



**Republic v Ayoma & another (Criminal Case E020 of 2022)  
[2022] KEHC 16949 (KLR) (28 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E020 OF 2022  
RE ABURILI, J  
DECEMBER 28, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**BERNARD OTIENO AYOMA ..... 1<sup>ST</sup> ACCUSED**

**ALEX ONONO OKETCH ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons Bernard Otieno Ayoma and Alex Onono Oketch 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 15/5/2022 at Onyinyore village, Onyinyore Sublocation, South Gem Location in Gem Subcounty within Siaya County, the accused persons jointly murdered one Daniel Onyango Rambo.
2. The accused persons pleaded not guilty to the charges against them and the matter proceeded to full trial with the prosecution calling a total of eight (8) witnesses in support of its case which is summarised herein below.

**The Prosecution's Case**

3. PW1 Wilfrida Anyango Lango testified that the 1<sup>st</sup> accused is her first-born son and the 2<sup>nd</sup> accused was her neighbor. She recalled that on the 15/5/2022 at 7pm, she was attending a funeral in Seme and on her way home, she received a phone call from Linda, her daughter, informing her that 'Winda', who is Daniel Onyango Rambo, had been brought to PW1's home by Onono and 'Otimbo' but that Otimbo had escaped. She testified that Onono was the 2<sup>nd</sup> accused in court.



4. It was her testimony that she boarded a motorcycle and rushed to her home where she found many people gathered. She also found Bernard, Onono and Otimbo. She stated that she was shocked to see Daniel Onyango lying down injured and so she tried to raise him up telling him to return Bernard's phone which Daniel had allegedly stolen. She stated that Daniel had run away for 2 weeks so they sent word for him to return the phone as Bernard was repaying a loan for that phone.
5. PW1 further testified that Daniel was badly injured and that she saw Bernard holding some firewood which he told her that he had taken from Otimbo so as to prevent 'Otimbo' from assaulting the deceased. She testified that Otimbo then escaped. PW1 identified the firewood which she took from Bernard and the bigger firewood which Otimbo allegedly threw away and escaped.
6. It was her testimony that Bernard and Onono remained at the scene and that she told them to take Daniel to Hospital as his leg was swollen. She testified that Bernard took his motor cycle and they escorted Daniel to hospital. She further testified that she also chased away the many people who had gathered in her homestead.
7. PW1 testified that she got into the house and inquired from Linda of what happened and that Linda explained to her that Otimbo had brought Daniel saying he had brought a thief after which she called Bernard. It was her testimony that as Linda was updating her on what had happened, Bernard called PW1 saying that they had taken Daniel for treatment but he had died after they took him to his house and that the mob was administering beatings on them.
8. PW1 testified that Bernard informed her to call the Assistant Chief which she did and the Assistant Chief informed her that he was aware as he had already received information. It was her testimony that the people wanted to burn her home so she slept out in the field. She testified that the following day, the police arrived at her home and she showed them the firewood then she went and recorded her statement.
9. In cross-examination, PW1 stated that when she reached her home, she found Bernard, the 1<sup>st</sup> accused, Onono, the 2<sup>nd</sup> Accused and 'Otimbo' as well as many other people gathered. She stated that Daniel was lying down and that she did not see anyone assault the deceased when she reached the scene as she found when Daniel had already been assaulted.
10. PW2 Stephen Pinda Aloo testified that on the 15/5/2022 at about 8pm, he was at his house when four people arrived on two motorcycles and called him out. He testified that he got out and they informed him that they had brought him a patient but upon seeing the injured person, he told them to take him to hospital. He testified that the people told him that they were good Samaritans who helped the injured.
11. It was his testimony that the injured person had a broken left leg, an open cut on the right leg and was unconscious. PW2 testified that he offered first aid and advised them to take the injured person to hospital. He stated that he cleaned the patient's wound and wrapped it with a piece of cloth. He further testified that the one who led them to his house left earlier. PW2 further testified that the following day, he was on his way to Kisumu when the DCI called him and informed him of the death of the person he had assisted the previous night.
12. PW2 stated that he saw the people who went to his house as the house was well lit. He testified that he saw them well as he was with them for 20-25 minutes. He identified the two accused persons as two of those who went to his house and stated that he had not known them before that date.
13. PW3 David Odhiambo Okinyo testified that on the 15/5/2022 at 8.30 pm he was in the home of Sylvester, the brother to the deceased. He testified that he had left his house at 7.30 pm escorting his



- guest when he heard ladies talk saying Bernard had assaulted Daniel and broke his leg so he went to Sylvester's house to inform him as he did not have his phone. It was his testimony that they then heard screams and proceeded to where the screams were coming from and on arrival, they found Bernard and Alex, Bernard on a motor cycle and Alex standing by and supporting Daniel on the legs.
14. PW3 testified that he inquired as to what had transpired and Bernard told him that Daniel had gone to sell Avocado at his house and stole Bernard's phone. He stated that they checked on Daniel and noticed that he was already dead so they called the Chief who came and arrested the two accused persons and subsequently the police arrived and arrested the two accused and moved the deceased's body to the Mortuary. Two days later, he recorded his statement. PW3 identified the two accused persons in the dock, as persons who were well known to him as they went to school together.
  15. PW4 Sylvester Okumu Rambo, the deceased's elder brother testified that on the 15/5/2022 at 8pm he was in his house when David Okinyo went and informed him that his brother Daniel had been seen with a broken leg on a motorcycle. PW4 stated that he heard a motor cycle outside so they got out and saw Alex Onono and Bernard Otieno, who had removed Daniel from a motor cycle. He testified that he saw Daniel with a broken leg and upon inquiring as to what happened, Bernard told him how Daniel had gone to sell them avocado then their phone got lost and so he was arrested and assaulted by people who asked him to produce a phone. He testified that he asked why they never took him to the police.
  16. It was his testimony that Alex was supporting Daniel on his legs and so they told him to make Daniel lie down and he, PW4, saw that Daniel was already dead. He testified that people screamed and they called the Chief as people wanted to kill Bernard and Alex so they saved them by locking them into Daniel's house. It was his testimony that the Chief and the police arrived at the scene and arrested the two while Daniel's body was removed to the Mortuary. He later recorded his statement with the police.
  17. PW5 Dr. Rita Aoko Opondo, a Medical Officer at Bondo Sub County Hospital testified on behalf of Dr. Alexander Oluu Opondo who carried out the postmortem on the body of Daniel IONyango Rambo, but that the said Doctor had since left the service and his whereabouts were unknown.
  18. It was her testimony that the postmortem was done at Bondo Sub County Hospital on 30/5/2022 at 10.00 am and that the Doctor observed that the body was naked of a black male aged 39 years, of normal nutritional status, slender in physique, body supine, well embalmed and preserved in formalin, with a time of death of more than 72 hours.
  19. PW5 stated that externally, bruises were noted on the back of the skull, right shoulder, right forearm, left side of the forehead and cheek, right side of the chest, back and on both feet. It was her testimony that the deceased had a fracture of both legs and that the right leg distal tibia and fibula had an open fracture wound approximately 1.5 cm.
  20. Internally, the genitourinary system was normal and that on the head, there was a bruising on the back of the skull and bleeding noted below the dura matter on the occipital lobe with a gorged blood vessel over the occipital lobe. The nervous system, spinal cord and spinal column were all normal.
  21. As a result of the examination, the Doctor concluded that the cause of death was due to blunt trauma on the head and that the doctor signed and dated the Postmortem Report on 30/5/2022. She produced the postmortem report as PEX 1.
  22. In cross-examination, Dr. Opondo testified that the deceased had other injuries but the severest which led to his demise were the ones on the head.
  23. PW6 Linda Awuor Ayoma, the daughter to PW1, the 1<sup>st</sup> accused's sister and the 2<sup>nd</sup> accused's neighbour testified that on 15/5/2022 at 7pm she was in their homestead cooking when 3 people namely, Alex



- Onono, Stephen and the deceased whom she knew as 'Winda' arrived and that Stephen asked her if Bernard or her mother was in and then told her to call Bernard and her mother to come as him and Alex had brought 'Winda' who Bernard was looking for, for allegedly stealing Bernard's phone.
24. PW6 testified that she called Bernard and her mother and informed them. She testified that she heard Stephen having an argument then he took a club and beat 'Winda' and she told him not to beat Winda in that home. She further testified that Bernard had not arrived but he later came and joined them at the veranda where he started asking 'Winda' where his phone was but 'Winda' denied stealing the phone.
  25. It was her testimony that Bernard asked Winda in a polite way but as Winda continued denying, Bernard raised his voice demanding 'Winda' to accept that he stole the phone. She testified that the child was crying and that she heard screams and noises from outside so she got out and found 'Winda' had been made to sit on the ground with Bernard and Alex holding sticks. She testified that she told them that if 'Winda' had denied stealing the phone, they should take him to the police station after which she entered the house as she was cooking and had a child in the house.
  26. PW6 testified that people came to their homestead. She stated that she was with her sister in law. She further testified that she saw the three assaulting the deceased despite her telling them not to assault him after which she entered the house and heard them beating him with sticks which she identified before court.
  27. It was her testimony that her mother also came and told them not to assault Winda. She further testified that she stayed in the house with her mother and that after some time, Bernard called her mother and informed her that they had taken Winda to hospital but that he had died. PW6 testified that her mother started crying. She further testified that they slept until the following day when police officers arrived and they were taken to record their statements. PW6 identified Bernard as the 1<sup>st</sup> accused and Alex as the 2<sup>nd</sup> accused.
  28. In cross-examination, PW6 stated that it was Alex and Stephen who brought 'Winda' to their home and that she did not notice any injury on him the time the two brought him. She testified that she saw Bernard assault the deceased 'Winda' as he was asking the deceased whether he had stolen the phone. She further stated that she also saw Alex and Stephen assault the deceased. She stated that she could not tell who used which stick to assault the deceased because it was at night.
  29. PW7 No. 119345 Police Constable Silas Kiprono stationed at Siala Kaduor Police Post which falls under Akala Police Station testified that on the 15/5/2022 at about 9 pm he was at Siala Police Station when Corporal Chemonges informed him that the area Assistant chief had called and informed him that someone at Aluor had been murdered.
  30. He testified that he and Corporal Chemonges prepared to leave for the scene and the Assistant Chief arrived and escorted them to a place where they found Daniel Onyango alias 'Winda' lying, five meters from his house, dead. He further testified that he had known the 2 suspects before as Alex Onono was a village elder and he also knew Bernard Otieno.
  31. It was his testimony that the two were in the deceased's house and that many people had gathered at the scene. He stated that other police officers from Akala Police Station arrived and escorted the two suspects to Akala Police Station as he and Corporal Wafula remained at the scene. He further stated that after a while, the police officers who had escorted the suspects returned in the company of Chief Inspector Wairagu and they removed the body of Daniel from the scene to Bondo Mortuary.
  32. PW7 testified that on the 16/5/2022 he and Corporal Chemonges went to the house of Bernard and his sister and the mother gave them two sticks which they said that the suspects, Alex and Bernard,



- used to beat the deceased and which Bernard's mother had removed from where she usually kept her firewood.
33. It was his testimony that they also recovered a cap belonging to Alex from outside of Benard's mother's house. He testified that he knew the faded grey cap written 'Vuma' well because Alex used to wear it all the time. He testified that he took the items to Siala Police Post. PW7 identified the two suspects as Bernard, the 1<sup>st</sup> and Alex, the 2<sup>nd</sup> accused.
  34. PW8 No. 79235 Corporal Bernard Chemonges, the officer in charge of Siala Kaduol Police Post testified that he was the Investigating Officer in this case. It was his testimony that on the 15/5/2022 while at the police post, the Assistant Chief, David Suji, called him and informed him of a murder incident that had been reported at Aluor and that the suspects were in danger of being killed.
  35. He testified that as he prepared to leave with his officers, the Assistant Chief arrived on a motorcycle so they left for the scene together and on arrival, they found many people gathered outside the house of the deceased and that the deceased's body was outside his house. There was blood at the scene. It was his testimony that at the doorstep of the house of the deceased, they found some people struggling over a panga, wanting to cut the suspects and the panga cut one of the suspects.
  36. PW8 testified that Alex Onono was hiding behind the door of the deceased while Bernard Otieno sat on the floor of the deceased's house. He testified that he inquired of what had happened and Alex, whom he knew as a village elder informed him that they were disciplining the deceased because he had stolen a phone, when he unfortunately died. He testified that he called Chief Inspector Wairagu and informed him and the other officers who were on patrol were called and they arrived at the scene in the police vehicle. It was his testimony that they escorted the suspects into the vehicle and then to Akala Police station and booked them in the OB.
  37. PW8 stated that he met the Officer Commanding Station (OCS) who accompanied him to the scene of murder and spoke to the crowd to calm them down. He testified that the people left then the body of the deceased was removed to Bondo Mortuary. He further testified that on the 16/5/2022 they returned to Bernard's home and met Linda his sister, his mother and wife whereupon Bernard's mother told him that when she returned home, she found the suspects assaulting the deceased so she snatched from them the sticks which they were using to assault the deceased and threw the sticks into the other firewood. He testified that they recovered the 2 sticks which he produced as PEX1 and PEX 2 respectively.
  38. PW8 further testified that they recovered a cap belonging to the 2<sup>nd</sup> accused which he produced as PEX 4. It was his testimony that he started his investigations and recorded witness' statements and that the postmortem was done on the 30/5/2022.
  39. PW8 testified that the accused were escorted for Mental assessment at Siaya County Referral and were subsequently charged with the murder of the deceased. He further identified Bernard as the 1<sup>st</sup> accused and stated that he had not known him before. PW8 identified Alex as the 2<sup>nd</sup> accused and stated that he knew him before because he used to work at the Chief's Office.

### **The Defence Case**

40. The 1<sup>st</sup> accused, Bernard Otieno Ayoma, gave sworn testimony and stated that on the 15/5/2022, he woke up as usual and went for prayers in the church and returned then he proceeded to Kambare Centre. It was his testimony that at 7.30 pm, his sister called him and told him that Daniel Onyango Rambo had been brought to their home by Stephen.



41. He testified that he went home and found Stephen and two boys surrounding Daniel Onyango Rambo at his mother's doorstep. He testified that he moved closer and asked Daniel Onyango Rambo why Daniel had stolen his phone but Daniel denied. It was his testimony that he told the deceased why he suspected him but the deceased told him that he had bought a phone and returned to the seller though the deceased refused to disclose who the seller was so Stephen and his friends assaulted the deceased.
42. DW1 testified that one of the boys hit Daniel on his legs using a club and Daniel moved away to another place. He testified that he told the people not to assault the deceased. It was his testimony that his mother came and found Daniel sitting down and tried to help Daniel stand up but he told her that the other boys had injured him on his legs. He testified that the other boys disappeared upon realizing that Daniel had fractured his legs and so he sought help from people nearby to place Daniel on a motorcycle to take him for treatment.
43. It was his testimony that he saw Alex Onono who assisted him to take Daniel to PW2's home who applied first aid and advised them to escort Daniel to hospital. He testified that they decided to return Daniel to his home so that he could be taken to hospital the next day and that when they arrived at his home, they met his brothers and neighbors who assisted them to remove him from the motorcycle and placed him on the ground.
44. DW1 testified that the deceased's brother asked him what had happened and as he was explaining, Daniel fainted and fell flat and that is when they realized that Daniel was dying. He testified that the deceased's brother called the Chief who inquired if DW1 was present at the scene and on replying that he was, the said it was a police case.
45. It was his testimony that the Assistant Chief arrived in the company of some police officers and later the OCS from Akala Police Station came and he and Alex were led away to the Police station then brought to court. DW1 testified that he did not cause the deceased's death as he was just asking him where his phone was. He stated that he spoke to Linda Awuor Ayoma who is his sister, the second follower. He further testified that his sister Linda could not say that he assaulted Daniel because she was present when Daniel was assaulted by the other people. He stated that he only shouted at Daniel asking him to say where his phone was and that he asked the other young men not to beat him.
46. It was his testimony that although Wilfrida, his mother testified that he had a small stick, he was the one who snatched the stick from Winda to prevent him from assaulting the deceased. He further testified that he never saw the stick that was used to assault the deceased in court. He reiterated that he never witnessed other injuries being inflicted except the ones on the deceased's legs.
47. In cross-examination, DW1 stated that he suspected the deceased to have stolen his phone though the phone was never recovered. He stated that it was Stephen and his friends who assaulted the deceased. He further stated that he never had disagreements with his younger sister Linda and was surprised that Linda told the court that she saw him assault the deceased.
48. DW1 admitted that Linda saw him at the scene but that she never saw him assault the deceased. He stated that when he arrived at the scene, he found the people assaulting the deceased.
49. DW1 further stated that Wilfrida Onyango was his biological mother and that they had never disagreed. He stated that his mother could have been threatened to testify against him. He reiterated that his mother found him preventing people from assaulting Daniel who had already been assaulted. He stated that his mother snatched the stick from him so that it could not be used to assault Daniel. It was his testimony that he never saw any injuries on the head of Daniel.



50. When questioned by court, DW1 stated that he expected Wilfrida and Linda to tell the truth but they never did and that he realized that they were state witnesses while in court.
51. DW2 Alex Onono Oketch gave sworn testimony to the effect that on the 15/5/2022 at between 6 - 7 pm, he was going to buy dinner when he heard Bernard making loud noise at his home saying “do not assault this guy because I am the one who lost my phone.” He testified that he went there and found ‘Winda’ sitting down at Bernard’s mother’s house. It was his testimony that he asked Bernard on what was happening and Bernard explained to him that ‘Winda’ had been injured by the people who were not willing to assist him go to hospital.
52. DW2 testified that Benard’s mother also urged him to help so they went to Pindi’s house on a motor cycle who tied Winda’s legs as they were fractured and advised them to take him to hospital or return him the following day.
53. It was his testimony that they returned Winda to his home where they found his brother, a neighbour and his in law. He testified that Bernard asked the neighbor to help them place Winda down from the motor cycle. He further testified that Winda’s brother started talking to Bernard asking him what had transpired and Bernard explained to him that some boys from Pala had brought Winda to his home on suspicion that Winda had stolen his phone.
54. DW2 testified that Winda suddenly fell down and his brother called the Chief who informed police at Siala who came to the scene and found them in Winda’s house. He testified that the police removed them from Winda’s house and the police from Akala came and escorted them to the police station. It was his testimony that he did not know who inflicted the injuries on the deceased but that he only saw injuries on the legs.
55. In cross-examination, DW2 reiterated that he found the deceased had already been assaulted and that he was just a good Samaritan. He stated that the crowd wanted to kill them after Winda died. He denied holding any firewood and reiterated that he did not assault Winda.

### **Analysis and Determination**

56. I have considered the charge, the evidence adduced for the prosecution and the defence. The accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. Section 203 of the *Penal Code* defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: Proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the accused persons and that the unlawful killing by the accused persons was with malice aforethought.
57. The first issue for consideration is whether there is proof of death. In the instant case, there is no dispute of the deceased’s death. This was confirmed by all the prosecution witnesses, more so by the evidence of PW3 and PW4. PW5 who testified on behalf of Dr. Alexander Oluu Opondo stated that the doctor concluded that the cause of death was due to blunt trauma on the head. Accordingly, I find and hold that the prosecution has satisfied this court beyond reasonable doubt that there was death and the cause thereof was established.
58. The next issue is whether the death of the deceased was caused by an unlawful act or omission. Article 26 (1) of *the Constitution* guarantees every person the right to life. The post-mortem report produced by PW5 revealed that the deceased’s cause of death was due to blunt trauma to the head. The doctor also found that the deceased sustained bruises on the back of the skull, right shoulder, right forearm, left side of the forehead and cheek, right side of the chest, back and on both feet and further that the



deceased had a fracture of both legs. In the circumstances, I am persuaded beyond reasonable doubt that the deceased died out of an unlawful act because such injuries could not have been self-inflicted. Furthermore, PW6 testified that she saw the deceased being assaulted.

59. The other question is whether there was proof beyond reasonable doubt that it was the accused persons who unlawfully caused the deceased's death. PW6, Linda Awuor Ayoma the deceased's sister testified that she witnessed both accused persons assault the deceased. She further testified that she saw the accused persons and another not before court assaulting the deceased despite her telling them not to assault him after which she entered the house and heard them beating him with sticks, which sticks she identified before court. PW6 further testified that her mother, PW1, also came and told the assailants not to assault the deceased. PW1, the 1<sup>st</sup> accused's mother corroborated this part of PW6's testimony.
60. In their defence, the 1<sup>st</sup> accused denied assaulting the deceased and stated that he questioned the deceased about his lost phone and stopped those assaulting the deceased from attacking him. On his part, the 2<sup>nd</sup> accused also denied assaulting the deceased and stated that he and the 1<sup>st</sup> accused were good Samaritans who tried to help the deceased after finding him assaulted and injured.
61. I have considered the testimonies by both the accused persons and the prosecution witnesses particularly PW6 and PW1 and I find that PW6 was firm and resolute in her testimony. She placed both accused at the scene of crime and set them out as those who assaulted the deceased. The other assailant was identified as Stephen but that he escaped. She stated that it was Alex, the second accused herein who in the company of Stephen, brought the deceased Daniel at the home of PW1 and asked PW6 to call her mother and Bernard, the 1<sup>st</sup> accused to come and meet the person who was suspected of having stolen the phone of Bernard. There was no reason why PW6 could lie about her brother. I find that although the 1<sup>st</sup> accused wanted her to testify in his favour, when she came to court, she decided to tell the truth of what she knew, saw and heard.
62. The 1<sup>st</sup> accused's demeanour when he learnt that PW1 and PW6 were testifying for the prosecution and therefore against him betrayed his confidence as he had expected them, being his mother and sister respectively, to testify in his favour. The accused persons are under no duty to challenge the prosecution's case. They could still have elected to remain silent. However, they chose to adduce and challenge evidence adduced by the prosecution witnesses. Their defence, was displaced by the cogent and uncontroverted evidence adduced by PW6 and corroborated by PW1. The defence by the accused persons that they merely helped the deceased and or prevented people from assaulting him was in my humble view, evasive and choreographed to appear as if the 2<sup>nd</sup> accused never brought the deceased to the home of PW1 yet PW6 was very clear in her testimony as to who brought the deceased to her home. I find the defence by both accused persons unbelievable.
63. It is worth noting that 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 of this case, however, there was no evidence that those people whom PW1 says came to her home and whom she told to go away, ever assaulted the deceased as a mob. She was categorical that when she arrived, the deceased had already been assaulted. PW6 also testified on who specifically assaulted the deceased. She stated that it was the accused herein with Stephen.
64. In my humble view, a common intention by the assailants to assault and kill the deceased or to take the law in their own hands was established beyond reasonable doubt. Although PW6 could not tell which of the two sticks was used by who of the assailants, she was clear that the assailants used the sticks to attack the deceased. PW1 is the one who took away the sticks from the assailants and she handed them over to the police the following day.



65. I hasten to add that recovery of a murder weapon is immaterial where there is direct evidence of the accused assaulting the deceased who died as a result of the injuries sustained in the assault.
66. In this case, I find that the common intention is drawn from the presence of the assailants at the scene of the crime, their action and even the omission of any of them to disassociate themselves from the assault.
67. 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.”
68. From the evidence adduced before this court it is without doubt that the deceased met his death after being assaulted and fatally injured by the accused persons herein who were in the company of others. PW6 placed both accused persons at the scene and further she identified the accused persons as part of the deceased’s assailants.
69. 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.”
70. In this case, the deceased was assaulted and killed on suspicion of having stolen a phone belonging to the 1<sup>st</sup> accused. All those who took part in the unlawful transaction did not deem it fit to apprehend the deceased suspect and hand him over to law enforcers. Instead they decided to take the law into their own hands. They were not permitted under any circumstances to do so and having done so, they came into direct conflict with the law. They must therefore be held criminally responsible for the consequences of their unlawful actions.
71. Despite their denial, the accused persons were placed at the scene of crime by the prosecution witnesses i.e. PW6 who knew both of them very well. Indeed, the prosecution evidence against the first accused and his co-accused proved and established that they were positively identified as being part of the people who assaulted and unlawfully killed the deceased. I am therefore satisfied that the prosecution has proved beyond reasonable doubt that it was the accused persons herein who unlawfully killed the deceased Daniel m Onyango Rambo.
72. As to whether the unlawful killing of the deceased 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.”

73. In *Republic v Stephen Sila Wambua Matbeka* [2017] eKLR it was held interalia that:
- “an inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.”
74. The deceased died as a result of the serious injuries sustained following the assault. The accused knew or ought to have known that hitting the deceased on the head and breaking his two legs would occasion him grievous harm or even death. I find that the two accused persons had the necessary malice aforethought to unlawfully kill the deceased.
75. In view of the foregoing, I find and hold that all the elements of malice aforethought and indeed the offence of murder have been proved beyond reasonable doubt against the two accused persons.
76. in the end, I find and hold that the prosecution has proved beyond doubt all the elements of the offence of murder against the two accused persons herein. I find Bernard Otieno Ayoma and Alex Onono Oketch Guilty of the offence of murder. They are accordingly convicted as charged.
77. Sentence to be pronounced after records and mitigation.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 28<sup>TH</sup> DAY OF DECEMBER, 2022**

**R.E. ABURILI**

**JUDGE**

