



**State v Otieno & 2 others (Criminal Case E029 of 2021)
[2022] KEHC 14386 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E029 OF 2021
RE ABURILI, J
OCTOBER 24, 2022**

BETWEEN

STATE PROSECUTION

AND

MOURINE ATIENO OTIENO 1ST ACCUSED

LAWRENCE OTIENO OUMA 2ND ACCUSED

BERNARD MOJO 3RD ACCUSED

JUDGMENT

Introduction

1. The three accused persons herein Mourine Atieno Otieno, Lawrence Otieno Ouma and Bernard Mojo 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 are that on the August 24, 2021 at Ugunja Township, in Ugunja sub-county within Siaya County the accused persons murdered one Edward Odhiambo Jagero.
2. The accused persons pleaded not guilty to the charges against them and the matter proceeded to full trial. The prosecution called a total of nine (9) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

3. PW1 Sheldon Omondi Oduor testified and recalled that on the August 24, 2021 while at Mbosie bodaboda stage, the deceased, who was riding a motor cycle, went and requested to be escorted to Ugunja and that upon reaching Ugunja junction, the deceased stopped and told PW1 that he wanted to call someone so the deceased requested PW1 to ride the motor cycle instead and directed PW1 to follow the route to Nyamasaria.



4. PW1 testified that they proceeded to Kamunye junction at which point the deceased directed him to proceed on. PW1 testified that the deceased spoke on phone with his girlfriend, giving her direction on where she could find him. It was his testimony that when they reached near the tarmac towards Kamunya junction, the deceased told him to hold breaks and then the deceased jumped off the motor cycle and remained behind. He testified that he had passed by two people standing, with one, a man on a motor cycle and a lady standing on the opposite side. He further testified that he then saw the deceased being beaten and the girl screaming saying mwizi mwizi after which two boys went to the scene.
5. PW1 testified that he got to help the deceased Edward but that more people arrived so he left and rode the motor cycle towards Ambira High School then turned towards Ugunja to the bodaboda stage and reached where Chege was and that someone called Chege and told him that a boda boda thief had been killed at Kamunya. He testified that he rode the motorcycle up to the home of David where he found David who received a call to the effect that someone had been killed. PW1 testified that he informed David that he had been with the deceased, Edward so David told him to return the motor cycle to Jack who was the owner.
6. It was his testimony that he knew that the motor cycle belonged to Jack and that the deceased Edward used to ride it for Jack so he returned it to Jack then went and informed Victor of what had happened. He testified that Victor declined to allow PW1 sleep at his place saying he, Victor could be invaded so PW1 took a blanket and went to sleep at Daniel Owino's place but left at 5.00am going to Victor's place. He testified that his mother came knocking asking for him and told him that Edward, the deceased, with whom he was with the previous day had been killed.
7. PW1 testified that he then went to his grandfather's home at Ligega where he stayed for a day until August 26, 2021 when we went to Ligega police post with his grandfather and were referred to Ugunja police station. He testified that the deceased, Edward, was attacked at about 7.30pm. He admitted that he did not know which girlfriend he was speaking to and that he did not see the people who were screaming saying 'thief' 'thief' because it was already dark.
8. In cross-examination, PW1 stated that he used to see Maurine Atieno, the 1st Accused, but he never saw her where the deceased was killed. He testified that he did not know the 2nd accused or the 3rd accused and that he never saw them where the deceased was attacked.
9. PW2 Maurice Onyango Owino testified that on the August 24, 2021 at about 10.30pm, he was at his home when Clifton Juma, a fellow rider, called him saying that he had received information that Eddy had been murdered and that his relatives were mourning. He testified that on the August 25, 2021 he went to Ugunja and learnt that Eddy had been killed so he proceeded to Ambira Mortuary and confirmed that Eddy was indeed dead. It was his testimony that he returned to Ugunja stage and heard rumours that Eddy had issues with another young man over a girlfriend.
10. PW2 testified that on August 31, 2021 he was at the bodaboda stage at 9.00am when a certain youth called Kevin went and told him that he had seen one of the people who had killed Eddy. He testified that they followed Kevin and he showed them the said person and they asked him to accompany them to the police station. PW2 identified that youth in question as the 2nd accused who he said used to ride bodaboda at Ugunja. It was his testimony that he did not know if the said youth had any disagreement with Eddy.
11. PW3 Benard Ouma Odhiambo testified that on August 24, 2021 at 10pm he was at Ugunja stage when the area Chief Joseph Oriaro called him and informed him that someone had been killed at Kamunya area so he asked him to take him, the Chief, to the place. It was his testimony that they arrived at the



- scene and found people assaulting the deceased. He further testified that the people mentioned Chege and the Chief telephoned Chege who came to the scene and tried but failed to identify the deceased.
12. PW3 testified that the Chief called the OCS Ugunja who arrived after about 10-15 minutes and that despite seeing the police vehicle (Mariam), the people continued beating the deceased whose body was swollen. He testified that he saw the second accused at the scene, beating the deceased using a stone and that he also saw Aluba, the third accused although not beating the deceased. PW3 testified that he took a stone from the second accused to prevent him from assaulting the deceased. He further testified that he used to see the third accused at Ugunja.
 13. It was his testimony that the police placed the deceased's body into the police vehicle but the rowdy crowd removed the deceased from the vehicle and threw him to the ground and continued assaulting the deceased. PW3 further testified that he left the Chief at the scene because of the curfew hours which were approaching and that the following day, he heard that it was Eddy, whom he knew well as a fellow rider at Ugunja, who had been killed..
 14. Further testimony from PW3 was that on the August 31, 2021, he was at their usual stage at Ugunja when he saw someone who pointed out to him the suspected killer of the deceased boarding a bus to Nairobi. He testified that they went and picked the suspect escorted him to the police station. He testified that the person in question was not in court and that he had a bag and was the one who gave names of people who killed Eddy. He testified that they left him at the police station then went looking for the named suspects. PW3 testified that he had been seeing the 2nd accused but not on a daily basis. He further testified that the 2nd accused had a swollen left ear.
 15. In cross-examination, PW3 stated that he saw people assaulting the deceased who had not died. He testified that he saw Maureen at the scene but that she was not assaulting the deceased. He further testified that he saw Lawrence, the 2nd accused, carrying stones and that he saw the 3rd accused though he did not see him beat the deceased.
 16. On being reexamined, PW3 stated that he saw Maurine, the 1st accused, standing but she was not assaulting the deceased.
 17. PW4 Patrick Ouma Odero testified that on the August 24, 2021 at about 7:00pm he was at Ugunja stage when someone went and informed them that someone was being assaulted at Kamunya so they went to find out who it was. He testified that they found the people assaulting the deceased. He further testified that he saw the 2nd accused hit the deceased on the head using a stone before the deceased died. PW4 testified that he had known the 2nd accused prior to that day as he always saw him.
 18. He further testified that he did not see the 1st and 3rd accused and that he did not know the victim until the following day when he heard that it was Eddy. It was his testimony that later on the August 31, 2021 at the stage, he found the 2nd accused so he called his colleagues PW2 and PW3 and informed them and together, they went and arrested the 2nd accused and escorted him to the police station.
 19. In cross-examination, PW4 stated that he knew Benedict Ouma Odhiambo who went to the scene after he had left the scene. He reiterated that the deceased was at the scene. He further stated that he only identified 2 people at the scene, one of whom ran away while the other was in court. It was his testimony that the people were beating the deceased and that many people assaulted the deceased.
 20. In re-examination, PW4 stated that when the vehicle light lit, he saw the 2nd accused take a stone and hit the deceased. He further stated that the other person who escaped pulled the deceased out of the road in front of the vehicle which had light on so he saw them very well and what they did.



21. PW5 Patrick Otieno Otieno testified that on the August 31, 2021 at 8am, he was at Ugunja stage when he heard people saying that a suspect in a murder case was boarding a bus to Nairobi. He testified that he went near and asked the person telling him that Eddy was his nephew and on what had happened to him. PW5 testified that the person told him that he was escorting his wife when Eddy went and started attacking him and the wife started screaming so people went to the scene and assaulted the deceased and further that he had reported at Ugunja Police on the inquiry for the OB Number, the person stated that it was at home with his wife. PW5 testified that they escorted the person to the police station at Ugunja. He stated that the person in question was not in court.
22. PW6 Dr Tonny Kiya, a Medical Officer and the Medical Superintendent of Ambira sub county Hospital in Ugenya conducted an autopsy on August 30, 2021 on the body of Edward Odhiambo Jagero Ref No OB 43/24/08/2021 at Ambira Sub County Hospital at 1030 hours. It was his testimony that the deceased was naked, male, of African race, good nutrition, well-built and height of 1.80M. He noted that the postmortem Changes were that rigor mortis had taken place and that the time of death was approximately 8pm on August 24, 2021.
23. Externally Dr Kiya noted that the head and neck had multiple cut wounds on head, face and neck. He further stated that there were cut wounds on the autoing aspects of the chest with haematoma on the left and right iliac regions of the abdomen, the back had haematoma on the lower and upper parts as well as gross haematoma on the buttocks and multiple bruises on the back region. He further noted that the upper and lower limbs had multiple bruises with deep cut wounds.
24. Internally, it was his testimony that the head suffered a gross haematoma and the scalp had multiple scalp fractures and gross haematoma in the brain. The other systems i.e. the respiratory, cardiovascular, and digestive and neurons, Spinal cord and spinal column were all normal. It was his testimony that as a result of his examination, he formed the opinion that the cause of death was traumatic brain injury secondary to multiple blunt and sharp objects. He issued a Death Certificate No xxxx and signed the postmortem report on August 30, 2021 in the presence of PC Gitau, Polycarp Ochieng and Prisca Owuor. He produced the postmortem Report as PEX 1.
25. On cross-examination, Dr Kiya reiterated that the cause of death was traumatic brain injury caused by sharp and blunt objects.
26. PW7 Victor Ochieng testified that on the August 24, 2021 in the morning, he had gone to work at Ugunja when he received information of the death of the deceased. He testified that he went to see Bernard who told him that Edward was beaten by a mob over a woman. It was his testimony that after one week, a bus agent went and informed them that the person suspected to have been responsible for the death of Edward and who claimed Edward wanted to rob him was at the stage so they went, arrested him and escorted him to Ugunja Police Station. He further testified that he knew the bus agent as 'Chonyo'. PW7 testified that he arrested the person in the middle,(identifying the 2nd accused). It was his testimony that on that night that the deceased was killed, PW7 was at home as he had left early.
27. In cross-examination, PW7 stated that he did not witness how the deceased met his death.
28. PW8 Polycarp Ochieng Orwaya testified that on the evening of August 28, 2021 he was in Kitale when Christine Awuor called him and informed him of the killing of the deceased. He stated that he travelled to Ugunja the following morning and proceeded to view the body of the deceased and on August 30, 2021, he identified the body of the deceased to the doctor who performed an autopsy.
29. PW9 No xxxx CPL Richard Ongera based at DCI Ugunja testified that on August 24, 2021 at around 8 pm, he was at the police lines station at Ugunja when he received information of a scene of murder



incident at Kamunya area. He testified that he was assigned the matter to investigate by the DCIO on August 25, 2021.

30. It was his testimony that on the August 30, 2021 the 2nd accused, Lawrence, was brought to the station by members of the public in the company of others not before court who were rearrested by the police. He testified that he could not recall the names of other suspects. He stated that CPL Ochola arrested Mojo, the 3rd accused and that Maureen, the 1st accused went into hideout in Homabay County upon learning that they were looking for her but through her sister in-law, she brought herself to Ugunja Police Station.
31. He testified that the postmortem was done at Ambira Hospital on the body of Edward Odhiambo alias Eddy. He further stated that he escorted the accused persons to Kakamega for mental assessment.
32. PW9 testified that from the statements of the witnesses, they mentioned the accused persons as suspects. He testified that he visited the scene at Kamunya area along Kisumu Busia Highway, 10 metres from the main road. It was his testimony that the witnesses who mentioned the 3 accused persons as the ones who killed the deceased was Joseph Otieno Ouma who had avoided coming to court. PW9 identified the 3 accused in court.
33. PW9 testified that he established that stones were used to kill the accused. He reiterated that Joseph Otieno Ouma told him that he saw the suspects commit the offence on August 24, 2021. It was his testimony that no photographs of the scene were taken. He further testified that officers from Ugunja went to the scene and took the deceased to Ambira Hospital but that those officers did not record their statements.
34. In cross-examination, PW9 stated that he investigated this murder case and that in the cause of investigations he found that the deceased was suspected to be a motor cycle thief. He further stated that some police officers rushed to the scene and found the deceased being beaten though the police officers in question were not witnesses in this case. It was his testimony that from his investigations, around 20 people were involved in beating the deceased and that the 3 accused and others not before court were identified positively as having been among those who assaulted the deceased.
35. PW9 further testified that from his investigations, the 1st accused was at the scene screaming and calling on the people to come and kill the deceased while the 2nd and 3rd accused were said to have stoned the deceased. PW9 stated that he had not brought any stones to court because the scene was disturbed and they were not able to recover the stones. He stated that the deceased died at Ambira Hospital.

Defence Case

36. Placed on their defence, the 1st accused Maureen Atieno Otieno testified as DW1 and stated that on the August 24, 2021, she was at her home after returning from her uncle's place and had agreed to meet in the evening with her boyfriend with whom they had a baby. It was her testimony that her boyfriend sent her Kshs 530 via mpesa so she left the house with her baby and elder child.
37. DW1 testified that it was dark and drizzling so she told the boyfriend, who was drunk and wanted to argue, that she wanted to go home. It was her testimony that she went home but on reaching near her gate, she heard her boyfriend screaming from behind asking her to go and help her as people were killing him.
38. DW1 testified that she went back and found people beating her boyfriend and when she asked one Ben on what had happened, he told her that the assailants had taken his phone so they both screamed which attracted many people who went to the scene and informed them that the people who had tried to



- snatch the phone also wanted to snatch a motorcycle from her boyfriend. She testified that the person was beaten and the beatings continued even when the police arrived.
39. It was DW1's testimony that she did not know the two persons who Ben stated were assaulting him and who wanted to snatch his motorcycle and further that she did not know what led to the death of Edward Odhiambo and that she never assaulted him.
 40. In cross-examination, DW1 stated that she was with her boyfriend, Benard Ogola Juma, who was arrested in connection with this case but that after paying Kshs 50,000 to the police, he was not charged and was not in court. She further testified that her boyfriend witnessed the deceased being beaten because it was her said boyfriend who screamed saying that people were beating him and wanted to snatch his motorcycle. DW1 stated that she did not know the other 2 accused persons or a person called Hussein.
 41. DW2 Lawrence Otieno testified that on the August 24, 2021 at about 6.30pm, he was at his place of work at Ugunja 'Filanga' stage on his way home having purchased food and heading home. It was his testimony that at Kamunya, he parked his motorcycle and proceeded for a short call when he heard screams ahead of him where he rushed to and upon inquiry from some of the members of the crowd, he was informed that a thief was being beaten. He testified that a police vehicle arrived and people scattered after which he saw a person lying in the middle of the road.
 42. DW2 testified that he did not recognize the person and that he went home, ate and slept and that after a week, while at his work place, 2 people went and asked him to take them to the police so he carried them on his motorcycle thinking they were customers as they had agreed on a payable fee. He testified that on reaching the police station, he met the DCI and his customers told the DCIO that DW2 was one of the deceased's assailants. He was placed in the cells.
 43. It was the 2nd accused's testimony that on the September 1, 2021, he and 7 other accused persons were taken to Ukwala Law Courts and subsequently detained for 14 days pending investigations but later 5 people were released and that they said that they had been told to give some money to the DCI for their release.
 44. DW2 denied knowing what led to the deceased's death although he admitted that he heard that the deceased was stealing a motorcycle. He further testified that he did not know the people who went near the deceased as it was dark. It was his testimony that he did not know the deceased and that he did not take part in assaulting him.
 45. In cross-examination, DW2 stated that from where he had gone for a short call to where the screams were coming from was a distance of about 150 metres and that it took him less than 5 minutes to arrive at the scene. He stated that he heard screams of thief! Thief!
 46. DW2 further reiterated in cross-examination that he could not tell if the deceased was already dead when he arrived as he stood beside the road as the deceased lay on the road. He stated that when he arrived, the deceased had already been assaulted and that he did not assault him. It was his testimony that he had not seen the people he was arrested with coming to court to testify.
 47. DW2 admitted that he knew PW1 and that he did not have any dispute with any of the witnesses who testified against him. He further denied being picked out of a crowd because he was seen committing the offence and reiterated that he found the deceased already assaulted.
 48. In re-examination, DW2 stated that when he went to the scene, he found people gathered.
 49. DW3 Benard Odhiambo Mojo testified that on August 24, 2021 at about 6.30pm, he was at central stage and that towards 7 pm one customer went and asked them to take her to Marko near Barteng



Primary School. It was his testimony that she was told to pay Kshs 100 which she stated that she did not have but that he agreed with her for a lesser fare so he took her to her destination but on returning, when he reached Uluani Primary School, he saw a police vehicle near a road block with many stationary vehicles nearby.

50. It was his testimony that he proceeded on and saw many people gathered as well as a police vehicle in the middle of the road and went find out what was happening. He testified that he saw one Jagot, a fellow motorcycle rider, and asked him what was happening to which Jagot responded saying that a motorcycle thief had been killed.
51. DW3 testified that he and Jagot upon request by the police carried the deceased's body into the police vehicle and they were then told to go on their way. He stated that he went and picked his motorcycle and proceeded to his home in Ambira and slept until the following morning when he went to his stage at Ugunja. He further testified that on the September 4, 2021 he escorted some people to a funeral and was to pick them at 4 pm which he did. However, that as it was cold and raining, he went to a hotel to have some tea where as he was drinking some people went and inquired of his names and told him to finish his tea after which they handcuffed him and took him to the police station. DW3 testified that at the station he was asked whether he knew the people at the scene and he responded by stating he only knew Jagot. DW3 testified that on the following Monday he was taken to Ukwala Law Courts with some other people and were detained for 7 days pending completion of investigations.
52. It was his testimony that he did not know what led to the deceased's death and that he found him lying on the ground and that he was not aware as to why he was asked to carry the body of the deceased only that he was near where the deceased lay. He stated that he decided to help the police officers. He reiterated that though there were many people he only knew Jagot. He stated that he never saw his co-accuseds at the scene.
53. In cross-examination, DW3 stated that it was getting darker as he took his customer to her destination and that on his return he met a crowd of people on the road and found the deceased lying down. He stated that Jagot was not in court and that he did not know Hussein. He stated that other people assisted him carry the deceased's body into the police car. He further stated that none of the prosecution witnesses lied about him.

Analysis and Determination

54. Having considered the evidence by the nine prosecution witnesses and the accused persons, the main issue for determination is whether the prosecution has proved the guilt of the accused persons beyond reasonable doubt to warrant a conviction for the offence of murder as charged. To sustain a conviction on a charge of murder 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'
55. From the foregoing evidence, the fact of death of the deceased was proved beyond reasonable doubt by the evidence of all prosecution witnesses PW3 and PW4 who were at the scene of the crime and testified that they saw people assaulting the deceased on grounds that he had stolen a motorcycle. It was evident from their testimony that the deceased was a victim of mob injustice.



56. The cause of death was confirmed through the postmortem report produced by PW6, Dr Kiya, as PEx1 that stated that the deceased's cause of death was traumatic brain injury due to multiple blunt and sharp objects.
57. As to whether the deceased's death was caused by an unlawful act, the evidence from the prosecution witnesses alludes to the deceased being a victim of mob injustice. In *Republic v Kelvin Amata Omboto & another [2017] eKLR* the Court was saddened by these state of affairs and stated;
- ' I note that he (deceased) was clearly a victim of what is often touted as mob justice but what should ideally be 'mob injustice' Mob justice is a very primitive and barbaric method of meting out justice that should be discouraged and condemned in the strongest terms possible as it has no place in a civilized society that observes the rule of law.'
58. It is trite that every homicide is unlawful unless it is authorized or excusable by law or committed in execution of reasonable defence of property or self-defence. See *Republic v Stephen Sila Wambua Matbeka [2017] eKLR*. The post mortem report (PEx1) established that the cause of death was traumatic brain injury due to multiple blunt and sharp objects thereby implying that the attack against the deceased was vicious as to leave no doubt that the assailants had a clear intention of snapping life out of the deceased.
59. In *Gusambizi Wesanga v Republic [1948] 15 EACA 65* the Court stated:
- ' Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.'
60. The evidence before court points to an unlawful act that led to the death of the deceased.
61. Having established the death of the deceased, the cause of death as well as that the deceased's death was due to an unlawful act, the question is whether the three accused or any one of them was positively identified as having been part of the mob who assaulted and fatally injured the deceased.
62. The testimony of PW3 and PW4 who were both at the scene of crime was that they saw the 2nd accused person assaulting the deceased using a stone. PW3 testified that he took a stone from the 2nd accused in an effort to stop him from assaulting the deceased. PW3 further identified the 2nd accused by his swollen left ear.
63. PW1 who was with the deceased prior to his death stated that he never saw the 1st accused persons at the scene of crime. PW4 stated that he did not see the 1st and 3rd accused person at the scene of crime. On his part PW3 stated that he saw the 1st accused at the scene though she was standing aside and not assaulting the deceased and that he also saw the 3rd accused at the scene and he was not beating the deceased.
64. Accordingly, the evidence adduced by the prosecution witnesses out rightly exclude the 1st and 3rd accused from having been involved in the unlawful killing of the deceased. Mere presence of the two at the scene is not sufficient to prove their involvement in the commission of the crime. However, I find that the evidence by PW3 and PW4 point towards the 2nd accused as one of those who assaulted the deceased occasioning him the injuries that led to his death. The question is whether that evidence is full proof. To answer that question, I must assess what the 2nd accused stated in his sworn statement of defence.



65. What then did the 2nd accused say in his defence? The 2nd accused denied assaulting the deceased stating that he arrived at the scene of crime and found the deceased already assaulted. It was his testimony that when the police arrived, people scattered and he was then able to see the deceased whom he did not know earlier, before he left for his home.
66. PW3 who was at the scene testified that the mob that was assaulting the deceased continued beating him even when the police vehicle arrived at the scene. This was corroborated by DW1, the 1st accused, who further corroborated PW3's testimony and stated that the mob continued assaulting the deceased even after the police arrived.
67. The evidence adduced by the prosecution against the 1st and 3rd accused though placing them at the scene does not implicate them in the deceased's attack. It is noteworthy that cases of mob injustice do attract spectators and from the evidence adduced before this court, I find that the 1st and 3rd accused were spectators to the incident.
68. From the evidence adduced by the prosecution witnesses who were at the scene namely PW3 and PW4 and also supported by evidence of the 2nd and 3rd accused, there were police officers at the scene who had gone to rescue the deceased. They took the deceased to Ambira Hospital from where he died, according to CPL Ongera the investigating officer in this case. PW3 also testified that he is the one who escorted the Chief Mr Oriaro to the scene and even left him there and that it was the Chief who called the police to the scene.
69. There is no reason why the chief or those police officers who went to rescue the deceased did not come to court to testify on what they saw or heard. PW3 stated that he saw the 2nd accused beating the deceased using a stone and that he is the one who took the stone from the 2nd accused person to prevent him from assaulting the deceased. The question is, was the 2nd accused throwing stones at the deceased or was using the stone to hit the deceased severally. It is not clear how the 2nd accused was beating the deceased using a stone. PW3 did not say that he saw the 2nd accused person assaulting the deceased and whether he was assaulting him from the vehicle or from the ground and in the full view of the police officers. If this witness was with the Chief, the question is whether the Chief also saw the same actions by the 2nd accused and if so, as an administrator, why did the Chief not record his statement and appear before this court to testify?
70. In addition, some of the key witnesses one of whom recorded his statement but became refractory and was jailed for seven days and later released on bond but vanished was never arrested by the police despite indulgence by the court. The investigating officer stated that the witness lived near the police station but that whenever they went to arrest him, he learnt of the move and escaped. The question is, how did the witness know that the police were going to arrest him if he was not being forewarned of the intended arrest since there was no evidence that he had left his abode which was near the police station handling this case? This refractory witness, according to the investigating officer, was an eye witness to the offence and that he recorded his statement on what he saw happen to the deceased on that material day.
71. The prosecution initially applied to have the statement recorded by the refractory witness to be produced under section 33 of the *Evidence Act* but the defence opposed. the Court granted the prosecution more time to have the witness arrested. On the date when the witness was to testify but he was not present, the prosecution did not revisit their application to have the statement of this refractory witness who was at large to be produced under section 33 of the *Evidence Act*.
72. Further, according to the 1st accused, her boyfriend who was the person that was allegedly attacked by the deceased leading to the mob injustice being meted on the deceased knew the persons who assaulted



the deceased but that he was set free by the police after he paid them kshs 50,000. There was no denial of this fact by the police meaning the people who were charged before this court are those who could not buy their freedom. This is not to say that this court can release persons who are culpable simply because they did not buy their freedom at the police station as alleged, but I find it very very unfortunate that blood money can be exchanged where life has been lost, to set free those who are culpable and drag to court those bystanders or the weak pocketwise.

73. On the evidence of PW4 that he saw the 2nd accused person assaulting the deceased using a stone, then the deceased died, this incident was taking place at night and the witness went to the scene at about 10.00pm and in the full view and presence of the police officers who had gone to the scene to rescue the deceased and take him to hospital. The question is, where were the police officers when the 2nd accused and others boldly stoned the deceased and if he did so, what action did they take at that particular moment? Did the police officers just watch the deceased being smashed to death? Why have those police officers not testified in this case?
74. Furthermore, PW2 testified of a certain youth called Kevin who went to him and told him that he had seen the person who was involved in the killing of Eddy then PW2 accompanied the said youth who identified the 2nd accused and they arrested him. This youth was never called as a witness to tell the court how he knew that it was the 2nd accused who was involved in the killing of the deceased.
75. I find that the prosecution failed to call crucial witnesses in this case to establish the guilt of the 2nd accused person beyond reasonable doubt, considering that it was at night when the incident herein took place and in the full view of the police officers who had gone to the scene to rescue the deceased. There is no evidence that the crowd was so violent that the police were unable to control it. There is also confusion from the evidence of PW7 on whether the 2nd accused is the person who was the boyfriend of PW1 or not, considering the evidence of PW2, PW3 and PW4. The Police did not seal all the loose ends in this case. They left so many gaps which the accused persons have no duty to fill. The 2nd accused did not deny being at the scene but like other bystanders, if at all he was involved in assaulting the deceased, the Chief and the police officers who were at the scene had a duty to arrest him and also record their statements on what they saw him and others do to the deceased. There is no watertight evidence adduced against the 2nd accused person to prove his guilt beyond reasonable doubt. Convicting him would be unsafe in the circumstances of this case.
76. Accordingly, I find that the prosecution failed to prove their case against all the three accused persons beyond reasonable doubt.
77. I find and hold that it would be unsafe to convict the accused persons based on the shaky and gap filled evidence adduced by the prosecution. I find the three accused persons herein Mourine Atieno Otieno, Lawrence Otieno Ouma and Bernard Mojo not guilty of the offence of murder. I acquit each one of them of the offence charged. Unless otherwise lawfully held, all the three accused persons are hereby set at liberty.
78. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF OCTOBER, 2022

R.E. ABURILI

JUDGE

