



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CRIMINAL CASE NO. 7 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-versus-**

- 1. PAUL OSWAGO ONJE**
- 2. ABERN MBIJA AGUMBA**
- 3. JARED OTIENO MBIJA**
- 4. WILLIAM OKUMU ORONDO.....ACCUSED**

**JUDGMENT**

**Introduction:**

1. The sudden death of *Shem Shefa Ongache* (hereinafter referred to as '**the deceased**') bewildered the Rongo community. The deceased was at the prime of his life. At the age of 27 years the deceased was a renowned Youth leader. He also related well within the community. His life was nipped in the bud when he was viciously killed in an attack outside the Stage Park Bar within Rongo township in the night of 14/02/2016. Scores mourned him.
2. Out of police investigations the four accused persons herein were arrested and charged with the murder of the deceased. The accused persons are members of the same family.
3. The particulars of the information of murder were as follows: -

**On the 14<sup>th</sup> day of February 2016 at Stage Park Bar, within Rongo township in Migori County in the Republic of Kenya jointly murdered SHEM SHEFA ONGACHE.**

4. The Accused persons denied the information. They were all admitted to bond pending the hearing and determination of the trial.

**The Trial:**

5. The State availed 13 witnesses in support of the prosecution's case. **PW1** was *Michael Okumu Janduong*. He was at the Stage Park Bar in the night of 14/02/2016. **PW2** was *Charles Othim Owiti*. He was with PW1 at the said bar at the material date and time. *Joshua Ganda Ochiel* was an uncle to the deceased. He testified as **PW3**. He identified the body of the deceased at the Homa Bay County Referral and Teaching Hospital mortuary on 16/02/2016 prior to the post mortem examination. The examination was conducted and a Post Mortem Report filled in by Dr. Osuri Kevin. Dr. Sammy Ruwa Mwatela instead produced the Post Mortem Report on behalf of Dr. Osuri Kevin who was, at the trial, undertaking further studies. *Dr. Sammy Ruwa Mwatela* testified as **PW7**. The autopsy on the body of the deceased was witnessed by *No. 49576 PC Alex Chebii* then attached at Kamagambo Police Station who testified as **PW4**.
6. On the fateful night, *No. 2008106606 APC Ambrose Epat* then stationed at the Deputy County Commissioner's Offices at Rongo was on duty. He testified as **PW5**. He is the one who arrested the second accused person in this case. *No. 200205778 Corp. Joseph Bora* was by then attached at the Rongo Sub-County Headquarters. He testified as **PW8**.

7. **PW6** was a Government Chemist. **PW9** was No. 230585 C.I. *Kenneth Kiruai* who was the initial investigating officer. He was the DCIO Rongo. PW9 was transferred and he handed over the conduct of the case to C.I. *Patrick Mwita* (not a witness) who replaced him. C.I. *Patrick Mwita* retired from the service in 2017 and handed over the case to No. 82722 PC *John Hilale*, then stationed at DCI Rongo. PC *John Hilale* testified as the investigating officer and as **PW12**.
8. *Dr. Maurice Ouma Otieno* testified as **PW10**. He is the one who examined the mental status of the accused persons. No. 800872 Sgt. *Benson Ingosi* was from the Scenes of Crime Department. He testified as **PW11**. *Bernard Ochieng Adera* testified as **PW13**. He was the owner of a motor vehicle registration number KBZ 067X make Toyota Probox (hereinafter referred to as '**the vehicle**').
9. The accused persons were placed on their defences. The first accused person gave a sworn statement. He availed 3 witnesses. They were his wife *Florence Atieno Oswago* (**A1DW1**), *Michael Ooko Ouma* (**A1DW2**) and *Isaiah Owala Gura* (**A1DW3**).
10. The second, third and fourth accused persons also gave sworn defences but did not call any witness.
11. In this judgement I will refer to the witnesses in the manner in which they numerically testified at trial. I will also refer to the accused persons in the numerical order as they appear in the heading of this judgement. For avoidance of doubt, that is how the accused persons appeared in the information.
12. All the accused persons were represented by Counsels. **Mr. Omollo** initially appeared for both the first and second accused persons. **Mr. Muniko** later took over the conduct of the defence of the second accused person. **Mr. Ojalla** appeared for both the third and fourth accused persons. **Mr. Kimanathi**, Learned Senior Principal Prosecution Counsel appeared for the prosecution.
13. The prosecution's case was hinged on circumstantial evidence. That evidence was three-pronged. First, there was evidence on those who were allegedly seen with the deceased immediately before the deceased was killed. That was the evidence by PW1 and PW2. Second, there was evidence on those whose clothes were found with the bloodstains which stains were proved to be of the blood of the deceased. That evidence was by PW6, PW9, PW11 and PW12. Third, the recovery of a panga which was stained with the blood of the deceased. That was the evidence of PW5, PW6 and PW8.
14. Due to the centrality of the evidence of the said witnesses, I will revisit that evidence. I will begin with the first limb of the witnesses; that is PW1 and PW2.
15. PW1 hailed from Rakwaro village in East Kamagambo in Rongo Sub-County. He was a mason. During examination-in-chief, PW1 stated that he walked into the Stage Park Bar (hereinafter referred to as '**the bar**') at around 06:30pm to watch a football match. He was with PW2, *Joseph Onyach* (not a witness) and other people. They occupied a table which was next to a window. PW1 could freely see outside of the bar.
16. The deceased was well known to PW1. According to their clan PW1 referred to the deceased as his son. PW1 watched the football match and when the game was over some people left the bar. PW1 recognized one senior police officer in the bar who also watched the football match. He was a *Mr. Ng'etich* (not a witness) who also left immediately the match ended. PW1 remained behind with those whom they had occupied the table and continued to take drinks.
17. At around 08:00pm PW1 saw the vehicle driven towards the bar. It was parked outside the bar and the deceased came out of the vehicle. The deceased walked into the bar. PW1 readily recognized the deceased. As the deceased also recognized PW1, the deceased approached and exchanged greetings with PW1 and those who were with PW1. The deceased then occupied a table which was just next to the door. He sat with someone whom PW1 knew as a mason.
18. Around 30 minutes later, PW1 saw two people walk into the bar. He recognized one of them as the second accused person. He had known him since 1998 as he used to store his tools of work at the home of the second accused person. PW1 was by then working at a site next to the home of the second accused person.
19. The second accused person also recognized PW1 and walked to where PW1 sat. He greeted PW1 and the other people. The second accused person chatted with PW1. The other person who walked into the bar with the second accused person went straight to the counter and bought a small bottle of water. He then walked towards the door. When the person reached near the table where the deceased sat he greeted the deceased. PW1 then saw the deceased and the person who was with the second accused person walk outside the bar. The person held the hand of the deceased in a very friendly manner. When the second accused person saw the deceased and the other person walk out of the bar he left PW1 and also walked outside the bar.
20. It was further PW1's evidence that after a short while PW2 also went out the bar. However, PW2 shortly rushed back into the bar and told him that the deceased had been killed.
21. PW1 also rushed out of the bar. As he stepped out of the main door of the bar PW1 saw a stationary bus parked at the front of the bar. He also saw the person who had bought water standing next to the bus. PW1 did not talk to the man. As PW1 passed him, the person held PW1. PW1 asked the person why he was holding him. The person instead asked PW1 if he was the one who was with the deceased. The person then forcefully pushed PW1 back into the bar.
22. The people who were with PW1 also came out of the bar as well. PW1 also successfully did so on another attempt. PW1 saw the second accused person outside the bar. It was the second accused person who told PW1 that they were killing a thief. PW1 heard the person who had pushed him into the bar say that they had reported a case of a thief at Kamagambo Police Station and they were told to kill the thief.

23. PW1 then saw two young men approach the bar. They began hitting the vehicle with a view of setting it ablaze. Many people began gathering at the scene. PW1 then saw *Mr. Ng'etich* at the scene.
24. PW1 viewed the body of the deceased. It was on the other side of the bus. The bus had blocked the security light from illuminating where the body was. PW1 used his phone torch light to see the deceased. PW1 however was not sure if the deceased had already died by then. He saw a cut wound at the back of the neck and the leg of the deceased. PW1 told *Mr. Ng'etich* that it was the deceased who had been killed. PW1 witnessed the officer call his other colleagues. *Mr. Ng'etich* then interrogated PW1.
25. PW1 informed *Mr. Ng'etich* what he had witnessed. He told him that the person who stood next to him was the one who had killed the deceased. That was the person who had restrained PW1 and pushed him back into the bar. PW1 pointed out the person to *Mr. Ng'etich* and the person was arrested.
26. PW1 also pointed out the two young men who had attempted to set the vehicle ablaze to *Mr. Ng'etich* and they were also arrested. PW1 also stated that he had seen the two young men standing next to the deceased when he was stopped at the door of the bar by the person he had identified to the police. PW1 further stated that one of the two young men had a stick and hit the deceased just to confirm if he was really dead.
27. PW1 described the person who had walked into the bar with the second accused person. To him, the person was tall and heavily-built. He also had a box haircut and wore a red-and-white striped shirt. He identified the person in Court as the first accused person.
28. PW1 also described the one who allegedly had a stick and hit the deceased as slender and tall. He wore a yellow Tee-Shirt. PW1 however stated that he was not able to identify the two young men.
29. PW1 was duly cross-examined. When so examined by *Mr. Omollo Counsel*, PW1 stated that there were 5 people on the table he occupied and that he faced the direction where the deceased sat. He also clarified that the table which the deceased occupied was about 2 metres away from where he was. According to PW1 the second accused person and his companion walked into the bar about 5 minutes after the deceased entered.
30. PW1 affirmed the position that the bar was a public place and people walked in and out at will. He also did not see anyone carry a weapon in the bar.
31. On cross-examination by *Mr. Ojalla Counsel*, PW1 confirmed that he did not know the third and fourth accused persons. He also stated that he could not confirm if they were the ones who killed the deceased. PW1 however reiterated that the third and fourth accused persons were the ones who wanted to burn the vehicle. He also confirmed that the first, third and fourth accused persons were arrested at the scene by *Mr. Ng'etich*. PW1 further confirmed that there were so many people at the scene.
32. When tasked to explain how he recognized the person who had a stick and who allegedly hit the deceased, PW1 stated that he did not know who that person was. He however reiterated that he saw the third and fourth accused persons at the scene for the first time since the place was well lit. PW1 did not attend any identification parade.
33. As stated, PW1 was in the company of PW2. PW2 also testified-in-chief and as cross-examined. PW2 also hailed from Rakwaro village in East Kamagambo in Rongo Sub-County. He was a contractor. He had walked into the bar with PW1. He also knew the deceased as his friend.
34. PW2 mainly reiterated the evidence of PW1. He however stated that he saw the second accused person (whom he knew before the incident as his longtime friend) and the one who had walked into the bar with pushing the deceased from the door of the bar towards the rear of the stationary bus. Around 3 minutes later PW2 heard a woman crying outside the bar that the deceased had been killed. He rushed outside the bar. He went to the rear side of the bus and saw the deceased lying down. He used his phone torch light to see as the place was dark. He saw the neck of the deceased cut and that the deceased was dead.
35. PW2 then went back to the bar. At the door PW2 saw the second accused person, the other person who had walked into the bar with the second accused person and three others hitting the vehicle. By then there were many other people outside the bar. According to PW2 he asked the second accused person and the other person who had walked into the bar with the second accused person why they were killing the deceased and they said they had an order from Kamagambo Police Station to kill him.
36. When police officers arrived at the scene PW2 was among those interrogated. He pointed out the person who had walked into the bar with the second accused person as one of the killers. The person was arrested by the police. PW2 described the other person who had walked into the bar with the second accused person as a '*tall one*'. He identified him in Court as the first accused person. He also identified the second accused person.
37. PW2 further clarified that he saw all the accused persons at the scene. Apart from the first and second accused persons PW2 did not see the faces of the other people who hit the car. PW2 was taken to Kamagambo Police Station by the police. On reaching at the station he saw four people having been arrested. He only recognized the first and second accused persons.
38. On cross-examination, PW2 stated there were three people at their table. He was with PW1 and one *Simon* (not a witness). He faced the window and the door was on his right hand. He was about 3 metres from the door. He had taken three bottles of Guinness beer by the time the deceased walked into the bar.
39. PW2 stated that the first and second accused persons walked into the bar about 30 minutes after the deceased arrived. He confirmed that

many other people had walked in and out of the bar before the deceased arrived.

40. On how the deceased left the bar, PW2 stated that the first accused person called the deceased and they walked out. He also said that the first accused person signaled the deceased out of the bar and that there was no commotion at all in the bar as the two walked out.

41. PW2 confirmed that he had hugged the second accused person and did not find any weapon on him. He also confirmed that the first accused person was not armed. Of importance is the fact that PW2 was the first one from their table to go outside the bar where he found many people having already gathered and that the deceased was then dead. PW2 also stated that he did not see the killers but only suspected the first and second accused persons as they took the deceased out of the bar.

42. According to PW2 he was the one who told the police what the first accused person had done and he was arrested at the scene. He did not know anything about the third and fourth accused persons. He was not sure if the third and fourth accused persons were the ones who hit the vehicle.

43. That was the evidence of PW1 and PW2 on those allegedly seen with the deceased shortly before he was killed.

44. *I will now deal with the issue of the bloodstains on the clothes of the accused persons.* PW9 is the one who spearheaded the issue. As said, he was the initial investigating officer. He testified that he was at home when he was called and informed that someone had been killed at the bar. He immediately called PW11 to the scene. He also rushed to the scene and found many people gathered.

45. He saw the body of the deceased with several wounds. He learnt that some suspects had already been arrested and taken to Kamagambo Police Station. He was also informed that a weapon suspected to have been used in killing the deceased had been recovered at the Deputy County Commissioner's office at Rongo. PW9 proceeded to the said office. He saw the weapon. It was a panga which had fresh blood stains on it. The panga was photographed by PW11. He also recovered the panga.

46. PW9 then rushed back to the scene. He also had the body of the deceased photographed as well. He organized and the body was taken for preservation at the Homa Bay County Referral and Teaching Hospital mortuary since there was insurmountable human pressure at Rongo. PW9 also had some of the suspects moved to Awendo and Migori police stations.

47. Having cleared the scene, PW9 went to the police station. He met four suspects who were the alleged killers. He identified them as the four accused persons in this case. PW9 interrogated them. He noted that three of them had fresh bloodstains on their clothes. They were the second, third and fourth accused persons. PW9 asked PW11 to photograph the three accused persons and capture the bloodstains. PW11 obliged.

48. PW9 collected the clothes which the second, third and fourth accused persons wore and which were bloodstained. The second accused person wore a grey-dark blue jacket. It had red strips. The third accused person wore a Brazilian yellow jacket. The jacket had blood stains at the back. The fourth accused person wore a dark blue jacket.

49. According to PW9 he asked the three accused persons about the source of the blood stains on their clothes but none had any response thereto.

50. PW12 prepared an Exhibit Memo Form. He forwarded the clothes aforesaid together with blood samples collected from the deceased, the third and the fourth accused persons. PW12 also forwarded a black jeans and a black T-Shirt which had been worn by the deceased at the time he was killed together with the panga which was recovered by PW9. PW12 also forwarded buccal swab samples from the first and second accused persons.

51. PW6 was to determine any relationships between the items and samples forwarded to him by PW12. He examined the items and noted that the black T-shirt and the black jeans together with the clothes recovered from the second, third and fourth accused persons and the panga were moderately stained with human blood. He successfully generated DNA profiles from all the items forwarded to him.

52. A comparison of the profiles followed. PW6 confirmed that the clothes worn by the deceased, the jacket worn by the second accused person, the jacket worn by the third accused person and the panga all had the blood of the deceased. The jacket worn by the fourth accused person instead had the blood of the fourth accused person. The DNA profiles generated from the samples collected from the first accused person did not match any other profile.

53. PW6 prepared a Report which he produced in evidence.

54. That was the evidence on the bloodstains which were found on the clothes of the accused persons.

55. *There was the issue of the recovery of the panga which had blood stains.* PW5, PW6 and PW8 testified on the issue. According to PW8, he was on 14/02/2016 attached at the Rongo Sub-County Headquarters. At around 08:30 pm *Chief Inspector Murunga* (not a witness) went to his house and informed him that there was a report on the vehicle which was parked at the bar and the police wanted to know the occupants. C.I. Murunga then requested PW8 to accompany him to where the vehicle was. PW8 obliged.

56. The two went to the bar and found the vehicle. They inspected it. As they were still on the vehicle a woman approached them while wailing that the deceased had been killed. The woman directed the police to where the body of the deceased was. The body lay in a pool of blood. To PW8, the scene was horrific.

57. PW8 observed the body closely. It lay around 20 metres from the door of the bar. The head had been cut from behind and the brain

matter was oozing. Both legs had also been cut and blood was flowing out. The blood was still collecting into a nearby trench. According to PW8 that was indicative of the fact that the deceased had just been killed otherwise the blood would have clotted.

58. PW8 was then approached by a young man. He was informed that there was a person with a panga in the nearby kiosks. PW8 was led by the young man to where the person was. They found that the person had left and was walking towards the Kenya Commercial Bank. PW8 followed the person and challenged him to stop. Instead, the person started running away. PW8 pursued him while raising alarm.

59. There were *boda boda* riders ahead. When the riders heard the call by PW8 they pursued the person chanting that the person had killed someone. The riders were approaching the person from the front whereas PW8 followed from the rear. Sensing that he will be cornered, the person instead took a turn towards the Deputy County Commissioners office past the Rongo law courts.

60. PW8 testified that the route which the person followed was well lit with street lighting. As he ran after the person PW8 saw him holding a panga. The person reached the rear gate to the Commissioner's offices. It was closed. The person jumped over the gate and entered into the compound. He was still holding the panga. PW8 called PW5 and informed him of the person who was armed and had jumped into the compound. PW8 then returned to the scene.

61. PW5 testified that there was a person who hurriedly went to him at the Deputy Commissioner's office at around 2100 hours. The person told PW5 that he was pursued by some *boda boda* riders. He however did not tell PW5 of the cause. The riders shortly arrived at the offices on the main gate. They informed PW5 that there was someone in the compound who had killed someone at the bar.

62. It was at that time when PW5 called PW8 and informed him of the suspect. PW5 confirmed that he was in custody of the person. PW5 was instructed by PW8 to hold him as PW8 was on his way to the offices. PW5 was also called by Mr. Ng'etich and asked to look for the suspect in the compound and detain him. When PW5 told Mr. Ng'etich that he already had the suspect Mr. Ng'etich ordered PW5 to ensure that he does not release him.

63. Mr. Ng'etich shortly called PW5 again. He told him that the suspect had a panga and that PW5 should look for it within the compound. PW5 searched for the panga. He found a panga lying next to a public works vehicle. PW5 called Mr. Ng'etich and informed him of the panga. Mr. Ng'etich asked PW5 not to interfere with the panga as they were on their way there.

64. Shortly, Mr. Ng'etich, PW8 and other officers arrived at the offices where PW5 was. PW5 led the team to where the panga was lying. PW5 witnessed the panga being photographed. He saw fresh blood on the panga. The police collected the panga and left.

65. PW5 remained with the suspect. PW8 later returned to the offices and took custody of the suspect from PW5. He led the suspect to Kamagambo Police Station.

66. Both PW5 and PW8 identified the suspect as the second accused person.

67. *For completeness of the prosecution's case* I will deal with the post mortem examination on the body of the deceased, the mental examinations on the accused persons and the ownership of the vehicle.

68. As already stated the post mortem examination was conducted at the Homa Bay County Referral and Teaching Hospital mortuary on 16/02/2016. It was handled by Dr. Osuri Kevin at 1500 Hours. The body of the deceased was identified by PW3 and the wife of the deceased (not a witness). PW4 witnessed the examination on behalf of the police.

69. Dr. Osuri Kevin made several observations. The body was well preserved immediately after death. There was no petechia and cyanosis. There were three deep cut wounds on the head and the brain matter was herniating. The right leg had a deep cut wound at the ankle. The left leg had a deep wound on the middle. When the head was opened, it was noted that there were linear fractures of the skull where the brain matter was herniating from.

70. The cause of the death was opined to be hypovolemic shock with head injury. Dr. Osuri Kevin filled in and signed a Post Mortem Report. That was the report which PW7 produced on behalf of Dr. Osuri Kevin.

71. PW10 assessed the mental status of the accused persons. That was on 19/02/2016 at the Rongo Sub-County Hospital. The accused persons were escorted to the hospital under police guard. PW10 opined that all the accused persons were fit to stand trial. He filled and signed a P3 Form for each of the accused persons. PW10 produced the forms in Court as exhibits.

72. PW13 testified as the registered owner of the vehicle. He produced a copy of the vehicle's logbook in confirmation. He narrated his close relationship with the deceased. He described him as his good friend.

73. PW13 also testified on how he had left the vehicle with the deceased in the night of 13/02/2016. He further testified that he had given his vehicle to the deceased again on 14/02/2016 so as to take the deceased's ailing sister to a hospital in Kisumu for medical attention. PW13 later on learnt that the deceased had been killed at Rongo. PW13 was by then in Kisii. He rushed to Rongo and proceeded to the bar. The body of the deceased had long been removed. He went to Kamagambo Police Station where he saw his vehicle. He was advised by the police to return to the station on the following day with all necessary documents on the vehicle. PW13 did so. He also recorded his statement on return to the police station.

74. Upon receipt of the foregone evidence, the prosecution's case was closed. The Court in a ruling rendered on 04/04/2019 found that *prima facie* cases had been established against each of the accused persons. They were all placed on their defences respectively.

75. All the accused persons gave sworn statements. Apart from the first accused person the rest of the accused persons did not call any witnesses. The first accused person called three witnesses. The witnesses testified as A1DW1, A1DW2 and A1DW3.

76. The accused persons variously denied committing the offence. They closed their respective cases.

77. At the close of the accused persons' cases Counsels were given the liberty to file written submissions. Mr. Omollo complied. Mr. Muniko relied on the record and Mr. Ojalla submitted orally. Mr. Kimanthi also tendered oral submissions.

78. Mr. Omollo submitted that the prosecution had failed to establish any case against the first accused person. He further submitted that the prosecution had failed to discharge its burden of proof as required in law. Counsel referred to **Article 50(2)(a)** of the **Constitution, Sections 107 and 109** of the **Evidence Act, Cap. 80** of the Laws of Kenya, the **Black's Law Dictionary**, 9<sup>th</sup> Edition and the decisions in **Miller vs. Minister of Pensions (1947) 2ALL ER 372-373** and **Woolmington vs. DPP (1935) AC 462** in buttressing the argument.

79. While contending that there was no evidence linking the first accused person with the killing of the deceased Mr. Omollo referred to **Wamunga vs. Republic (1089) KLR 424**, **Nzaro vs. Republic (1991) KAR 212** and **Gabriel Kamau Njoroge vs. Republic (1982-1988) 1 KAR 1134**.

80. Submitting that no malice aforethought was proved Counsel relied on **Section 206** of the **Penal Code** and in **Republic vs. Tubere s/o Ochen (1945) 12 EACA 63**, **George Ngocho Mutiso vs. Republic (2010) eKLR**, **Republic vs. Ernest Asami Bwire, Abanga alias Onyango vs. Republic Cr. Appeal No. 32 of 1990** and **Karani & 3 Others vs. Republic (1991) KLR 622**.

81. Mr. Ojalla submitted that the prosecution had failed to prove its case against the third and fourth accused persons. He pointed out that the accused persons were not identified to have been at the scene of crime. Counsel further submitted that there were no reasons why, when and how the accused persons were arrested. On the bloodstains on the third accused person's jacket, Counsel submitted that the third accused person gave an explanation which was not controverted. He contended that the third and fourth accused persons were only arrested as they had reported threats to their family the night before the deceased was killed.

82. Mr. Kimanthi submitted that the prosecution had proved its case beyond any doubt. He relied on the evidence of PW1 and PW2 who were eye-witnesses. He further submitted that the defences confirmed that all the accused persons were members of the same family and were at the scene of crime at the material time.

83. Counsel further submitted that the killing was a retaliatory attack on the demand made by those who were in the vehicle for their money. Counsel urged this Court to find all the accused persons guilty as charged.

#### **Issues for determination:**

84. It is now on the basis of the foregone evidence that this Court is called upon to decide on whether the accused persons are guilty of the offence of murder. As the accused persons were charged with the offence of murder, the following three issues arise for determination: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons and/or any of them (which constitutes the '*actus reus*' of the offence);

(c) Proof that the said unlawful act or omission was committed with malice afterthought (which constitutes the '*mens rea*' of the offence).

#### **Analysis and Determinations:**

85. I will consider each of the issues separately.

##### **(a) Proof of the fact and the cause of death of the deceased:**

86. There is no doubt that the deceased died. Several witnesses so confirmed. They include PW1, PW2, PW3, PW4, PW7, PW8, PW9, PW11, PW12 and PW13.

87. As to the cause of death, PW7 took this Court through the Post Mortem Report which was prepared by his colleague. He stated that the cause of death was opined to be hypovolemic shock with head injury.

88. Since there was no any other evidence contradicting the medical finding on the cause of death this Court concurs with that medical evidence and finds that the deceased died as a result of shock secondary to the head injuries.

##### **(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused persons and/or any of them:**

89. As I stated earlier in this judgment there was no eye-witness account on how the deceased was killed. In such a case reliance is on circumstantial evidence.

90. This Court is hence called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

- (i) **The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- (ii) **The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- (iii) **The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused persons and none else.**

91. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135** and also in **Simon Musoke vs. Republic (1958) EA 715**. The principles have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo vs. Republic (2014) eKLR** among many others.

92. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

**4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v. R (1958) EA 715* citing with approval *Teper v. R (1952) AL 480* thus: -**

*It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.*

93. Having laid the applicable legal principles in this case I will now ascertain three issues. They are whether the accused persons were at anytime on 14/02/2016 at the scene of crime, whether the accused persons interacted with the deceased and the issue of the blood stains.

94. *On whether the accused persons were at the scene on 14/02/2016*, PW1 and PW2 were the key witnesses on this issue. I have already captured their evidence above. Both PW1 and PW2 stated that they knew the second accused person well. They also stated that when the second accused person entered into the bar he went to where PW1 and PW2 were and they exchanged greetings. The second accused person then left and immediately thereafter PW1 and PW2 learnt of the death of the deceased.

95. The presence of the second accused person at the bar was vouched by the first accused person in his defence. I will shortly deal with that defence. I therefore find that the second accused person was seen at the bar shortly before the deceased was killed.

96. The first accused person tendered a detailed sworn defence. He stated that he had been made aware of the threat at his uncle's home by people who were in the vehicle. He had in fact seen and talked to the occupants in the vehicle the night before the deceased was killed.

97. As to whether the first accused person was at the bar, he stated as follows in his evidence-in-chief: -

**.... Some of my family members proceeded to Rongo as I heard that the person who had wanted to kill the members of my uncle's homestead had gone to Stage Park Bar in Rongo. I was tired and hesitant to leave home but my uncle impressed upon me as an elected leader in the family. My mother also impressed upon me to go to Rongo. I then proceeded to Stage Park Bar and arrived well. I found my uncle and my cousins and asked them if the person was there so that I could go and get the police. They told me he was there and I saw three (3) people seated at the door and even showed me the motor vehicle the person had previously used.....**

**I then went to Kamagambo Police Station ..... The officer told me that a report had been made of an attack at Stage Park Bar and that officers had rushed there.....**

98. When cross-examined by Mr. Kimanthi, the first accused person stated as follows: -

**...When I went to Stage Park Bar I found accused 2, accused 3 and accused 4. It is true that at one point the four of us were at the Stage Park Bar.....**

99. The third accused person also testified that he was at the main stage at Rongo on the fateful evening when he heard that someone had been killed at the bar. He rushed there as well.

100. The fourth accused person stated that he was at the material time in a hotel adjacent to the bar. As he walked away he was informed by a motor cycle rider that the third accused person had been arrested and was at the police station. He proceeded to the station where he was also arrested.

101. Having carefully considered the evidence of PW1, PW2 and that of the accused persons I am satisfied, and so find, that all the four accused persons were at one point or the other at the bar in the evening of the material day.

102. *The next item for consideration is whether the accused persons interacted with the deceased at the bar.*

103. All the accused persons denied any dealing with the deceased at the bar.

104. PW1 and PW2 testified that the first and second accused persons walked into the bar together. The second accused person recognized PW1 and PW2. He approached and greeted them. The first accused person went to the counter and bought a small bottle of drinking water. He then walked out of the bar with the deceased. As the deceased left the bar with the first accused person, the second accused person also left PW1 and PW2 and went out of the bar.

105. PW2 further testified that he was the first one to leave their table and rush outside the bar. PW2 was responding to a cry by a woman that the deceased had been killed. PW2 saw the deceased lying down with a cut on his neck. He appeared lifeless. As he turned back into the bar, PW2 saw the first and second accused person and other three young men hitting the vehicle. PW2 talked to the first and second accused persons. He asked them why they were killing the deceased. They informed him that they had an order from the police to do so.

106. PW2 confirmed that there were many people outside the bar. PW2 saw the police arrive as other people disappeared. He was interrogated by the police and told them that he had seen the first and second accused person with the deceased shortly before the deceased was killed. The first accused person was then arrested.

107. PW1 also saw the first and second accused person walk into the bar. The second accused person went to where PW1 and his friends sat and greeted them. The first accused person bought a bottle of water and left. As the first accused person was nearing the door he greeted the deceased and held his hand in a friendly manner as the two walked out of the bar.

108. PW2 returned into the bar and informed PW1 that the deceased had been killed. PW1 rushed out of the bar. At the door he was restrained by the first accused person. He was asked whether he was the one who sat with the deceased. He was then pushed back. However, before he was pushed back he saw the second accused person who told him that they were killing a thief.

109. PW1 narrated to the police who readily came to the scene what he had witnessed. The first, second and third accused persons were arrested.

110. The first accused person denied ever dealing with the deceased as alleged. According to him, he was only told by the members of his family who included the other accused persons that the person who had threatened his family members sat on a table with two others. He was shown the person who turned out to be the deceased. The first accused person left to the police station to follow up the matter.

111. The foregoing is the rival evidence which this Court must weigh, reconcile and decide on whether the accused persons interacted with the deceased as alleged by the prosecution.

112. Identification of the accused persons as the ones who were last seen with the deceased is crucial. The incident occurred at night. PW1 and PW2 did not know the first accused person. As such, this Court is called upon to exercise immense caution in dealing with the evidence of PW1 and PW2.

113. The Court of Appeal in **Wamunga vs Republic (1989) KLR 426** stated as under: -

***It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***

114. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

115. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

***... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

116. Returning to the case at hand, PW1 and PW2 had been drinking as from 06:00pm. The incident occurred between 08:30pm and 09:00pm. PW1 and PW2 had therefore been drinking for around two and a half hours. PW2 took three Guinness beer bottles within that period. PW1 and PW2 also confirmed that they never attended any identification parade.

117. With such a state of affairs, I will not finalize the issue here. I propose to consider the issue of the bloodstains and the arrest of the accused persons first. The totality of those issues will then answer the question as to whether the accused persons interacted with the deceased as alleged.

118. I will begin with the arrest of the accused persons. There are two versions on how the first accused person was arrested. PW1, PW2 and PW8 testified that the first accused person was arrested at the scene of crime.

119. The first accused person contended that he was arrested on his way from the police station and not at the scene of crime. He availed A1DW3 who confirmed that he met the first accused person near Kamagambo Police Station in the evening of 14/02/2016 between 08:00pm and 08:30pm. That was after A1DW3 had closed his hardware shop at around 07:00pm, gone to Royal Hospital for a check-up and as on his way back home. They exchanged greetings.

120. A1DW3 stated that the first accused person told him that he was heading to the police station to report a case. They then parted ways.

121. Having already examined the evidence of PW1 and PW2 at length, I will now look at the evidence of PW8 on the arrests.

122. PW8 testified extensively on how the second accused person was arrested. On the other accused persons, this is what he stated: -

**.....I returned to the scene.**

**Many people had now gathered. They identified 3 people who had been with the deceased and we arrested them and took them to Kamagambo Police Station. There was a lot of noise from the riders....**

**..... The three people who were with Shem were first, third and fourth accused persons.....** (emphasis added)

123. PW1 stated that he was the one who identified the first, third and fourth accused persons to a senior police officer a Mr. Ng'etich. It was Mr. Ng'etich who arrested the three accused persons. PW1 further stated that he was also led to the police station by Mr. Ng'etich where he recorded his statement. Mr. Ng'etich did not testify in this matter.

124. PW2 only identified the first accused person to the police who was the only one arrested at the scene and taken to the police station. When PW2 went to the station later he saw four people having been arrested over the matter.

125. PW8 had been involved in chasing the second accused person until he confirmed his arrest. He then went back to the scene. By then there were so many people at the scene. There was equally a lot of noise from the *boda boda* riders. When PW8 returned to the scene Mr. Ng'etich had been there before. According to PW1 it was Mr. Ng'etich who arrested the first accused person. PW2 did not give the name of the arresting officer. PW8 did not state who identified the first, third and fourth accused persons prior to their arrest.

126. Depending on the particular circumstances of each case, the arrest of a suspect may or may not be a serious issue. It all depends on the case. However, it has been severally judicially held that failure to call crucial witnesses without any justification creates the impression that such witnesses would have tendered adverse evidence to the prosecution. (See **Bukenya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280** and **Nguku versus Republic (1985) KLR 412**).

127. There was the defence by the first accused person as well. The first accused person contended that he was not arrested at the scene but as he walked from the police station towards the bar. A1DW3 affirmed that he actually met the first accused person near the police station at around 08:30pm on the fateful day.

128. The third accused person stated that he was arrested at the scene and that when he was taken to the police station he found the first accused person already arrested and thereat.

129. The fourth accused person stated that he received information that the third accused person had been arrested and he was at the police station. He proceeded to find out the reason. On reaching at the police station the fourth accused person found the first and third accused persons already in custody. He was also arrested at the police station.

130. According to PW2 in examination-in-chief '*some people disappeared from the scene on seeing the police.*' Could that buttress the first accused person's position that he was arrested elsewhere by some GSU and Administration Police Officers?

131. The first accused person therefore raised an *alibi*. The law is clear that there is no burden cast on an accused person to prove an *alibi*. The burden of proof lies with the prosecution throughout to negate such an *alibi*. (See **Kibale vs. Uganda (1999) 1 EA 148, Saidi vs. Republic (1963) EA 6, Boniface Gitonga vs. Republic (2015) eKLR** among others).

132. The puzzle could have been easily resolved in any of these two ways. First, by the testimony of Mr. Ng'etich who according to PW1 is the one who arrested the first, third and fourth accused person at the scene. Second, by the production of the Kamagambo Police Station Occurrence Book which would have indicated how the first accused person found his way to the police station. Neither happened.

133. Therefore, by placing the evidence of the 3 prosecution witnesses (PW1, PW2 and PW8) on how the first accused person was arrested on one hand and the evidence of the first accused person, A1DW3, the third and fourth accused persons on the other hand, the scales of justice tilt against the prosecution. There is a glaring and unresolved lacuna as to where, how and who arrested the first accused person. That is a reasonable doubt on the prosecution's evidence.

134. What of the arrest of the third and fourth accused persons? The prosecution's evidence was to the effect that the third and fourth accused persons were the ones who attempted to set the vehicle ablaze and were arrested at the scene. That was in essence the evidence of PW1, PW2 and PW8.

135. PW2 was however categorical that he did not recognize the persons who attempted to set the vehicle ablaze. He emphasized that he knew nothing about the third and fourth accused persons and that he only witnessed the arrest of the first accused person at the scene.

136. On being cross-examined by Mr. Ojalla PW1 stated as follows: -

**I do not know the 3rd and 4th accused persons. I cannot say they are the ones who killed Shem because I did not see them do so. I did not see how they are involved with the death of Shem. However, they are the ones who wanted to burn the Probox car and that is why I say they are the ones who were in company of the one who killed Shem..... I only saw the 3rd and 4th accused person at the scene where the body was. There were many people at the scene. I do not know who hit the deceased with a stick. The three accused persons were arrested at the scene. They are the first, third and fourth accused persons....**

**.....The 3rd and 4th accused persons went away and returned when the police had come to the scene... I saw the 3rd and 4th accused persons at the scene for the first time but the place was well lit. I did not attend any identification parade....**

137. PW8 stated that the third and fourth accused persons were among the three people who were arrested at the scene when the people identified them as part of the killers.

138. The third accused person stated in his defence that he learnt of the killing of someone at the bar and, just like any one else, rushed to the scene. He was then recognized by the police officers as one of those who made a report at the station about the vehicle. He was therefore arrested and taken to the station. The testimony of the third accused person therefore settles his arrest at the scene.

139. The fourth accused person denied that he was arrested at the scene. According to him he learnt of the arrest of the third accused person while walking near the bar and proceeded to the police station to ascertain whether it was true and, if so, why. When he reached at the police station the fourth accused person was arrested since he was the one who had earlier on that day made a complaint to the police on the vehicle.

140. Without re-inventing the wheel the position taken by this Court pertaining to the arrest of the first accused person equally applies to the fourth accused person. For avoidance of doubt, the issue was not settled in favour of the prosecution.

141. There was also the arrest of the second accused person. PW8 narrated at length how he ensured that the second accused person was arrested. PW5 duly corroborated that evidence.

142. On his part the second accused person stated that he went to the bar on the fateful day at around 06:00pm. He took drinks until around 07:30pm when he heard people talking about the vehicle which had been at the second accused person's home the night before. He went out of the bar and truly saw the vehicle. He then proceeded to the Rongo Deputy Commissioner's offices to report about the vehicle. He met two officers and explained to them why he was there. He was asked to wait as the police made some calls.

143. The second accused person further stated that at around 08:00pm a police vehicle was driven into the Deputy Commissioner's offices and he as taken to the police station. On reaching at the police station he found the first, fourth and third accused persons already arrested and in custody.

144. The second accused person therefore settled that he was arrested at the Deputy Commissioner's offices at Rongo. That was in tandem with the evidence of PW5 and PW8 on his arrest.

145. This Court now finds that the second accused person was arrested at the Deputy Commissioner's offices at Rongo and the third accused person was arrested at the scene. The first and fourth accused persons were not arrested at the scene.

146. *I will now turn to the issue of the bloodstains.* That was the evidence of PW6, PW9 and PW11. According to PW9 he saw the accused persons for the first time at the police station. He noted some blood stains on the clothes of the second, third and fourth accused persons. There were no visible stains on the clothes of the first accused person.

147. PW11 was asked by PW9 to photograph the accused persons. He did so. He however managed to process only two of the four photographs as the other two were spilt. He only processed the photographs of the second and third accused persons. PW9 confirmed that the bloodstain on jacket which was worn by the third accused person was at the back.

148. PW6 confirmed that the stains which were on the jackets of the second, third and fourth accused persons, the clothes of the deceased and the panga were of human blood. He also confirmed that the clothes of the deceased, the jackets of the second and third accused persons and the panga all had the blood of the deceased. The blood on the jacket for the fourth accused person was the fourth accused person's own blood.

149. The third accused person attempted an explanation on how the blood of the deceased was on his jacket. He stated that he arrived at the scene around 10 to 15 minutes after he received the report at the main bus stage. He saw the body of a young man lying down. It had cuts and was bleeding profusely. To him, *'the blood was spilling upwards'*.

150. On cross-examination by Mr. Kimanthi, the third accused person stated as follows: -

**The blood was not spilling as such when I reached there but someone in the crowd hit the deceased and blood spilled on me...**

151. PW8 arrived at the scene with Chief Inspector Murunga to view and inspect the vehicle which had been reported to have been involved in threatening the family members of the accused persons. They were not aware of the killing of the deceased. Suddenly a woman rushed to them and informed them of the death of the deceased. PW8 rushed to where the body lay. He observed it and noted several cuts on the head and legs. Fresh blood was flowing to a nearby trench which to him was an indication that the cuts had been inflicted not long ago.

152. PW8 therefore reached the scene and saw the body before the third accused person.

153. The issue of someone hitting the deceased as he lay down was also raised by PW1. This is what PW1 stated: -

**...I had seen the two men standing next to the body of Shem as I was being held by the man. One of them had a wooden stick and hit Shem to confirm if Shem was really dead. It was evident that these people were together in the mission to kill....**

154. PW1 witnessed the above before the police arrived at the scene. The third accused person arrived at the scene after the police had long arrived. He in fact found the police officers at the scene. In his own words, the third accused person stated that the police officers immediately recognized him as one of those whose who had made a report at the station on the vehicle and the third accused person was arrested.

155. The first explanation by the third accused person on how the blood of the deceased found its way to his jacket was that as he arrived at the scene the blood from the body of the deceased was spilling upwards. When he was cross-examined on the possibility of blood spilling upwards for about 15 minutes post attack, the third accused person brought in the issue of someone hitting the deceased and blood spilling up. Those were two different versions.

156. In making the above observation I remain alive to the legal position that the legal burden of proof in criminal cases rests on the prosecution throughout the trial. However, in this case the blood of the deceased was found on the clothes of the third accused person. At that point in time the *evidential burden of proof* rested on the third accused person to render an explanation. The *standard of proof* in such an instance can only be on a balance of probability. The third accused person was therefore to render a plausible and reasonable explanation.

157. From the prosecution's evidence on when the police arrived at the scene, it is clear the police took over the scene and there was no indication that they ever left the scene. Was it therefore possible that someone would hit the deceased who was long dead in the purview of the police with no counter reaction by the police? Further, if the third accused person was arrested immediately he arrived at the scene then did the blood which spilled on his jacket also spill on the police? If so, was there any police action?

158. A careful analysis of the evidence of the third accused person alongside the testimony of PW1 and PW8 brings out the fact that if the third accused person was truly at the scene and, like PW1, also witnessed someone hitting the deceased with a stick then he must have been there long before the arrival of the police. That cannot be 15 minutes post the killing of the deceased since PW8 arrived at the scene almost at the commission of the act. PW8 found fresh blood oozing from the body of the deceased. The blood was not spilling upwards.

159. The explanation by the third accused person on how the blood of the deceased found its way to his jacket was not reasonable and plausible. It did not pass the required standard of proof. The only reasonable way out can only be that the third accused person was present during the killing of the deceased and that is how the blood of the deceased spilled on his jacket.

160. The second accused person did not say anything about the blood of the deceased which was found on his jacket.

161. *The other aspect was the recovery of the panga which had stains of the blood of the deceased.*

162. PW5 and PW8 dealt with the issue at length. Their respective evidence were not seriously controverted. I have carefully considered the evidence of PW5 and PW8 in relation to the recovery of the panga. PW8 gave chase to the second accused person. He did not lose sight of him. The road the second accused person took was well lit with street lighting. PW8 saw the second accused person holding and running with the panga. He even saw the second accused person jumping over the rear gate to the Commissioner's office while still holding the panga.

163. PW5 arrested the second accused person inside the Commissioner's office compound. When PW5 was informed that the second accused person had a panga which was suspected to be a murder weapon PW5 managed to trace it within the compound.

164. PW9 recovered the panga. That was the panga which PW6 confirmed it was stained with the blood of the deceased.

165. Having analyzed the evidence of PW5, PW6 and PW8 I find no difficulty in finding, which I hereby do, that the second accused person was with the panga. Further, the second accused person ran away from the scene to the Commissioner's offices where he was arrested and the panga recovered. The second accused person equally did not render an explanation, *albeit* on a balance of probability, why the panga had the blood of the deceased on it.

166. The second accused person therefore had the panga which was stained with the blood of the deceased.

167. From the foregone analysis I will now revert to the main issue as to whether the accused persons interacted with the deceased at the bar. In dealing further, I must reiterate the words of *Lord Denning* on the what constitute the proof beyond any reasonable case in a criminal case. My Lord, rightly so, stated in the **Miller case** (supra) thus: -

***... That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence, of course it is doubt but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.....***

168. The concept of proof beyond any reasonable doubt was also considered in **United States vs. Smith, 267 F. 3D 1154, 1161 (DDC Cir. 2001)** (citing **In Re Winship, 397 U.S. 358, 370, 90 S. Ct. 1068, 1076 (1970) Harlan, J. concurring**) where the Court stated as follows: -

*The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.*

169. Guided by the settled foregoing legal principles, the binding decisions on identification and circumstantial evidence and the evidence on record, I hereby make the following findings. **One**, although the first accused person was at one time around the bar, he denied entering inside the bar and calling the deceased out where the deceased was killed. Considering the circumstances surrounding the identification of the person who entered inside the bar, bought some water, called out the deceased and the arrest of the first accused person there is no tangible evidence settling the identification of the first accused person as such a person. A finding that the first accused person was the person referred to by PW1 and PW2 and who interacted with the deceased inside the bar can only be erroneous. There is hence no credible evidence that the first accused person interacted with the deceased at the bar as alleged.

170. I must however add that there was profound suspicion on the first accused person's possible involvement in the killing of the deceased. That aside, suspicion alone cannot be a basis of convicting an accused person. The Court of appeal in **Sawe vs. Republic (2003) KLR 364** stated that:

*Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.*

171. In **Mary Wanjiku Gichira vs Republic Criminal Appeal No. 17 of 1998** the Court of Appeal held that: -

*Suspicion, however strong, cannot provide a basis of inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life.*

172. Alluding to the issue, the Court of Appeal in Tanzania in **R vs. Ally (Criminal Appeal No. 73 of 2002 (2006) TZCA 71** held that: -

*Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.*

173. **Two**, the foregoing position on the first accused person's innocence must apply to the fourth accused person with similar strength. In fact, from the analysis of the evidence it came out that the reason why the fourth accused person was arrested was that he had earlier that morning reported to the police about the vehicle which was used to threaten the family members of the accused persons. No witness, properly so, identified the fourth accused person at the scene. Further, the fourth accused person was not arrested at the scene. I hence find that although there was evidence that the fourth accused person was at the bar at one point, there was as well no credible evidence that he had any interactions with the deceased at the bar.

174. **Three**, I have re-considered the principles on circumstantial evidence in respect to the evidence against the second and third accused persons. I have also considered the defences put forth by the said accused persons. The places where the two accused persons were arrested, the stains of the blood of the deceased on their clothes, the second accused person having been arrested with a panga which had the blood of the deceased coupled with the explanation given by the third accused person on the bloodstains on his jacket taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the second and third accused persons variously took part in the killing of the deceased. I equally find that there were no other co-existing circumstances which would weaken or destroy that inference.

175. **Four**, were the second and third accused persons principal offenders or just aided and abetted a crime? **Sections 20 and 21** of the **Penal Code, Cap. 63** of the Laws of Kenya come to play.

176. **Sections 20(1)** provides as follows: -

## **20. Principal Offenders**

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

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

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

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

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

177. Section 21 states as follows: -

**21. Joint offenders in prosecution of common purpose**

**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 purposes 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**

178. The Court of Appeal has extensively dealt with the said sections. I will refer to Nairobi Criminal Appeal No. 124 of 2012 John Ouma Awino & Another vs. Republic (2014) eKLR. The Court stated *in extenso* as follows: -

30. *It becomes necessary therefore to consider whether the two sections can be applied to the same facts to produce the same result. The Sections appear under "Chapter V" of the Penal Code which covers "PARTIES TO OFFENCES." But Section 20 defines "Principal offenders" while Section 21 refers to "Joint offenders in prosecution of common purpose." The two are different, not only in their content but also in their application. Common intention under Section 21 connotes a situation where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it normally precedes the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.*

31. *The application of the section has been considered in several decisions but we take it from the case of Dickson Mwangi Munene & Another v. Republic Cr. App. No. 314 of 2011, where the Court stated as follows:-*

*"This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E. A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.*

*In Njoroge vs. Republic [1983] KLR 197 at p. 204, the Court of Appeal stated that:-*

*"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."*

*As to its proof, referring to its earlier decision in R. vs. Tabulayenka s/o Kirya (1943) EACA 51, it continued to state that:-*

*"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."*

56. *As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia vs. R [1963] E.A. 363 where "there was no evidence of any agreement formed by the appellants prior to the attack made by each" it was held that "that is not necessary if an intention to act in concert can be inferred from their actions" like "where a number of persons took part in beating a thief."*

**32. In that court's view, the prosecution has to prove the following elements of the offence:**

a) a criminal intention to commit the offence charged jointly with others,

b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and that

c) the accused was aware of this when he or she agreed to participate in that joint criminal act."

33. *We have carefully reassessed the record and we find that the evidence relied on was insufficient to prove those elements which constitute the offence charged. To that extent, we agree with Mr. Njanja that the provisions of Section 21 were misapplied in this case. It was neither proved beyond doubt that Oumas had agreed with Otieno to carry out the joint criminal act nor did a common intention arise in the course of commission of the offence. In the Dickson Munene case (supra) the court relied on the following criteria which was set in the earlier decision of Abdi Ali v. R (1956) 23 EACA 573 which was cited with approval in R v. Cheya [1973] EA 500:-*

*"[T]he existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was*

and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under this section, the former by itself is irrelevant to the section. It is only then a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can be applied.”

34. Having dealt with Section 21, we think Section 20(1)(c) (supra) squarely covers the situation before us. There was evidence, that Ouma at first attempted to block the escape route of the deceased before following him to the place where the fatal blow was inflicted. At the store where the fatal blow was inflicted, Ouma stood guard preventing other people from accessing the store. He may not have inflicted the blow himself, but preventing other people from assisting the deceased or himself omitting to assist, he was aiding and abetting the crime. He was not an innocent bystander or a separator of a fight as he testified. Mr. Njanja submitted that the evidence of Ouma's complicity came from Martin (PW1) and was at best speculative, suggesting that it ought to be disregarded. In our view, however, the evidence was properly accepted by the trial court after due consideration, based on its positive assessment of the witness's credibility which we have no basis for impeaching.

35. Aiding and abetting generally means somehow to assist in the commission of a crime or to be an accomplice. The elements of the offence have been variously expressed in different jurisdictions of the world, but they encompass proof that the person knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. It is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed. In this case, Ouma knew that the deceased was being assaulted. The definition of causing death in Section 206 of the Penal Code includes the possibility of grievous harm. The circumstances surrounding the offence establish that Ouma intended the consequences of his acts, and must take responsibility for them. Under the law, he was a principal offender.

179. There are some events which preceded the killing of the deceased. In the night of 13/02/2016 some people in the vehicle went to the home of the fourth accused person. They demanded the repayment of some money which was allegedly due. The people threatened that if the money was not paid, they were going to come back with officers from Nairobi and shoot everyone in that family.

180. The threats alarmed not only the family of the fourth accused person but the rest of the members of the families of the other accused persons. As stated, all the accused persons are closely related and lived in a large homestead.

181. The first accused person was also informed of the arrival of the people in the vehicle. He went and met the vehicle and the occupants. The vehicle was however driven off at such a high speed that it almost hit the first accused person. The first accused person had to dive off the road.

182. The first accused person advised the fourth accused person to report the matter to Assistant Chief. The fourth accused person obliged. He was however directed to lodge a complaint at the Kamagambo Police Station.

183. The fourth accused person was accompanied by the third accused person the following morning to the police. The complaint was registered as OB No. 11/14/2/2016 at 09:00 hours. The report read as follows: -

**REPORT IN: To the station is one William Okumu Orondo c/o phone no. 0728604628 and a resident of Nyaburu area and he reports that at night around 03:00hrs while sleeping three people went to their home with a prob box KBZ 067X and they demanded the brother namely Benmard Ochieng' Arondo who was charged with the offence of stealing a motor cycle and as at now the said brother is in Migori prison. They said they will be back again**

184. The following day in the early evening the second accused person returned to the home of the first accused person and told him that the person who had threatened the family had returned. The first accused person was later informed that the person had proceeded to the bar and that some family members had followed him there. The first accused person then went to the bar and then to the police station.

185. There was a real threat to life in the family of the accused persons. The members knew that the person was at the bar. Some proceeded there. The first accused person met them there and they showed him the person. Shortly the deceased was killed.

186. It was the second accused person who told the first accused person that the person had returned to the home in the evening of 14/02/2016 and requested him to accompany them to arrest him.

187. The second accused person was found with a panga which had the blood of the deceased. The panga must have been one of the weapons (if not the only one) used in the attack.

188. The third accused person was also at the scene. He was a member of the family which had been threatened and was shortly after the death of the deceased found with the blood of the deceased on his clothes. He knew all along that the family was pursuing an enemy who had vowed to kill them.

189. The Court of Appeal of Eastern Africa in the Tabulayenka case (supra) observed that 'the common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.'

190. The third accused person was at the scene of crime. He did not successfully disassociate himself from the events at the scene that led to the killing of the deceased.

191. I find that common intention was established in this case. The second and third accused persons actively participated in the killing of the deceased. The two were joint offenders in prosecution of a common purpose. **Section 21** of the **Penal Code** perfectly applies.

192. The second ingredient is now answered in the affirmative in respect to the second and third accused persons on the basis of circumstantial evidence. The second ingredient is however answered in the negative in respect to the first and fourth accused persons.

**(c) Proof that the unlawful acts on the part of the second and third accused persons were committed with malice aforethought:**

193. The starting point is the law. **Section 206** of the Penal Code defines 'malice aforethought' as follows:

**206. Malice aforethought shall be deemed to be established by evidence proving any one 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 the 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 bodily harm is caused or not, or by a wish that it may not be caused.**

**(c) An intent to commit a felony.**

**(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.**

194. The Court of Appeal has also dealt with this aspect on several occasions. In the case of **Joseph Kimani Njau vs R (2014) eKLR**, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171**, held as follows: -

**Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused;**

**i) The intention to cause death;**

**ii) The intention to cause grievous bodily harm;**

**iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.**

**It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (emphasis added).**

195. The Court of Appeal in **Tubere case** (supra) set out the parameters for determining the presence of malice aforethought. The elements include: -

**(i) The nature of the weapon used;**

**(ii) The manner in which the weapon was used;**

**(iii) The part of the body targeted;**

**(iv) The nature of the injuries inflicted either a single stab/wound or multiple injuries.**

**(v) The conduct of the accused before, during and after the incident.**

196. In **Mary Wanjiku Gitonga –vs- R (Nyeri) Criminal Appeal No. 83 of 2007 (UR)** the Court of Appeal in analyzing the evidence and on holding that there was indeed malice aforethought stated as follows: -

**We are told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed.... Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only underwear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an**

*axe and cut him on the head. Malice aforethought is proved where an intention “to do grievous harm to any person.....” is shown.*

*In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.*

*In the circumstances we see no reason to interfere with the appellant’s conviction for murder. The conviction was fully justified by the evidence on record.*

197. Applying the foregone principles in this case, there is evidence that there was eminent threat to life on the members of the accused persons’ family. The potential attackers had threatened to return and wipe out the whole family. According to the first accused person, the second accused person informed him that the people had returned to their home using the vehicle in the early evening before the incident occurred.

198. The deceased had a total of 5 deep cuts. PW8 described them as horrific. Three were on the head. They had fractured the head and the brain matter was haeniating. Each of the legs had a deep cut. The wounds had shattered the middle part of the left leg and the ankle on the right leg. The photographs produced as exhibits indeed confirm that the injuries were serious and must have been inflicted using a lot of force.

199. As held by the Court of Appeal in **Mary Wanjiku Gitonga** case (supra) ‘*in using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband, she ended up killing her.*’ In this case there were three deep cut wounds on the head. The wounds were mostly caused by the panga found with the second accused person. By cutting someone with a panga on the head three times with such a force one could have only intended to kill or cause grievous harm at the very least.

200. Can the second and third accused persons therefore be said to have acted in self-defence or under provocation? I will not venture deeply since the two are defences in law which none of the two accused persons relied on. However, I must state that the threat was made in the night before the incident. The first accused person rightly advised his family members to report the matter to the authorities. The matter was eventually reported to the police.

201. The members of the accused persons’ family learnt that the vehicle which had been used by those who threatened them was parked at the bar. The bar was not far from the police station. It was within Rongo township. It was not demonstrated that there was any threat that hindered the members of the accused persons’ families from reporting the presence of the vehicle to the police. There was also no evidence that the deceased was among the three people who were in the vehicle when the threats were made. I say so because the fourth accused person did not state as such when he made the report at the police station.

202. Further, there is no indication that the deceased ever resisted any arrest or refused to accompany his handlers to the police station prior to the killing. The attackers seemed to have long made up their minds to finish whoever they would find in or with the vehicle. That was indeed so reckless.

203. The cumulative effect of the foregone is that the second and third accused persons intended to kill the deceased. There was malice aforethought.

204. The third ingredient is also answered in the affirmative.

**Disposition:**

205. As I come to the end of this judgment I must mention that the trial took around 4 years to be completed. This was caused by two main reasons. First, in 2017 and 2018 I was involved in the hearing of election petitions in Western Kenya. Second, the first accused person was a sitting Member of County Assembly in Mombasa County when he was charged herein and needed time to defend his seat. Further, the first accused person was injured during the campaigns and sustained injuries. He needed time to recuperate. I therefore render an unreserved apology to all the Counsels and the parties in this matter for the period taken to complete the trial.

206. In the end, the following final orders do hereby issue: -

**(a) The first accused person (Paul Oswago Onje) and fourth accused person (William Okumu Orondo) are found NOT GUILTY of the murder of Shem Shefa Ongache, the deceased in this case. They are forthwith set at liberty unless otherwise lawfully held.**

**(b) The second accused person (Abern Mbija Agumba) and third accused person (Jared Otieno Mbija) are jointly FOUND GUILTY of the murder of Shem Shefa Ongache as charged. Each of them is hereby convicted under Section 322(2) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.**

207. These are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 16<sup>th</sup> day of June, 2020**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Imbo for Mr. Omollo**, Counsel for the first accused person.

**Mr. Muniko**, Counsel for the second accused person.

**No. appearance for Mr. Ojalla**, Counsel for the third and fourth accused persons.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant.