st and 3rd accused had a case to answer while it acquitted the 2nd accused.
93. The 1st and 3rd accused were thus placed on their defence.

The Defence Case

94. The 1st accused testified as DW1 having elected to give a sworn testimony. He stated that he used to farm on the land which was the reason he was before this court as his parents used to farm on it at the meadow. He testified that in 2018, he was called by the Deputy County Commissioner- DCC Mr.



- Rotiata to a meeting and he informed them that he had information that some people wanted to invade the land in question and proceeded to caution them from invading the land which had its owner.
95. DW1 testified that three days later, they went to the DCC where he conceded that he was farming the said land at the meadow and Mr. Rotiata told him to continue farming at the meadow but that he should not allow any other person to farm there otherwise he would be answerable. He testified that on the 17th November 2018, he went to the farm in question after breakfast as he had asked a person to come and plough the land with a tractor. He testified that fuel got finished so it stopped and the manager went to Polopolo to get fuel and he remained with the driver at a shade.
 96. DW1 testified that between 2pm – 3pm, he saw a white vehicle coming to the farm, a prado from which two people emerged and came to where he was and started speaking to the tractor driver asking him who had hired him to plough. He testified that he stood up and then saw one person whom he learnt was Paul remove something from his waist then shoot in the air. He testified that he saw a pistol which was pointed at him by Paul who started beating him so he lay down.
 97. DW1 testified that Paul beat him twice and on the third time, the 1st accused picked a panga which the driver had and threw it at Paul and it cut Paul's abdomen. He testified that Paul fell down and the 1st accused went and picked the panga. It was his testimony that the person followed him and held his trouser from behind so he turned and cut him. He testified that the person tried to enter the vehicle but fell down and that Paul had fallen down and was unconscious.
 98. DW1 testified that he went home leaving the people on the farm and that he saw Paul drive off as he was leaving. He testified that he never planned to kill and that he was shocked by the gun shots. He stated that he was defending himself as he had been hit twice using a pistol. He testified that he never saw Julius Mengich at the scene. DW1 testified that when he reached home, he changed clothes then went to his clan people in Kapsabet at Kapsisiwa where he slept and the following day at around 10am, he saw three people approach and they asked him where he had come from and he responded that he was from Chemelil.
 99. DW1 testified that they handcuffed him and told him that someone was wanted and led him to the Chief's office where he was informed that he was the one wanted which he later admitted to the Chief who took him to Kapsabet where he was picked and taken to Chemelil.
 100. In cross-examination, DW1 stated that when Paul shot, DW1 was sitting in the shade. He admitted that he was never hit with a pistol nor was he injured. He reiterated that he was saving himself. DW1 admitted that he cut the person on the neck but that he never intended to kill him. He testified that he heard 4 shots. He stated that the deceased had no weapon and that he, DW1 went away because he was shocked. He admitted to cutting the deceased severally using a panga. In re-examination, DW1 testified that he cut Bengo because Bengo held DW1's trouser from behind.
 101. The 3rd accused testified as DW2 and recalled that on the 17th November 2018, he was working at Kapsenyoi in Nandi where he had gone to cut sugarcane until 2pm when he went to shower in a nearby river as they waited to be paid. He testified that he went home and reached at about 3pm, ate then gave his wife Kshs. 500 for household needs then he proceeded to his neighbour to partake alcohol.
 102. He testified that at 4pm, a phone call was received that Bengo had been killed and Paul was injured. He testified that they stopped drinking as tension was high then continued drinking and left for home at 7pm. DW2 testified that the following morning was a Sunday so he stayed at home. He testified that on the 19th November 2018, he heard that the killer had been arrested.



103. It was his testimony that on 22nd January 2019 he was arrested from his house at 6am by police officers from Rugaa Patrol Base and that CID officers came and interrogated him the whole day about the farm dispute and what transpired on 17th November 2018 and informed him that they had arrested the main suspect and were looking for witnesses. He testified that they took him to Ahero Police station where he slept and brought him to Kisumu court before taking him to Kondele Police station.
104. DW2 testified that the CID were asking him to help them with evidence but he told them he knew nothing. He testified that they told him that they would give him Kshs. 50,000 if he gave evidence as an eye witness as they had spoken to Paul Owuor who had been cut. It was his testimony that on the 27th January 2019, the CID came with Paul while he was at Kondele Police station and they were placed on an identification parade which procedures he did not know. He testified that he had a brown shirt and that the other people were not dressed like him. He further stated that Paul came straight and looked at his shirt then pointed at him. He admitted that he signed the form for the parade.
105. DW2 denied being at the scene and stated that he was charged because he refused to be an eye witness to the incident.
106. In cross-examination, DW2 denied Paul knowing him or that he attacked or helped the 1st accused to attack the deceased and Paul. He further reiterated that he was not at the scene and that he suspected that it was the 2nd accused who mentioned his name.
107. In re-examination, DW2 stated that he did not know why the CID wanted to give him money but that they said that they wanted him to be an eye witness.

Analysis and Determination

108. I have carefully considered the evidence as adduced by the prosecution witnesses and the defence proffered by each of the two accused persons. The main issue for determination is whether the prosecution has proved its case against the two accused persons or any one of them beyond reasonable doubt. To sustain a conviction for the offence of murder, the prosecution must prove all the elements of the offence of murder as stipulated in section 203 as read with section 206 of the Penal Code.
109. The first and second elements of the offence of murder that must be proved beyond reasonable doubt are whether there was proof of death and its cause. From all the foregoing evidence adduced by the prosecution witnesses including PW1 and PW2 who witnessed the incident at the scene and the evidence of PW12, Dr. Mchana who performed an autopsy on the body identified by the deceased's wife and her aunt, it is without doubt that one, George Anyango Obala died after being cut in pieces using pangas by his assailants.
110. The post mortem report (PEX2) established that the cause of death was decapitation secondary to sharp force trauma following assault. It also shows that the deceased's injuries were extensive and so severe.
111. On whether the death of the deceased was unlawfully caused, from the description by PW1 and PW2 on what they saw and heard, and the type of injuries described by PW2 Dr. Mchana, such injuries could not have been self-inflicted. I am satisfied that the death of the deceased was unlawfully caused by his assailants and was undoubtedly and undisputedly traceable to the injuries inflicted upon the deceased.
112. The prosecution having established beyond reasonable doubt that the deceased George Anyango Obala was unlawfully killed, the next question and element to be proved beyond reasonable doubt is whether the two accused persons who were placed on their defence or any one of them was positively identified or recognized as having unlawfully killed the deceased.



113. Identification evidence must always be treated with caution. It must be free from error or mistake because a witness might be mistaken even if he is honest (see, Joseph Onyinkwa Nyariki v Rep [2019] eKLR).
114. Further, consideration ought to be given to the prevailing circumstances at the material time and scene of the offence. In that regard, whether favourable conditions and adequate opportunity existed for the identification of the offenders especially if the offence occurred in the hours of darkness. In the instant case, there is undisputable evidence, however, that the incident took place in broad daylight. The question of darkness does not arise.
115. The prosecution bears the burden of proving that it was the accused persons who participated in the unlawful killing of the deceased and that burden does not shift to the accused persons. The accused persons were reminded at the close of the prosecution's case that albeit they had been found with a case to answer, that in itself did not amount to them being guilty of murder as charged; that they enjoyed their constitutional rights to be presumed innocent; to remain silent and not testify; to adduce and challenge evidence of the prosecution; and not to give self-incriminating evidence. They were also reminded that they had the options of giving evidence if they chose to do so, on oath or unsworn. Both accused persons were ably represented by advocates, Mr. Maua and Mr. Bagada.
116. The evidence of PW1 and PW2 placed the two accused persons at the scene of the incident on the material date and time. The 1st accused testified, led by his counsel and stated that he was at the scene of the incident. He stated that he cut the deceased on the neck and that he cut him severally. The 1st accused stated that he was defending himself.
117. Revisiting the evidence adduced by prosecution witnesses, PW1 testified that he knew all the players in the incident which took place about 50 metres away from where was. That he saw the 1st accused attack Paul, PW2, with a panga and that the only thing that saved PW2 from the wrath of the 1st accused was that Paul knelt down and started begging the 1st accused person to spare his life as he had surrendered the land. PW1 stated that at that point, the 1st accused turned to where the deceased George was and had run to and proceeded to cut him into pieces. PW1 testified that the 3rd accused and another person not before court (Chabararia) joined the 1st accused in cutting the deceased. He testified that all the deceased's attackers were known to him and were armed with pangas. As earlier stated, this incident took place in broad daylight between at about 1pm.
118. PW2, Paul Owuor testified of his ordeal in the hands of the two accused persons herein. That he knew the 1st accused as Malakwen and he attended a police identification parade where he positively identified the 3rd accused herein as one of those who attacked them and how PW2 survived the attack on him by a tall man who had approached them whilst armed with a panga and forced him to unsheathe his pistol and fire in the air in an attempt to scare the tall man who was advancing towards them brandishing a panga and whistling. PW2 testified that he saw the deceased being attacked by 10 men including the tall man who had attacked him whom he recognized due to his bright red shirt. PW1 too stated that the 1st accused whom he knew very well was dressed in a red Tshirt.
119. PW2 also stated that he recognized the 3rd accused whom he testified that he had seen around the farm prior to the incident. PW2 identified the 1st accused as the tall man who attacked him and the 3rd accused as Mengich. It is worth noting that PW2 picked out the 3rd accused from an identification parade carried out by the police.
120. PW5, the Chief of Kapsisiwa Location testified that he arrested the 1st accused in his location and that the 1st accused after which he learnt that it was this w1st ho was being sought after in connection with the alleged murder in Chemelil.



121. PW10, a police officer and friend of the 1st accused also testified how on the day of the incident, the 1st accused called him and told him that he, the 1st accused had killed two people and instructed PW10 on where to find their bodies, and that is where the body of the deceased was recovered. Even without the testimony of PW5 and PW10, as no confession was recorded from the 1st accused person in accordance with the Judges Rules, there is the evidence of PW1 and PW2 on what they saw the 1st accused do and that evidence remained intact even in cross examination. In addition, and as earlier stated, the 1st accused in his own defence which he was not obliged to give, stated that he cut the deceased on the neck and severally in self defence. He was testifying on oath. PW1 a protected witness vividly narrated how he saw the 1st accused cut the deceased using a panga.
122. From all the above evidence, it is clear that the 1st accused was one of the people who participated in the killing of the deceased. The 1st accused claims that he was defending himself, after seeing PW2 fire the gun.
123. Thus, self defence is a defence that can justify killing or committing an offence of a personal nature. However, murder is defined as the intentional killing of another person with malice aforethought. Malice aforethought refers to the intention or desire to cause serious harm or death to another person. The question is whether that defence of self defence by the 1st accused is available to him. The Privy Council in *Palmer v Reginam* [1971] All ER 1077 stated that:
- “Where the evidence is sufficient to raise the issue of self-defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self-defence.”
124. The Court of Appeal in the case of *Victor Nthiga Kiruthu & another v R* [2017] eKLR while discussing self-defence stated that:
- “The principles that have emerged from these and other authorities are as follows:-
- (i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
 - (ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
 - (iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.
 - (iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
 - (v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.” [Emphasis added]



125. In this case, there is no evidence that the deceased was armed or that he posed any threat to the 1st accused person herein to warrant the vicious attack. The amount of force used to eliminate the deceased, the weapons used and the injuries inflicted on the deceased were all too massive and excessive to amount to any self defence mechanism. See also the Court of Appeal in the case of *Lucy Mueni Mutava v Republic* [2019] eKLR where it stated that:

“Besides, the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed, in our view, was way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. See *Racho Kuno Hameso v R* [2014] eKLR.”

126. I thus find the 1st accused’s defence of self defence not merited. It was an afterthought and amounted to a mere denial. I reject that defence.

127. What about the 3rd accused? Was he identified as one of those people who attacked and unlawfully killed the deceased? The 3rd accused denied being anywhere near the scene of the incident. He raised the defence of alibi.

128. The Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR had this to say about alibi defence and I concur as that is a court superior to this court:

“In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie v Republic* [1984] KLR, this Court stated:

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

19. In the recent case of *Victor Mwendwa Mulinge v R*, [2014] eKLR this Court rendered itself thus on the issue of alibi:

“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...”

20. Comparatively, in the South African case of *S v Malefo en andere* 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

- (a) There is no burden of proof on the accused to prove his alibi.
- (b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.
- (c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."
- (d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").



- (e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.
21. In another persuasive South African case of *R v Biya* 1952 (4) SA 514 (A) at 521C - D Greenberg JA said:
- “If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.”
22. In *S v Sithole* 1999 (1) SACR 585 (W) at 590g - i it was correctly stated:
- “There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”
23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:
- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlongu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))
24. In the instant matter, the two courts below considered the alibi defence raised by the appellant. The question is whether the defence of alibi adduced by the appellant can stand. The law prior to the repeal of Section 235 of the Criminal Procedure Code required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. (Emphasis supplied - See *Republic v John Kimita Mwaniki* [2011] eKLR).



129. The prosecution is under a duty to disprove an alibi defence even if raised late in the day. The evidence by PW1 and PW2 is that they saw the 3rd accused person at the scene and also PW2 pointed out the 3rd accused at an identification parade. PW1 knew the 3rd accused person very well. PW1 and PW2 narrated what they saw the 3rd accused do to PW2 and to the deceased, and how the 3rd accused attacked PW2 before proceeding to attack the deceased. The evidence of identification on the parade, which evidence I have already referred to above remained intact even in cross examination.
130. The testimony of PW2, the survivor of the attack and that of PW1 placed the 3rd accused at the scene. These two witnesses were two different individuals with no connection who both positively placed the 3rd accused at the scene and as one of the attackers of the deceased. Just to rehash the testimony of PW1 a protected witness whose evidence remained unchallenged on cross-examination, he stated that he saw Mengich and Malakwen walk away from where Paul was and to where George was upon which Malakwen cut George into pieces until he died. PW1 testified that Chebararia and Mengich also cut George. He reiterated that Malakwen was the first to cut George followed by Mengich and Chebararia. PW1 testified that he was about 50 metres from the scene of crime and could clearly see what was happening in the farm. He testified that Malakwen, Chebararia and Mengich were armed with long pangas while both Paul and George were not armed.
131. The 3rd accused also attempted to fault the identification parade wherein PW2 identified him stating that he was dressed differently from other members of the parade. However, the testimony on record is that he went on to give the identification parade his seal of approval by signing it and further did not raise any issue against the identification parade in cross-examination when the same came up during trial.
132. The alibi adduced by the 3rd accused was never raised in cross-examination. Furthermore, the evidence by PW1 and PW2 were so watertight that they completely displaced that alibi defence.
133. I find and hold that the two accused persons were positively identified as being among the persons who, with a common intention, attacked and hacked the deceased to death. A common intention may be drawn from the presence of the assailants at the scene of the offence, their action and even the omission of any of them to disassociate himself or herself from the assault.
134. Section 21 of the Penal Code provides that:
- “When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
135. It was established beyond any reasonable doubt that the deceased herein was brutally butchered by a group of people comprising of the 1st and 3rd accused as well as the missing ‘Chepararia.’ Each of the persons who took part in assaulting and unlawfully killing the deceased was as guilty as the other.
136. In *Rex v Tabula Yenka s/o Kirya & others* (1943) 10 EACA 51, it was stated that:
- “To constitute a common intention to prosecute an unlawful purpose ...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omissions of any of them to disassociate himself from the assault.”



137. Despite their denial, the accused were positively identified and placed at the scene by the prosecution witnesses i.e. PW1 & PW2.
138. On whether the accused persons and their accomplices at large had malice aforethought when they unlawfully killed the deceased, under section 206 of the Penal Code, malice aforethought is deemed to be proved by the prosecution where any of the following circumstances exist:
- a. An intention to cause the death of another.
 - b. An intention to cause grievous harm to another.
 - c. Knowledge that the act of omission causing death will probably cause death or grievous harm to some person, whether that person is the one killed or not accompanied by indifference (sic) whether death or grievous injury occurs or not or by a wish that it may not be caused.
 - d. An intent to commit a felony; and
 - e. An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.
139. It is trite that the intention to kill may be inferred from the facts of the case. This was stated in the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63 where it was held that it was the duty of the court in determining whether malice aforethought has been established to consider the weapon used, the manner in which it is used and the part of the body injured.
140. In *Yoweri Damuliza v Republic* [1956] 23 EACA 501, it was observed that an inference of malice aforethought would flow more easily from the use of a spear or of a knife than from the use of a stick.
141. In the case of *Ernest Asami Bwire Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990*, the court held that malice can be inferred from the manner of the killing. In that case, the court considered the fact that brutal killing was well calculated and planned by the appellant and concluded that he had an intention to kill the deceased. In the case of *Karaki & 3 Others v Republic* [1991] KLR 622, the Court of Appeal held inter alia that malice aforethought can be deemed from the nature of injuries caused on the deceased and the weapons used.
142. In this case, the evidence adduced was that the accused persons used pangas to cut the deceased in what I call the butchering of the deceased. This is because the postmortem report as produced in evidence showed deep cut injuries to the body of the deceased which involved decapitation of the head from the neck that caused death. It is worth reproducing those injuries here as follows as stated by PW12 Dr. Mchana, as per the postmortem report: there was a decapitation of the head on the right side, held by a small skin on the left side, that there was an abrasion collar on the back side. The deceased had a deep cut on the right lower jaw, twice, sharp choppings on the right shoulder, the right humerus - arm was slashed into two, two cut wounds - sharp on the right hand (defence cuts) 3 cuts on the right mid chest going down and one cut on the right mid chest and deep. There was a cut below the chest cavity and that the blood vessels were severed at the parts named above following the deep cuts. In the abdomen, there was swelling of mesentery (supports intestines) and that there was little food in the stomach. The spine and spinal cord was cut at the level C12.
143. My conclusion from the above injuries caused by pangas which are sharp objects is that the intention of the assailants was clearly to kill or do grievous harm to the deceased. I find that malice aforethought was proved beyond reasonable doubt.



144. In the end, I find and hold that the prosecution proved all the elements of the offence of murder against the 1st and 3rd accused persons herein beyond reasonable doubt. I find each of the two accused persons herein guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and I convict each one of them accordingly.

145. Sentence shall be pronounced after records and mitigation.

146. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2023

R. E. ABURILI

JUDGE

