



**State v Anyama & 3 others (Criminal Case E025 of 2021)  
[2022] KEHC 12112 (KLR) (17 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E025 OF 2021  
RE ABURILI, J  
AUGUST 17, 2022**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**DANIEL OJWANG ANYAMA ..... 1<sup>ST</sup> ACCUSED**

**FRANCIS OTIENO OTIENO ..... 2<sup>ND</sup> ACCUSED**

**GEOFFREY ODHIAMBO ABONGO ..... 3<sup>RD</sup> ACCUSED**

**JAMES OMONDI OGALLO ..... 4<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein Daniel Ojwang Anyama, Francis Otieno Otieno, Geoffrey Odhiambo Abongo and James Omondi Ogallo are jointly 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 as the Information dated August 23, 2021 are that on the May 26, 2021 at Liunda Beach, Uyawu sub-location in Bondo Sub-county within Siaya County jointly murdered one Clinton Otieno Omondi.
2. The accused persons pleaded not guilty to the charges against them and the matter proceeded to full trial. The prosecution called seven (7) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

3. PW1 Dr Juma Wanjofu Daniel testified that together with Dr Rita Apondo, they carried out the a postmortem on the deceased's body on the June 3, 2021 at Bondo Sub County Mortuary at 11.50 hours. He testified that the body was of a naked, male African race, young about 20 years old, of good nutritional status, adequate physique, height - 171 cm with various postmortem changes and that the body lay supine decomposing and *rigor mortis* present.



4. Dr Juma testified that the time of death was more than 72 hours. Externally, there were obvious signs of decomposition with skin putrefaction and swollen abdomen, the back and extremities i.e. lower and upper limbs. He further testified that there were bruise marks on the forehead, preauricular area (near the ear) about 4 x 6 cm in dimension, eyes were swollen, small bruises noted on the right knee.
5. It was his testimony that there were no scratches and no fractures and that blood stains were noted from the left ear and frothing from the mouth. Dr Juma testified that the body was covered in sand suggestive of death around a humid area and that internally, the head revealed a subgaleal haematoma on the left temporal side of the head. In the nervous system, part of brain tissue was decomposed and some red discolouration on the temporofrontal area of the dura was present, suggestive of internal haemorrhage. It was his testimony that other systems were not exposed.
6. They concluded that the cause of death was head injury with subsequent drowning secondary to blunt trauma to the head. They jointly issued death certificate No 1021582 with Dr Rita, signed and stamped the postmortem report which produced as PEx1.
7. In cross-examination, PW1 testified that there were no fractures and that they could not determine the cause of blunt trauma though a fall on the rock could cause it.
8. PW2 Philip Omondi Chore who lived in Liunda Beach and was a fisherman testified that he used to fish with other people's boat as he did not have a boat and that specifically, he used George Nyapoda's boat. It was his testimony that on the night of May 25, 2021 at around midnight, he went to pick the boat from George Nyapoda in the company of Ouma, Omondi and Clinton. He testified that Clinton was riding the boat. That they fished omena until 5am that night and then they decided to return to the shore when another boat approached them and the occupants invaded them in a zigzag manner trying to block them.
9. PW2 testified that the occupants of the other boat neared them fast as they rode their boat towards the shore at a distance of 5 meters apart. He testified that the other boat then hit them and its occupants then started beating them. He stated that there were about four people in that other boat whom they were able to see as they had a torch. It was his testimony that when the occupants invaded them and started beating them, he heard the driver of that boat being called by name as Onyango. He testified further that Clinton was the one who rode their boat so he heard Clinton calling out to Onyango asking him not to invade them.
10. It was his testimony that when the other boat neared them, the occupants stood up and started beating them using wooden planks and that they also had knives. He testified that he was hit on the head, fell in the water and swam onto the beach and went to inform Nyapoda Nyadoro who had employed them of what had happened. He stated that 3 of his fellow fishermen remained in the boat battling the invaders.
11. After PW2 had informed Nyapoda, the latter who was also chairman of the Beach Management Unit (BMU) went to the beach and got into the Engine boat and together they went to where the invasion had taken place but did not find the invaders as they had already left for Wichlum. PW2 testified that Nyapoda did not know the owners of the invading boat so he reported to the other beaches for information. PW2 went back to the house and was taken to where the invaders had gone, at Amoyo, where his colleagues had been taken.
12. PW2 testified that he reached Amoyo and found his colleagues Ouma and Omondi but did not find Clinton. He testified that when he asked about Clinton's whereabouts, Ouma and Omondi told him that Clinton had remained in the lake. It was his testimony that they recorded their statements on how they were invaded. He testified that their boat was found at Wichlum beach where the invaders had



- taken it and that he later learnt that Clinton was beaten and killed and thrown into the lake where his body was recovered. He testified that he did not know their invaders.
13. PW3 Joshua Omondi Omedi testified that he was a fisherman at Liunda Beach though he did not use his own boat. It was his testimony that on the May 25, 2021 he went fishing with Ouma, Clinton and Philip and also with one alias “young”. He further testified that at about 5am on May 26, 2021 while in the lake and after fishing, as they were returning towards Liunda Beach, they were invaded.
  14. It was his testimony that he was tired so he had slept in the boat and as they approached their beach, another boat emerged and hit their boat and the occupants beat them up and threw one of them, “young”, into the lake. He testified that the occupants of the other boat hit another, Philip, who swam to the shore. PW3 testified that the invaders beat up the other occupant who fell in the water and as he could not swim, they returned him into the boat. He further testified that he hung onto the boat as they beat him.
  15. PW3 testified that the invaders then took them, PW3 and Ouma, from their boat into theirs and took away all their property i.e. battery lamps and bulbs which they were using. He testified that the invaders tied their boat onto theirs and drove to Wichlum whereupon on arrival, the chairman questioned the invaders why they had taken hostages and they responded by stating that they-PW3 and his colleagues had stolen the invaders’ lamp.
  16. PW3 testified that the invaders told the chairman that two people were in the water. He testified that they were given first aid and that their Beach Chairman followed them at Wichlum after he was called and they checked their lamp and discovered that it was not the same as that of PW3’s invaders after which the invaders were arrested and taken to Bondo in the company of Ouma, chairman Nyapoda and another and escorted to Bondo Police Station. He stated that he did not know their invaders because it was at night. He further testified that he only saw them at 9am but he could not recognize or identify them as he was in pain. PW3 further told the court that he was treated at Bondo District hospital and that the invaders beat them up Enroute to Wichlum so they could not look at them.
  17. In cross-examination, PW3 stated that they had approached the shore when they were invaded. He testified that after Philip was beaten, he jumped into the lake and swam to the shore. He further stated that it was Ouma who tried swimming but was unable so he returned to the boat. PW3 reiterated that when he recorded his statement, he was in pain.
  18. PW4 John Nyapoda, a fisherman at Liunda Beach testified that he employed people to go and fish for him and that on May 25, 2021 he had given out the fishing boat to Clinton, Ouma, Omondi Chore and another Omondi at 5pm to use until morning at 5am. He testified that Clinton was the boat driver.
  19. It was his testimony that on the May 26, 2021 at about 5.30am, he received information from Phillip, Omondi and Chore who went and told him that they had been invaded when they were returning to the beach after fishing so he took another boat and went with them except Phillip up to where they had been invaded. He testified that they never found the boat and his colleagues so he called his colleagues from nearby beaches and used his BMU networks to inquire from the County and Sub County Chairman who later informed him that a boat had been spotted at Wichlum where PW4 proceeded to.
  20. PW4 testified that he arrived at Wichlum and found the Chairman who had also taken PW4’s fishermen for treatment at Wichlum and that when they returned, he inquired from them on the whereabouts of their colleagues. PW4 testified that they told him that upon being invaded, one of them was thrown into the lake. He testified that they went and recorded their statements. He further testified that at Wichlum, he found that the Chairman had arrested the people who had attacked his



boat and towed it to Wichlum. He further testified that the suspects were brought and he saw them. It was his testimony that he previously did not know the attackers.

21. PW4 testified that they accompanied him to Amoya and that he learnt that Clinton had been beaten and thrown in the lake and subsequently died and was buried.
22. In cross-examination, PW4 stated that his people told him that they were invaded and assaulted. He stated that it was the Chairman, Wichlum BMU, who showed him the people who invaded his fishermen while in the Lake.
23. PW5 Daniel Onyango Olang'o testified that he was a fisherman and that he fished using another person's boat. It was his testimony that on the May 25, 2021 he was in a boat driven by Clinton Otieno and was in the company of Omondi, Omedi and Omondi Chore.
24. He testified that they fished until 5am when they were returning to the beach when another boat emerged and the occupants invaded them as they neared their beach. PW5 testified that the people in that other boat were armed with big wooden planks and that they started beating them up. PW5 testified that it was at night but they had big rechargeable torches while they in their boat had a battery lamp. He stated that there were four invaders and that they drove their boat next to PW5's and started assaulting them from their boat using the wooden planks.
25. PW5 stated that he was overwhelmed with the beatings which were severe and continuous. He stated that they were all beaten and that he fell into the lake and though he did not know how to swim, he had a life jacket on which protected him from sinking. He testified that he held on to a rope tied on the boat whilst screaming for help so the invaders held him and placed him in their boat. It was his testimony that they were forced to lie down in the invader's boat from where they were beaten. He testified that he was with Omondi Omedi in the invader's boat. He stated that he never saw Clinton at that time.
26. PW5 testified that when he fell into the water, Clinton was in PW5's boat even as he was being beaten. He testified that the invaders then took them to Wichlum after tying PW5's boat to their boat and on reaching Wichlum Beach, the men told the hostages to get out of the boat. It was his testimony that the invaders' Beach Chairman was present so he asked them why they had brought PW5's boat and how many people were in PW5's boat and where the rest were to which the invaders responded by saying that there were four but two were in the lake. PW5 testified that the Wichlum Chairman called their chairman and informed him of what he had found at Wichlum after which he took them to hospital at Wichlum for treatment and then arrested the invaders.
27. It was his testimony that their Chairman came and they were taken to Amoyo Police Post then to Bondo District Hospital and after receiving treatment, they were released to go home. PW5 testified that he saw their attackers at Wichlum whom he identified as the accused in the dock. He stated that he saw them at daytime. He further testified that the 1<sup>st</sup> accused had a facemask which he removed when they reached Wichlum, and reiterated that he saw all the four accused persons at Wichlum Beach in the morning. He testified that he had not known them before. PW5 stated that Clinton died.
28. In cross-examination, PW5 stated that he saw the invaders when they were brought from the office of the chairman and that prior to that date, he had not met the four accused persons before. It was his testimony that the incident took place at night and as such he could not identify the attackers. PW5 stated that when he fell in the water, the attackers pulled him into the boat. He reiterated that they held him when he shouted for help. He further stated that Phillip did not jump into the water voluntarily as they were being beaten by their attackers.
29. PW5 stated that Clinton was in the boat when PW5 fell in the lake but upon his being lifted into the boat, he never saw Clinton. He testified that they had gone to fish far and that they had a lamp which



- they used for fishing. It was his testimony in cross-examination that they did not know the reason why the attackers beat them up and that it was not true that the attackers' lamp was found in PW5's boat. He testified that he recorded his statement with the police wherein he stated that when they reached Wichlum Beach, their attackers claimed that they beat PW5 and his colleagues because they had stolen the attackers' solar lamp, which was not true.
30. PW5 stated that he saw all the four accused persons. It was his testimony that the 1<sup>st</sup> accused wore a face mask and was beating them and that he also lifted PW5 into the boat. He further testified that all the four accused persons were beating PW5's team. He stated that two attacker remained in their boat while two were in PW5's boat when they pulled him back into the boat from the lake.
  31. PW6 Peter Were Ajulu testified that he is a fisherman and the Chairman of Wichlum BMU (Beach Management Unit). He testified that on the May 26, 2021 at about 7.30 am, he was at the Beach when he saw his boat approaching while pulling another boat. It was his testimony that he went closer and asked his fishermen who were in his boat where they had got the other boat from and they replied that they arrested the boat and its occupants.
  32. PW6 testified that his boat had his 4 fishermen namely; Dan, Godfrey (the 1<sup>st</sup> and 3<sup>rd</sup> accused whom he identified), 'Boy' the 4<sup>th</sup> accused and another, the 2<sup>nd</sup> accused in the dock whose name he did not know. He further testified that Dan was riding the boat. It was his testimony that he knew all the 4 accused persons as they were fishing for him and that he had seen the last accused for the 1<sup>st</sup> time on that day when he joined his other fishermen as they went out fishing. He further testified that the other boat had 2 people whom he did not know and that his fishermen told him that 2 other occupants of that other boat had entered the waters in the lake. PW6 testified that the 2 people in the other boat were trembling and feeling cold and that one of them had some injuries.
  33. PW6 testified that he spoke to the 2 people in the other boat and they told him that his fishermen had struggled with them as they arrested them. He testified that he took the 2 strangers to the hospital then started looking for the owner of that boat through the BMU network. It was his testimony that he found the owner, whom he knew as Nyapoda, and spoke to him and informed him to go to Wichlum. PW6 testified that Nyapoda informed him that his boat went to fish with 4 people. He further testified that when he escorted the 2 people to hospital, he left his 4 fishermen in his office and that he also went and reported to the police at Amoyo Police Station to investigate. PW6 testified that the Chairman of Liunda BMU arrived at Wichlum after the police had arrived and claimed that 2 of his fishermen had not arrived at Liunda Beach. It was his testimony that they interrogated PW6's fishermen who said that 2 people jumped into the waters.
  34. PW6 testified that the police held his fishermen to help with investigations and that at 3pm, the Chairman of Liunda BMU, called him and informed him that one of the 4 fishermen who had vanished had been found, alive and subsequently, 2 days later, the Chairman of Liunda BMU called him again and informed him that one of the fishermen had been found dead in the lake. It was his testimony that he recorded his statement with the police who visited his office. PW6 confirmed to court that it was the 4 accused persons who went with his boat pulling another boat with 2 other strangers whom he previously did not know.
  35. In cross-examination, PW6 informed the court that his fishermen told him that they arrested the other people because the other people were found stealing a lamp and that 2 of the other people had jumped into the waters. He further stated that Nyapoda called saying one person had swum to the shores and another had died. It was his testimony that there were 16 batteries found in the other boat instead of 8 and that Nyapoda said that the extra batteries were not his.



36. It was his testimony that his fishermen did not go to report to him but that he went to check on the boat as he usually did whenever it returned from the waters fishing. He further stated that his fishermen returned the way they usually returned and that he was not present when the 4<sup>th</sup> accused went to fish although he returned in his boat.
37. PW7 No 50823 CPL Suleiman Opondo, the Investigating officer in this case testified that on the afternoon of May 25, 2021 he was in his office when a report was received from Amoyo Police Post to the effect that four men had been arrested by the Chairman of Wichlum BMU and handed to Amoyo Police Post. He testified that when the 4 arrived from the fishing expedition, they were accompanied by another boat and 2 seriously injured people.
38. PW7 testified that he accompanied police officers and went to Amoyo Police Post and was handed 4 people namely; Daniel Ojwang Anyama, Francis Otieno Otieno, Geoffrey Odhiambo Abongo and James Omondi Ogallo, whom he took to Bondo CID Office for interrogation. He further testified that in the course of his investigations, he found that 2 people of the 4 occupants of the arrested boat had vanished and thereabouts were unknown but 2 had been taken to hospital after being recovered from the boat that was pulled by the 4 accused persons.
39. It was his testimony that they found that one person had swam safely to Liunda Beach and sought assistance while the 4<sup>th</sup> person was not seen until the 4<sup>th</sup> day when he was found floating dead at Liunda Beach. He testified that they went to the scene and removed his body to Bondo Sub County Hospital mortuary where a postmortem was carried out. He further testified that when they recovered the body of Clinton, they found bruises on his body with some parts swollen.
40. PW7 testified that the postmortem was carried out in his presence as well as the deceased's other family members. He further testified that he opened a file for investigations, recorded witness statements and sent the file to ODPP Siaya for advice. He later escorted the 4 accused persons to Kisumu Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) for mental assessment and subsequently the four were charged with murder. PW7 identified the four people he arrested as the accused persons in the dock.
41. In cross-examination, PW7 stated that the surviving fisherman who swam to safety reported that they were beaten thoroughly and so they fell into the water. He further stated that the body of the 4<sup>th</sup> fisherman was recovered near Liunda Beach.

### **The Defence Case**

42. Daniel Ojwang' Anyama, the 1<sup>st</sup> accused testified on oath as DW1 and denied killing the deceased stating that on the May 25, 2021, at around 6 pm, they went to work as fishermen from Wichlum Beach in the company of Francis Otieno, Geoffrey Odhiambo Abongo and James Omondi Ogallo. He further stated that they went to fish as usual using the boat of Ruth Onyango.
43. It was his testimony that between 4 - 5 am on May 26, 2021, they saw another boat approaching them but it never reached them and instead it proceeded to one of their lamps 100 metres away. He testified that they watched as the occupants of the other boat went, took the lamp, switched it off and put it in their boat then left so they put up their net quickly and discreetly followed them. DW1 testified that they caught up with the other boat which then turned towards the shore nearby so they used their electric torch which they lit at them and the occupants of the other boat started jumping out of their boat.
44. He further testified that they chased the other boat for about 20 minutes during which time the other boat's pilot turned off the engine and jumped out of the boat and started swimming away. DW1 further



- testified that another man jumped out and swam and that when they reached the boat, another person jumped in the water so they only found one person in the boat with the third person hanging on to the boat.
45. DW1 testified that they asked the man hanging on the boat to return to the boat but he refused so they pulled him back into the boat. It was his testimony that they questioned the 2 as to why they stole a lamp but they denied saying the 2 who had escaped were the ones who had stolen the lamps. DW1 testified that they took the lamp and found other batteries stolen from other boats because he knew some batteries which he identified. He testified that they questioned the hostages who revealed that they were from Liunda Beach. DW1 testified that they pulled the other boat and tied it on to theirs and took it to Wichlum Beach. He reiterated that he did not see the 2 people who ran away.
  46. The 1<sup>st</sup> accused testified that they reached Wichlum Beach at around 9 am where they found the Chairman and many people, who asked them about the people and the new boat and they explained how they chased the people who had stolen their batteries/lamps. He further testified that their Chairman asked the 2 men where their workmates were and they said the others had escaped.
  47. It was his testimony that they were locked into a room of the Chairman's office, with the 2 men. He further testified that the 3<sup>rd</sup> person whom they rescued hit his head on the edge of the boat when he was jumping into the waters and suffered a minor cut on the head and was also feeling cold so the Chairman took him to a chemist and he was given some painkillers and an Elastoplast. DW1 testified that their Chairman called the Chairman of Liunda Beach who came and they were interrogated at Wichlum BMU Office. He further testified that the Liunda Beach Chairman said that one of the people who escaped went to his home that morning. It was his testimony that police officers were called and advised that they must wait and look for the missing fisherman to come so that they could deal with the issue of stealing.
  48. DW1 denied throwing the other people into the water. He stated that PW4 said that they rescued him from the waters. He further stated that they did not know the other people or where they came from.
  49. In cross-examination DW1 stated that on the morning of May 26, 2021 they were only two boats fishing at the place. He further stated that the issue was about their stolen lamp. DW1 further stated that their boat was not physically attacked and that none of them sustained any injuries. It was his testimony in cross that they spoke to the 2 people whom they found on the boat. He further confirmed that the boat which had other fishermen was at their place that morning.
  50. The second accused person Francis Otieno Otieno testified on oath as DW2 and denied the charge of murder. He further denied knowing the deceased. It was his testimony that on the evening of May 25, 2021, he was at Wichlum then went fishing with Daniel Ojwang, Geoffrey Odhiambo and "Kibaki". He stated that they laid their fishing equipment including a lamp and that between 4 - 5am, they heard the sound of another boat approaching which reached them and confiscated their lamp, switched it off and turned back. It was his testimony that they collected their nets and started following the other boat and approached them.
  51. DW2 testified that the other boat went to a shore which they did not know well. He further testified that they lit a torch and saw 2 people jump into the water, with the coxswain being the first to jump out and as they got nearer the boat, another person jumped out of the boat but they managed to return him into the boat. It was his testimony that they interrogated them and they said it was the two escapees who had stolen the lamp. DW2 testified that they arrested the 2 with their items and checked and saw their lamp in that captured boat and thus pulled their boat to the beach at Wichlum and reported what had happened.



52. He testified that the captives were taken to the office and their items including their lamp and other stolen items were kept in the office. It was his testimony that their Beach Chairman called Liunda Chairman who arrived at Wichlum and stated that he knew the people. He further stated that the captured boat was found to have 11 lamps yet the occupants had said that their boat had 8 lamps and further that the persons they had arrested could not explain where the other lamps had come from. DW2 testified that they were told that they had killed one of the occupants of that other boat and threw him in the waters which was not true. He further stated that nothing was taken from their boat. He reiterated that they never killed anyone but only followed their lamp which was stolen.
53. In cross-examination, DW2 told the court that they were attacked by the occupants of the other boat between 4-5am and that the two boats were the only ones at the scene. He further stated that they spoke to the 2 fishermen who had testified in court after catching up with them. DW2 further stated that he heard that the deceased was in the company of the 2 whom they found in the boat and who jumped into the water and whom they had rescued. It was his testimony that one of the 2 whom they rescued hit his head on the boat so he got an injury and he was treated when their chairman took him for treatment. It was his testimony that none of the occupants of his boat were injured.
54. In re-examination, DW2 stated that he never saw any of the people who testified in court avail a P3 form as proof of their injuries.
55. Geoffrey Odhiambo Abongo testified on oath as DW3 and recalled that on the May 25, 2021 he was fishing at Wichlum with his three co-accused and that they fished from 5 pm until 4 - 5 am when they saw another boat approach them, with its occupants proceeding to take their lamp, switching it off before leaving in the same direction. He testified that they quickly folded their equipment and followed the thieves and as they neared them, DW3's coxswain lit a torch and so the thieves sped off so they also sped off towards them and caught up with them.
56. DW3 testified that they saw 2 men jump into the waters and that they found people in that boat. He further testified that one other jumped into the water so they pulled him into the boat and Daniel asked them why they stole their lamp and they said that the 2 who had escaped are the ones who had stolen the lamp. He further testified that they took the captives into their boat, tied the other boat on to DW3's and rode to Wichlum Beach and informed their Chairman who detained them in a room as he investigated on where the 2 men had originated from.
57. DW3 testified that the men said that they were from Liunda Beach and that there were 4 people in the boat so he called their Chairman who went to Wichlum. He further testified that the two said that 2 of their colleagues had jumped into the waters and swam away. It was their testimony that when the Wichlum Chairman arrived, he said that the 4 had 8 lamps but when they checked their boat, they found 11 lamps. DW3 denied either assaulting anybody or killing the deceased whom they did not know prior to that date.
58. In cross-examination, DW3 stated that they reached the other boat and spoke to the occupants. He further stated that it took them about 20 minutes to reach the other boat. He further stated that he only saw the 2 occupants and recognized them after reaching the Beach. It was his testimony that as they followed the other boat, they saw the occupants jump into the water, after a torch was lit at them. He stated that the occupants jumped into the waters because they were afraid having stolen DW3's lamp. He reiterated that nobody assaulted the other people or them. He further stated that he saw the 2 people they met in the boat in court as they testified.
59. James Omondi Ogallo testified on oath as DW4 and stated that he was 18 years old having been born in August 2003. He testified that in 2021 he was at Wichlum fishing and that on the evening of May



- 25, 2021, they had gone fishing at Wichlum. He denied knowing the deceased or killing him and stated that on the material date, he was with his 3 co-accused fishing when between 4 - 5 am, they heard a boat approaching, before picking their lamp, switching it off, placing it in their boat and speeding off.
60. DW4 testified that they chased the thieves and when they neared them, DW4's coxswain lit a torch and one person from the pursued boat jumped into the water. He further stated that another one also dived into the water and that as they moved closer, another one jumped out of the boat but they pulled him into their boat and Daniel asked them why they took the pursuing boat's lamp to which they replied that the 2 who had swam away had stolen the lamp.
61. It was his testimony that they reached Wichlum Beach and their BMU Chairman called the Chairman of Liunda who went to their place and when asked how many lamps his people had, he said 8 although 11 lamps were found in that boat. He testified that they were escorted to a police post then later escorted to Bondo. DW4 stated that he did not assault anyone on that night and that he did not know who Clinton was nor did he have any issue with him.
62. In cross-examination, DW4 admitted that there was another boat whose occupants stole their lamp. He reiterated that they only found 2 people in the other boat as 2 people dived into the water when DW4's coxswain lit a torch. DW4 further stated that the engine was making noise so he did not hear nor see the 2 jump into the water. He further stated that one of those who jumped into the water was rescued and placed into their boat. He further stated that he did not know who Peter Were Ajulu was but that he saw him in court and at Wichlum Beach.
63. DW4 further stated that one young man pulled from the water had an injury on his forehead. He further stated that he never saw anyone assault the occupants of the other boat and that he did not know the occupants of the other boat nor did they have a dispute with them. He stated that they only arrested them for stealing their lamp. It was his testimony that they had no reason to lie to court. In re-examination DW4 restated that the occupants of the other boat stole from them.

### **Analysis and Determination**

64. I have considered the evidence adduced by both the prosecution witnesses and the defences proffered by the four accused persons on oath. The only issue for determination in this case is whether the prosecution has established the charge of murder against the four accused persons beyond reasonable doubt. The charge of murder is provided under section 203 of the *Penal Code*. The prosecution is required to prove beyond reasonable doubt the following ingredients of the offence:
- a. The fact and the cause of death of the deceased
  - b. The fact that the said death was caused by unlawful act of omission or commission on the part of the accused person - "actus reus"
  - c. That the said unlawful act of omission or commission was committed with malice aforethought - "mens rea"
65. Regarding the fact of the death of the deceased, there is no dispute, nor is there any dispute as to the cause of death. The deceased died of head injury with subsequent drowning secondary to blunt trauma to the head. This was the testimony of PW1, Dr Juma who carried out the postmortem on the deceased's body.
66. On whether the deceased's death was caused by an unlawful act, the cause of death as stated hereinabove was head injury with subsequent drowning secondary to blunt trauma to the head. Every homicide is presumed to be unlawful except where circumstances make it excusable for example in self-defence or



in defence of property as was held in the case of *Gusambizi Wesanga v Republic* [1948] 15 EACA 65. However, having considered the evidence on record as adduced by the prosecution witnesses and the defence, I am persuaded that the death of the deceased was due to an unlawful act.

67. As to whether it was the accused persons herein who caused the deceased's unlawful death, the testimonies of PW2, PW3 and PW5 who were all in the boat with the deceased was to the effect that the accused persons invaded them and started beating them. PW2 testified that he heard the deceased calling out to Onyango asking him not to invade them. He further testified that he jumped into the water and swam to the shore.
68. PW3 testified that the accused persons invaded them and beat them up then threw two of them in the water but realized that one of those thrown could not swim so they brought him into their boat. PW5 testified that they were beaten by the accused who were armed with big wooden planks till he fell into the water and hang on to a rope whilst screaming for help which prompted the accused to help him into their boat. PW5 further testified that whilst in the boat, the accused persons continued beating them. It was his testimony that prior to falling in the water he saw the deceased in the boat but when he was lifted back in, he could not see the deceased.
69. On their part, all the accused persons denied beating the occupants of the other boat that they were pursuing and stated that the coxswain of the pursued boat jumped into the water when he noticed that he was being pursued and that the accused persons nonetheless rescued one of the occupants of the offending boat and who had fallen into the water and hit his head on the boat.
70. From the above testimonies compared, and the injuries sustained by the deceased, I am not persuaded that the deceased coxswain on his own accord and out of fear of being captured by the accused persons herein jumped into the water to avoid being captured. This is because the testimonies of PW2, PW3 and PW5 regarding the beatings that they all received from their captors the accused persons herein, while the victims were still in the boat was consistent with the findings of Dr Juma who carried out the postmortem on the body of the deceased.
71. According to Dr Juma, on examination of the deceased's body, they noted that there were bruise marks on the forehead, preauricular area (near the ear) about 4 x 6 cm in dimension, that his eyes were swollen and that the deceased had small bruises noted on the right knee. He further testified that blood stains were noted from the left ear and frothing from the mouth, that in the nervous system, part of brain tissue was decomposed and some red discolouration on the temporofrontal area of the dura was suggestive of internal haemorrhage and further that the other systems were not exposed leading him to conclude that the cause of death was head injury with subsequent drowning secondary to blunt trauma to the head. Simply put Doctor Juma found that the deceased's death was caused by the head injuries he sustained and the drowning came after the head injuries were inflicted.
72. This testimony by Dr Juma on the cause of death was consistent with the testimony of PW5 who testified that the accused persons whilst armed with big wooden planks gave their hostages a serious beating. It is also not clear from the evidence adduced herein at what point the deceased fell into the water but taking into account PW5's testimony that is corroborated by the findings of Dr Juma, I am inclined to believe PW5's testimony that prior to him falling out of the boat after being beaten by the accused persons herein and being 'rescued' as he could not swim further and cried for help, he spotted the deceased inside the boat and who was also a recipient of the beatings from the accused but that upon PW5 being pulled back into the boat, he did not see the deceased.
73. From the evidence adduced herein, I am satisfied that it was the accused persons who caused the unlawful act that led to the deceased's death. I find that the prosecution proved this ingredient of



murder against the four accused persons beyond reasonable doubt that they are the persons who unlawfully killed the deceased.

74. Before I deal with the last element of murder, I must first determine whether the 4 accused persons acted in concert and with a common intention when they unlawfully killed the deceased. Of relevance to the joint charge herein are the provisions of sections 20 and 21 of the Penal Code. Section 20 provides in subsection (1) that:

“(1) “When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

“(a) “every person who actually does the act or makes the omission which constitutes the offence;

“(b) “every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

“(c) “every person who aids or abets another person in committing the offence;

“(d) “any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”

75. Regarding common intent, section 21 provides:

“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.”

76. In this case, the common intention, or *mens rea* to be proved is an intention to cause death or knowledge that the act or omission would cause death as stated in the definition of malice aforethought in section 206 of the Penal Code.

77. In the case of Stephen Ariga & another v Republic [2018] eKLR the Court of Appeal considered the definition of common intent in section 21 of the Penal Code before stating that:

“What common intention implies was set out by the predecessor of the court in *Wanjiru d/o Wamerio versus Republic* 22 EACA 521 as follows: -

“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”

78. The court further observed that: -

“The ingredients of common intention were enunciated in *Eunice Musenya Ndui v Republic*, Criminal Appeal No 534 of 2010 [2011] eKLR as follows:

“(1) “There must be two or more persons;



- (2) "The persons must form a common intention;
- (3) "The common intention must be towards prosecuting an unlawful "" purpose in conjunction with one another;
- “(4) An offence must be committed in the process;
- “(5) "The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful”

79. In the instant case, the evidence adduced by the prosecution clearly shows that the accused were more than two persons, that in their attack of the occupants of the other boat being PW2, PW3 PW5 & the deceased. The accused persons committed an unlawful purpose by taking the law into their own hands to punish the deceased and his colleagues for alleged theft of their lamp, which unlawful act led to the commission of an offence that is the deceased’s murder.

80. On whether the unlawful killing of the deceased by the accused persons was with malice aforethought, section 206 of the [Penal code](#) provides that:

“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 death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that that it may not be caused.”

81. From the testimonies of PW2, PW3, PW5, all the 4 accused persons who were in the other boat were involved in the attack of the boat in which the witnesses and the deceased were. The witnesses who were captives also testified that the accused persons assaulted them using wooden planks. Even assuming that the accused attacked the deceased and his passengers on account that they had stolen their fishing materials, nothing prevented the accused persons from following the deceased and his team up to the shores and reporting the matter to the Beach Management Unit Office and to the police for action. In my humble view, the attack by the accused on the deceased and his team was unwarranted and was intended to cause death or grievous harm to him.

82. In the circumstances I am satisfied that the prosecution proved their case against the accused persons and established all the elements of murder beyond reasonable doubt. I hereby find all the four accused persons herein Daniel Ojwang Anyama, Francis Otieno Otieno, Geoffrey Odhiambo Abongo and James Omondi Ogallo, guilty of the offence of murder as charged. I convict them accordingly.

83. Sentence shall be after records and mitigation. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 17<sup>TH</sup> DAY OF AUGUST, 2022**

**RE ABURILI**

**JUDGE**

