



**State v Ogao & another (Criminal Case E011 of 2022)
[2022] KEHC 17009 (KLR) (29 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E011 OF 2022
RE ABURILI, J
DECEMBER 29, 2022**

BETWEEN

STATE PROSECUTION

AND

JANE ATIENO OGAO 1ST ACCUSED

BRIAN OWINO OGAO 2ND ACCUSED

JUDGMENT

Introduction

1. The accused persons herein are Jane Atieno Ogao and Brian Owino Ogao. They are mother and son. They 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.
2. The particulars of the offence are that on the night of 6th and 7th March 2022, at Agwato 'A' Village, Nyalgunga Sublocation in Alego Usonga Sub County within Siaya County, jointly with others not before court murdered one George Otieno Jera. On 29/3/2022 the accused persons pleaded not guilty to the Information for murder and the matter proceeded to full trial.
3. The prosecution called a total of seven (7) witnesses in support of its case which is summarised herein below.

The Prosecution's Case

4. PW1 Julius Otieno Odhiambo testified that he lived at Lower Pandi behind Central Secondary School in Siaya and that he was a Supervisor at Pride Inn Security Company. He testified that the deceased George Otieno Jera was one of their guards assigned at the Ministry of Housing premises. PW1 recalled that on the 6/3/2022, the deceased reported on duty at 6.48 pm and that he worked with Emmanuel Shikanga. That at about 8.10 pm, PW1 went and checked on them and found them to be ok after



which he went and did spot checks and returned at 8.30 pm when he signed off for other spot checks then went home.

5. The witness stated that the following day at about 7 am, he received a call from one of his guards, Miriam Otieno Wayugi of JUST, and spoke to Victor Ogutu who worked with Miriam and informed them that he was on his way from Kobare. He stated that Victor told him that Emmanuel Shikanga was waiting for PW1 with his report so he rushed there and found Emmanuel Shikanga who told him that he received information through a phone call from a guard at KERRA Offices to the effect that George Jera who had sneaked out of duty at 11pm was dead.
6. PW1 testified that he proceeded to Siaya Mortuary and found the body of George Jera lying on the floor and that upon leaving the mortuary, he met the deceased's family members including his mother who greeted him. He testified that he went and reported to the police station and was then directed to go to the DCIO where he recorded his statement. He testified that he had worked with George for one (1) month and one week.
7. In cross-examination, PW1 stated that Emmanuel Shikanga informed him that he was told that George was killed at Nyakongo near his home area. He further stated that he could not tell if the guard who was also assigned at KERRA also resided at Nyakongo or if he was in the mob that may have killed George.
8. PW1 stated that George and Emmanuel had worked for 3 weeks together during which time he had never received any report of George leaving work early or of being a criminal or committing any house breaking. He admitted that he did not know where George's body was recovered from and that George had absconded duty when he was found dead.
9. PW2 Emmanuel Shikanga Leseroy testified that he previously worked as a Security guard at Pride Inn but left to work in a hotel at Kiti Moto. He testified that he knew George Jera whom he had worked with at Pride Inn and with whom he had been assigned to work at the Public Works offices.
10. It was his testimony that on the 6/3/2022 the deceased George Jera reported on duty early, while he, PW2, reported at 6pm and found George a bit drunk. He testified that at 8 pm, PW1 their supervisor reported on duty and that at about 10 pm, George disappeared without informing him where he had gone after they had done patrols together. According to PW2, they worked until morning when a fellow guard with Lavington Guards and also assigned at the Public Works offices told him that he had received a phone call that George had been killed. He testified that he did not have a phone and thus at 7 am, he requested a colleague to call PW1 and inform him of what he had heard. It was his testimony that PW1 came and they went together to Siaya Mortuary where they met the deceased's family members.
11. It was PW2's testimony that the deceased's mother told them that George was killed at home when he was found stealing a plastic chair. PW1 testified that he had worked with George for one month and that George never used to vanish from work. He further testified that when George vanished, he never looked for him because he had no phone.
12. In cross-examination, PW2 reiterated that he never had a phone that night and that he had told the police the same. He further reiterated that George's mother informed them that George was killed when he was found stealing. PW2 stated that he did not know that George was a thief. He stated that the Lavington Guard was with them and that the latter told PW2 that he got a phone call that George was killed.
13. PW2 admitted to not knowing where George's was killed or body recovered from. He further stated that he could not tell who took his body to the morgue. It was his testimony that George left work at



- about 10pm without telling him that he was leaving. He stated that George had gone behind the office while he was in front of the office.
14. PW3 Edwin Odhiambo Jera, the deceased's older brother testified that on 7/3/2022 at around midnight, his mother called him saying Jack Otieno, his cousin, had woken her up saying he had heard George screaming from the home of Jane Ogao, PW3's sister-in-law. He testified that he told her to let him speak to Jack if he was there and Jack told him that he had heard George screaming from Jane's home saying he was being killed and further that 2 motorcycles had been heard there.
 15. PW3 further testified that he called his brother Benard and asked him why he was not rescuing George and asked him to send Jane's phone number but Benard said that he did not have it but gave him Dan's number. PW3 then spoke to Dan, Jane's first born son who told him that he had been to Jane's home and found George being assaulted but that he had asked the assailants to leave him.
 16. PW3 testified that he told Dan to go back and rescue George and also that he could give the phone to Jane so that they could speak. It was his testimony that he spoke to Jane who said "*tumemmaliza leo. Ametusumbua sana, kuja umpeleke mortuary*". It was his testimony that Jane informed him that the deceased had stolen plastic chairs and money and that he should call the police because she had called police to come in vain. He further testified that Jane told him that he could not talk to George because George could not talk.
 17. He testified that he called a police officer at Siaya Police Station who went and removed the deceased's body to Siaya Mortuary. It was his testimony that George used to go and drink chang'aa at the 1st accused's house. He further stated that on the 17/3/2022, he went to hospital and witnessed the postmortem on the deceased's body. PW3 identified Jane Ogao "Nyasembo" as the 1st accused. He stated that he did not speak to the 2nd accused.
 18. In cross-examination, PW3 stated that Jack told him that he heard motorcycles enter the home so he knew motorcycle riders had gone to the home. He further stated that he recorded his statement with the police and signed it. He further stated that when he spoke to Jane on the phone, she told him that his brother George disturbed her for long and that she had finished him with her sons.
 19. PW3 stated that he told the police that the 1st accused informed him that the deceased had disturbed them, been stealing from her so he was caught red handed stealing and the boda bodas had dealt with him. He stated that Jane told him that they had assaulted his brother. It was his testimony that when he called the police, he told them that his brother was beaten to death so they should go and collect him. He stated that Jane had informed him that they had 'finished' George. He denied reporting that he had reported a mob injustice when he called the police.
 20. PW3 stated that he knew that there was a case where it was alleged that George stole Television sets and yet the said TVs belonged to him and that when George had been arrested he produced receipts, proving ownership so he was released.
 21. In re-examination, PW3 stated that when he called the police, he told them that Jane had informed him that they had killed George so he should take him to the morgue. He further restated that Jack told him that 4 youths/ boda boda riders were involved in assaulting the deceased.
 22. PW4 No. 242306 Police Constable Peter Mutwiri stationed at DCI Siaya testified that on the 6/3/2022, he was on standby duty when a colleague, PC Koriase, notified him of a scene of crime to be attended to at Nyalgunga village of alleged mob injustice in the home of Jane Atieno. He testified that they proceeded to the scene and found the lifeless body of George Jera and on inquiry, they were informed that the deceased was found by Atieno, trying to steal.



23. It was his testimony that they went to the home of Jane Atieno and found bloodstains in her PVC carpet, photographed the scene, collected the body and arrested Jane Atieno and her son. He testified that on the 25/3/2022 they visited the scene together with Jane Atieno and found the carpet removed from her sitting room and taken to the kitchen. He stated that it had blood stains which were swapped by scenes of crime and photographs taken.
24. PW4 testified that Brian Owino had blood on his leg and a swab was taken for examination. He further testified that blood samples were taken from the deceased and he did an exhibit Memo dated 28/3/2022 which he used to forward the exhibits to Kisumu Government Analyst for examination. He produced the Exhibit Memo as PEX1.
25. He testified that a report was done on 23/6/2022 which report concluded that the DNA profiles generated from bloodstains found on the exhibits send to the chemist matched the DNA profile of the deceased. The exhibits were:
 - 'A' nails from the deceased
 - 'B' Apron received from Jane Atieno.
 - 'C' Swab taken from right leg of Brian Owino.
 - 'D1' & 'D2' Red stains swabs from carpet of house of Jane Atieno.
26. It was his testimony that they found the deceased lying at the fence outside Jane Atieno's home and that they found Jane Atieno in the company of her son Brian, and that she led them into her house. He testified that on the 6/3/2022 when they visited the scene, they did not collect the carpet but collected plastic chairs and sticks, energy drinks and firewood. He testified that one stick had blood stains.
27. He further stated that the accused claimed that the deceased had stolen her chairs and that they found the chairs and energy drinks besides the deceased's body. He produced the 3 plastic-green chairs as PEX 3a, b & c.
28. PW4 produced the pieces of the firewood as PEX 4a, b, c, d, the broken table leg as PEX5, 6 cans of Energy drinks - Power play as PEX6a, b, c, d, e, f, a blue checked apron, which they found Jane wearing on 6/3/2022 as PEX7 and the PVC carpet as PEX8. It was his testimony that they arrested Jane and Brian, the two accused persons. He further testified that a postmortem was carried out on the deceased's body on the 17/3/2022.
29. In cross-examination, PW4 stated that the report was made through a mobile phone by the deceased's brother who was not at the scene. He stated that apart from the two accused persons, nobody else told him that they saw the accused assault the deceased. He further stated that the deceased was 30 meters away from Jane's house and that at Jane's home, they saw two people standing by the body who vanished when they arrived. It was his testimony that when they reached the scene, they found Jane beside the body with her son inside the house.
30. PW4 further stated that from his investigations, Jane was the assailant as per the evidence he got from her house. He admitted that there were other people at the scene but they vanished and that he tried to locate them in vain. He further stated that he established that the deceased had a pending case of breaking in a different location.



31. PW5 Polycarp Lutta Kweyu, a Principal Government Chemist Analyst at Kisumu testified that on the 28/3/2022, Police Constable Peter Mutwiri of DCI Siaya submitted the following samples for forensic analysis:
1. Fingernails samples 'A' of George Otieno Jera (said to be deceased)
 2. Checked blue Apron 'B'
 3. A cotton swab 'C' with red stains.
 4. 2 cotton swabs with red stains marked 'D' and 'D2'
32. It was his testimony that they were requested to ascertain if stains noted were of a human being and generate any DNA profiles. He testified that he made the following preliminary findings after examination of the exhibits:
1. The stains on the Apron 'B' was tested positive for human being blood.
 2. The cotton swabs 'C,' 'D1' and 'D2' also tested positive for blood of a human being.
33. He testified that by comparing the DNA profiles generated, he reached the conclusions that the DNA profile generated by blood stains on the cotton swabs 'C,' 'D1' and 'D2' matched the DNA profile generated from the finger nail samples of the deceased George Otieno Jera and further that the DNA profiles generated from the Apron 'B' was a mixed DNA profile of the deceased George Otieno Jera and other unknown male.
34. PW5 testified that he prepared the report on 23/6/2022 which he signed and produced it as PEX 9.
35. In cross-examination, PW5 stated that in his work, labelling of samples was very important and that samples were not to be mixed. He stated that it was the Police Officers who label. It was his testimony that they must relate their findings with what was brought by the police. He further stated that in his report finding, he referred to D but this was an error as it was supposed to be D1 not D. He testified that he did not receive any samples from the accused persons and thus could not make any comparison with what he never received.
36. In re-examination, PW5 stated that the D in his finding was a typing error as the finding was derived from "D1" where the DNA profile was generated from.
37. PW6 Dr. Juma Gabriel Wekesa a Medical Officer at Siaya County Referral Hospital testified that they did the postmortem on the body of the deceased George Otieno Jera, a 36-year-old man on 16/3/2022 at 1.00pm and made the following findings:
- a) Externally, there were multiple areas of bruises - abrasion. On the head, hands and feet, two cut wounds on the right leg. One was 5 cm long and the other was 3 cm long extending deep to expose the bones.
 - b) Internally, there were multiple areas of scalp haematoma. They opened up the head and found multiple areas of large contusions on the left and right parental areas.
38. He testified that all other systems were normal and that they thus concluded that the cause of death was severe blunt head injury with intra cranial contusions. They issued a death Certificate No. 1581706



- and signed the postmortem and took some specimens of one toe nail and one finger nail for further investigations. He produced the postmortem Report as PEX10.
39. PW7 No. 66783 Corporal Simon Likony attached to Scenes of Crime Siaya testified that on the 25/3/2022 at about 3pm while at the Crime Office, he was requested by Sergeant Nzive and other officers to accompany him to Nyalgunga area to visit a Crime scene where death had occurred on the night of 6th and 7th March 2022. He testified that they went to home of Jane Ogao and on arrival, they found one semi-permanent house which had a padlock.
40. It was his testimony that PC Mutwiri had briefed him that there was a carpet in the sitting room so he peeped through the main door gap but saw no carpet so they searched in the compound and recovered it folded and placed in another house in the same compound. He testified that they removed the carpet and discovered that it was blood stained. He further testified that he swapped using sterile swaps and handed the swaps to PC Mutwiri who took to the Government Analyst for DNA analysis.
41. It was his testimony that on the 27/3/2022 at about 3 pm, he received a flash disk from Police Constable Mutwiri and an exhibit memo and was requested to produce photographs which he did upon which he realized that the photographs were of a male adult body that lay dead in darkness outside and of a plastic carpet inside the house, which was blood stained. He identified to court the following photographs:
- i. The 1st photograph was the general view of the main house locked from outside.
 - ii. The 2nd photograph was a closer view of the house with padlock.
 - iii. The 3rd photograph of the inside of the sitting room of a house.
 - iv. The 4th and 5th photographs are closer view of the carpet recovered in one of the other houses.
 - v. The 6th photograph is of a plastic carpet after unfolding it.
 - vi. The 7th photograph is a closer view of several blood stains of that carpet.
 - vii. Photograph 8 and 9 is the closer view of the deceased lying outside the house.
 - viii. Photographs 10 and 11 are the carpet which was still in the house before it was moved from the main house.
42. He testified that he is the one who processed the photographs and that all the films were in his custody. He stated that some photographs were taken by the investigating officer while he took some. He further testified that the investigating officer took photographs 8, 9, 10, 11 while he took the other photographs. He produced the 11 photographs as PEX 2(a - k) and the certificate of photographic evidence as PEX2(l)
43. In cross-examination, PW7 stated that they found the house locked and that they recovered the carpet from one of the houses. He stated that they never recovered plastic chairs or bottles; but that the same were in the photographs. It was his testimony that he handed over the recovered carpet to the Investigating officer.
44. He further stated that he took photograph 3, Jane's sitting room in the company of Jane Ogao and the Investigating officer. He further stated that one could not print the photographs unless one is shown the gadget that took the photographs as indicated in his certificate.



The Defence Case

45. Jane Atieno Ogao, the 1st accused gave sworn testimony as DW1 and stated that the deceased used to be a habitual thief who had stolen from her many times. She testified that after her husband died, the deceased used to break into to her house from time to time and that on the material day, her children were coming to her house to fetch drinking water from the kitchen where they had slept and found the door to her house opened using a master key.
46. She testified that they informed her that she had forgotten to lock the door. It was her testimony that the children screamed and she opened the door and got out and that many people including bodaboda riders came to her home upon hearing the screams. She further testified that she found people beating the deceased and they returning him into her house. She stated that they beat him using sticks and that she tried to protect him but all was in vain.
47. DW1 testified that she called the Assistant Chief many times but he did not come to the scene. She further stated that she wore an apron and that she went to protect the deceased so that he would not be killed but she got injured on her right shoulder. She testified that the men overpowered her and beat the deceased and killed him there.
48. It was her testimony that she went to another old man to inform him but he was sick and he could not come and upon her return, she found the deceased dead. She testified that when the police came to her house, they removed the body of the deceased. She stated that she removed the carpet from her sitting room and took it to the kitchen because it was risky having it in the main house. She further testified that the incident occurred after midnight, that people were many and it was at night so she could not identify the mob who killed the deceased. She testified that she never killed the deceased but that she tried to help the deceased but was overwhelmed.
49. In cross-examination, DW1 stated that she knew the deceased for a long time since she got married in that area in 1991. She stated that she never had any love affair with the deceased after she was widowed. It was her testimony that Melvin entered her house when the deceased was in her house and went away and that he was her sister's child.
50. The 1st accused denied that she was embarrassed after Melvin found the deceased in her house and that is why she screamed or that she screamed after Melvin closed the door but rather that she screamed when the children screamed. She testified that Brian went to the scene after many people had arrived at the scene as he was sleeping at his grandmother's house.
51. DW1 testified that it was the people who pulled the deceased from the outside into the house and beat him from her house as they asked her to reveal where the stolen items were.
52. In re-examination, DW1 stated that she never heard any witness say she was the deceased's lover or that she assaulted the deceased. She further stated that the people were the ones who got hold of the deceased from outside and returned him and beat him from her house.
53. DW2 Brian Otieno Ogao, the 1st accused's son testified that he did not participate in the killing of the deceased. It was his testimony that on the material night, he was asleep in his grandmother's house when he heard screams from their homestead. He testified that it was at midnight so he ran there and found a thief had entered and stolen from their house and that people were outside their house assaulting the deceased.



54. DW2 testified that the police came later and the people disappeared then the police arrested him and his mother and told him to take his sweater. He testified that they entered the police vehicle and he was taken into custody.
55. It was his testimony that when he reached his mother's house, he found when the deceased had been removed from the house. He testified that he did not identify the people who assaulted the deceased as it was dark at night. He testified that he did not assault the deceased or move close to where the deceased lay but just stood outside their house.
56. In cross-examination, DW2 told the court that he saw the deceased that day in their home though he knew him as he was from his village. He further stated that he found the deceased outside their house and that there were many people.
57. When questioned by the court, DW2 admitted that he used to go to school but stopped after the institution of the instant charges.

The Accused Person's Counsel's Oral Submissions

58. Mr. Okanda counsel for the accused persons submitted that the Prosecution had not proved its case against the accused persons beyond reasonable doubt and that what was before court was a case of mob justice in which none of the 7 prosecution witnesses told the court the role played by any of the accused in assaulting the deceased.
59. Mr. Okanda relied on the case of *Republic v Florence Kola, Carole Kola and Another* [2021] eKLR, where the court observed that in situations where the death of the deceased was of mob justice, it was difficult to tell who inflicted the fatal blow hence a common intention was not easy to be deduced.
60. It was further submitted that the evidence adduced did not directly point to the 1st accused as a participant in the Murder as she tried to shield the deceased from the assault by the mob. Mr. Okanda submitted that the conduct of the 1st accused must be seen as someone who tried to protect the deceased from harm.
61. It was further submitted that the history of the deceased was that he had criminal conduct as testified by the investigating officer and that on this occasion, the deceased had broken into the 1st accused's house to steal. It was submitted on behalf of the accused persons that the 1st accused tried calling the Assistant Chief but she got no response.
62. Mr. Okanda submitted that the act of removing the carpet to the kitchen roof was not one of trying to cover up the offence but of preserving it for investigations as one could not be expected to comfortably stay in a house with blood all over the carpet.
63. It was further submitted that there was no evidence allocating any role to the 2nd accused in the Murder of the deceased as he was a young boy who only went to his homestead to find out why there were screams.
64. Mr. Okanda submitted that the investigators had a duty to investigate further to find out who was involved in the killing of the deceased, since there were many people in that home that night and the police found many people standing in the homestead but let the people escape. Counsel urged the court to acquit the accused persons as no evidence had been led to prove their guilt beyond reasonable doubt.



The Prosecution's Oral Submissions

65. Mr. Kakoi Senior Principal Prosecution Counsel submitted that the theory of mob injustice was one that had been created by the defence not the prosecution's case. He submitted that only two people assaulted the deceased to death and that the accused had not called any evidence to corroborate their theory of mob injustice.
66. Mr. Kakoi further submitted that the accused was beaten in the house then taken outside and that the crowd only came after the fact. He testified that from the photographs, there was nothing that broke such as furniture etc. to show that a mob invaded the deceased.

Analysis and Determination

67. I have considered the evidence adduced by the prosecution witnesses and the defence. The main issue for determination is whether the prosecution have proved all the elements of the offence of murder to the required standard of beyond reasonable doubt.
68. The charge of murder is provided for under Section 203 of the *Penal Code* and 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."
69. The fact of the deceased's death is not in doubt, PW1,2,3 & 4 all testified to seeing the deceased's body at the mortuary and at the scene of crime. The fact of death is further confirmed by PW6, Dr. Juma Wekesa who carried out the postmortem on the deceased and issued a death certificate No. 1581706. As for the cause of death, Dr. Wekesa testified that the cause of death was severe blunt head injury with intracranial contusions.
70. That the deceased's death was caused by an unlawful act is similarly not in doubt. Article 26 (1) of *the Constitution* guarantees every person the right to life. It is trite that every homicide is presumed to be unlawful except where circumstances make it excusable for example in self-defence or in defence of property.
71. From the testimonies of all the prosecution witnesses and the defence, there is no doubt that the deceased did not inflict the fatal injuries on himself and neither was there evidence of absolute self defence or defence of property proffered by the two accused persons herein. Accordingly, I find that the evidence before court points to an unlawful act that led to the death of the deceased.
72. As to whether it was the accused persons who caused the deceased's death, none of the prosecution witnesses witnessed the attack that led to the deceased's death. In essence, the prosecution case was based on circumstantial evidence.
73. The testimonies by the prosecution witnesses PW1,3 & 2, contrary to submissions made by Mr. Kakoi for the prosecution, all point to the deceased being a victim of mob injustice. The nature of injuries sustained by the deceased as set out by Dr. Wekesa in the postmortem report similarly point to the deceased being a victim of mob injustice.



74. The testimony of PW4, the Investigating Officer regarding broken table legs, cans of energy drinks and pieces of firewood some of which were stained with blood similarly point to a mob assaulting the deceased. PW4 further testified that there were people at the scene standing by the body of the deceased but who got away once PW4 arrived at the scene. All these pieces of evidence point to the deceased being a victim of mob injustice.
75. From all the foregoing evidence it is without doubt that the deceased met his death after being assaulted and fatally injured by a group of villagers or mob of people on suspicion of having stolen from the 1st accused's house.
76. In *Abamad Abolfatbi Mohammed and Another v Republic* [2018] eKLR the Court of Appeal held inter alia that:
- “Before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence.”
77. In the instant case, the evidence raised by the prosecution against the accused persons in my view amounts to mere suspicion. The evidence by PW3 on which this case seems to be built that the 1st accused informed PW3 that they had finished the deceased is not on its own enough to sustain a conviction against the accused persons herein. PW3 like other prosecution witnesses never witnessed the deceased's death and his testimony is largely made up of hearsay. Further, none of the prosecution witness alluded to the 2nd accused as being part of the people who attacked and injured the deceased.
78. In situations where the death of the deceased is attributed to “mob justice” or “mob injustice”, it is difficult if not impossible to pinpoint which person in the mob administered the killer or fatal blow. In the circumstances, a common intention by the assailants to assault and kill the deceased or to take the law in their own hands may be lacking. However, a common intention may be drawn from the presence of the assailants at the scene of crime, their action and even the omission of any of them to disassociate themselves from the assault.
79. 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.”
80. It was undisputedly established that the deceased herein was unlawfully killed by a mob of people. Each of the persons who took part in assaulting and killing the deceased was as guilty as the other for the unlawful killing.
81. 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.”
82. In this case, the deceased was assaulted and unlawfully killed on suspicion of being a thief. The accused contended that they were not in the mob of people who assaulted and killed the deceased. The 1st



accused testified that she even tried to protect the deceased from the beatings he was receiving and got a scar for her trouble. She further testified that she tried to call the area Assistant Chief on numerous occasions during the incident but that she was not successful. On his part, the 2nd accused testified that he stood away from the incident and was only attracted to the screams.

83. I note that none of the prosecution witnesses was at the scene during the deceased's attack and none of them could place any of the accused persons as the deceased's attackers. The prosecution evidence against the 1st accused and her co-accused failed to prove and establish that they were positively identified as being part of the mob of people who assaulted and killed the deceased. The fact that the deceased was beaten and killed at the homestead and house of the 1st accused was not sufficient to link the two accused persons to the unlawful killing of the deceased.
84. I hasten to add that it is an undisputed fact that the deceased had clandestinely left his place of work at night and without permission only for him to be found at the 1st accused person's house.
85. From the pre-bail assessment report, the deceased had a past criminal record. he had already been convicted and sentenced to serve one-year imprisonment by Siaya Law Courts for the offence of burglary and stealing contrary to section 279 (b) and 304(2) of the Penal Code on 22/11/2018 *vide* Criminal case No. 357 of 2017. As if that was not enough, the deceased was at the time of his demise facing another criminal case *vide* Siaya Chief Magistrate's Court Criminal case No. 114 of 2021 and the said case was scheduled for hearing on 17th march, 2022. The charge was house breaking and stealing.
86. From the above findings and revelations by the probation officer through a social inquiry, I have no doubt in my mind that the deceased was a habitual criminal and that on this material day he had gone to try his other luck at the 1st accused person's house when he met his death. He was a bother to the community as he appears not to have been ready to change his anti-social criminal behaviour despite being jailed and prospects of being jailed again for thefts. The deceased was working and eking a living as a security guard but he was not satisfied that he could eke a decent living through hard work. As fate would have it, his forty days were over. This is not to say that suspected criminals should be subjected to mob injustice but that in this case, the prosecution did not prove beyond reasonable doubt that it was the two accused persons, mother and son who assaulted the deceased. Finding a thief and screaming for help is not an offence. That is all that the 1st accused did. I believe her testimony that the deceased had gone to steal from her house and upon her screaming, he was met by a responding mob who administered injustice on him occasioning him fatal injuries.
87. It is for the for the above reasons that I find and hold that the prosecution has failed to prove beyond reasonable doubt that it was the accused persons who assaulted the deceased and inflicted fatal injuries on him.
88. Accordingly, I find the two accused persons herein Jane Atieno Ogao and Brian Owino Ogao Not Guilty of the offence of murder. I acquitthem of the Information for murder. Unless otherwise lawfully held, the two accused persons are hereby set at liberty forthwith.
89. I so order. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 29TH DAY OF DECEMBER, 2022

R.E. ABURILI

JUDGE

