



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL CASE NO. 22 OF 2014**  
**CONSOLIDATED WITH CRIMINAL CASE NO. 27 OF 2012**

**REPUBLIC**

**VERSUS**

**1. MOHAMMED WANYOIKE AND**

**2. MICHEAL OMONDI AWUONDO alias MIKA**

**JUDGEMENT**

The two accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code chapter 63 Laws of Kenya. The particulars of the offence are that the accused on 27.7.2012 at Maweni Village in Malindi District within Kilifi County murdered Abdallah Mohamed. Initially the 1<sup>st</sup> accused was charged separately in Criminal Case No. 27 of 2012. The case was later consolidated with Criminal Case No. 22 of 2014. The 2<sup>nd</sup> accused was also charged separately in Criminal Case No. 22 of 2014 and the two cases were consolidated on 2.12.2014.

The prosecution summoned six witnesses in support of its case. PW1 DR. MUUMIN AWEIS is a medical doctor who was stationed at the Malindi District hospital. He testified that a post mortem on the deceased was to be conducted on 5.8.2012 but the deceased's relatives declined on the basis that they were Muslims. PW1 testified that the deceased had been treated at the Malindi District hospital by Dr. Anwar whom he knew and was stationed at Kilifi hospital. The deceased was treated on 2.8.2012 and complained of inability to talk or walk for four days. The deceased's history given to the hospital was that he was assaulted by people known to him. He had difficulties in breathing. He was referred to Mombasa for C.T. Scan. The scan was done on 3.8.2012 and it revealed multiple fractures on the right front of the head leading to blood clot on the brain. That injury could not have been seen with the naked eyes. According to PW1 no post mortem was conducted. The cause of death was not determined as the post mortem was not done.

PW2 BENEDICT KALU MWACHIRO is a carpenter. On 27.7.2012 he was at his place of work which is near the road at between 1.00 pm to 2.00 pm. He saw two young men whom he knew. One was Mika whom he identified as the 2<sup>nd</sup> accused while the other one was Rasta who was the deceased. The deceased had a mountain bike which had fallen down. The deceased held PW1's hand and told him not to leave him as he would be killed. The 2<sup>nd</sup> accused made a phone call and two other boys whom PW1 knew went there. The two boys were holding a whip which was made of the tail of a fish (mkia wa taa). The 2<sup>nd</sup> accused said "mnyama ndio huyu" – this is the animal. The other two boys started whipping the

deceased. The 2<sup>nd</sup> accused pushed the deceased down and hit him with a stone twice on the head. The other two boys were known as Boi and Nature. Nature is the 1<sup>st</sup> accused. The deceased started crying saying “nimeumia” – I have been injured. Several other people went to the scene. PW4 took the deceased to Malindi hospital. He later heard that the deceased had died. It is his evidence that the crowd went to the scene after the deceased had been attacked by the accused.

PW3 FATMA SHARIF SALIM was the deceased’s wife. They had separated at the time of the incident. On 27.7.2012 she got a phone call from her brother in law, Mwinyi, who told her to rush to Malindi hospital as the deceased had been attacked. She rushed there with the deceased’s children. She saw the deceased at the emergency section bleeding from the mouth and ears. One eye had been injured. It was about 6.00 pm. They were advised to do a C.T. Scan. He went with the deceased and he slept at her place. He had been attacked all over the body. The deceased told her that he had been attacked by Mika, Nature and Boi. He wanted to go to see breeze area for his bicycle and fifty euros. She gave the deceased tea. She asked the deceased to stay at home so that she could look for money for the x-ray. The deceased used to take drugs. When she went back to the house she found that the deceased had ran away. It was a Saturday. The following day the deceased was found having collapsed and had foam coming from his mouth. She took him to Maimoon hospital. The deceased had developed fits. She took him to Pandya hospital where the C.T. Scan was done. Immediately the scan was done the deceased died. This was on 3.8.2012. the body was taken to Malindi hospital. The hospital wanted to conduct a post mortem but family members declined. The C.T. Scan revealed that the deceased had internal bleeding. She knew the accused. The 1<sup>st</sup> accused is Nature while the 2<sup>nd</sup> accused is Mika. They are from her village. When she saw the deceased on Sunday he could not talk or see. He was unconscious. According to her, from Saturday to Sunday the deceased was not attacked by any other person as he was with Omar (PW5) Omar had called her to inform her that he had given the deceased porridge but he was not talking.

PW4 SAUMU ABDUL reside in Shela in Malindi. On 27.7.2012 at about 2.00 pm she was in Maweni Sea Breeze area. She saw the deceased bleeding from the mouth. She also saw two boys who had a bicycle. It was at a car wash area. She went close but the boys threatened to beat her. She saw the 2<sup>nd</sup> accused assaulting the deceased with a big stone. The 1<sup>st</sup> accused was standing aside while holding a whip made of a fish tail. There were four boys in total. Two of whom are the accused. She knew the accused by appearance. She called for a tuk and took the deceased to Malindi hospital. She then went to inform the deceased’s relatives. The accused quarreled with the deceased before assaulting him. She did not know why the deceased was being assaulted. PW5 OMAR ABDUL KIVOHO reside in Maweni in Malindi. On 28.7.2012 at 2.00 pm the deceased who was his brother in law and were living together went out. He went back while having bandages on the face. He asked for porridge. PW5 prepared the porridge but the deceased could not take it. The deceased told him that he had been assaulted by three boys namely Janja, Boi and Nature. He took the deceased to his grandfather Mzee Mbaruk. The grandfather called the deceased’s wife (PW2). The deceased was taken to hospital but died. He did not know the accused before they were arrested. The deceased had left their home on 27.7.2012 and went back on a Monday.

PW6 P.C. ANDREW WEKESA was stationed at the Malindi police station. He investigated the case. The deceased’s brother by the name Masai Mwinyi reported the case on 27.7.2012. On 5.8.2012 PW6 got information that the deceased had passed on at Mombasa and the body was being taken to Malindi. He went to Malindi District hospital where a post mortem was to be conducted but family members objected. The body was released to the family members. Mwinyi refused to testify. His investigations revealed that the deceased was assaulted at Maweni area on 27.7.2012 at about 2.00 pm. There were four attackers namely Mohamed Seif Wanyoike alias Modi Nature, Michael Mwangi alias Mika, Oscar who disappeared and one by the name Raf who also disappeared. On 27.10.2012 the 1<sup>st</sup> accused was arrested and interrogated. He stated that his Kshs.2,800/= and an L.G. phone worth Kshs.3,500/= had been stolen by the deceased. The 1<sup>st</sup> accused traced the deceased while in the company of Oscar and Mika. The deceased tried to run away but he was cornered and assaulted. It was a case of mob justice. The deceased left his bicycle and started running but managed to run for about 20 metres before he was cornered. The accused assaulted the deceased. The accused were later charged with the offence.

In his unsworn evidence the 1<sup>st</sup> accused Mohamed Wanyoike Seif testified that he lives in Maweni Sea Breeze Area in Malindi. On 26.7.2012, he was at home when he disagreed with his wife. They went out with his wife and did not sleep in the house. They returned the following day 27.7.2012 at about 10.00 am. He found his house had been broken into. He asked neighbours who informed him that someone had opened his house and they chased him away upto the road. The neighbours took Kshs.1,800/= from the thief who had stolen from his house. He saw people standing in a crowd. He did not see the thief who was beaten. Three months later at about 10.00 pm police went to his house and arrested him. He was then charged with the offence. He did not know the deceased.

The 2<sup>nd</sup> accused, Michael Omondi Awuondo testified that he lives in Muyeye area in Malindi. On 26.7.2012, he was heading to the market at about 2.30 pm. He saw a crowd along Casuarina road. He heard that there was a thief who had been caught stealing and was being beaten by people. He tried to stop the people from beating the deceased. The crowd turned on him claiming that he was assisting a thief. He was hit with a stone on the head and started bleeding. He went to a retail shop and was given spirit which he poured on the wound. He then went to do his work at the bus stage. One week later relatives of the deceased went to his place and asked him about the incident. He told them that he was present when the deceased was being beaten but did not identify anyone. He showed them the place where he lives with his grandmother. He continued with his work until October 2014 when he was arrested by the police. He was charged with murder of the deceased. From July 2012 to October 2014 he was in Malindi but no one went to arrest him.

Miss Aoko, counsel for the 1<sup>st</sup> accused submit that the prosecution has failed to prove its case to the required standard. The cause of death is not known. The medical evidence on the cause of death is quite important. Counsel cited a text book, MEDICAL AND NON-MEDICAL 4<sup>TH</sup> EDITION 2010 by Rao & Rao on Expert Evidence. The authors state as follows at page 181: -

**“Courts are concerned with the medico-legal cause of death and not with the manner or mode of death.”**

It is submitted that although in some cases, the cause of death might be established without medical evidence, even in such cases medical evidence on the effect of grave injuries should be adduced as held in the case of **NDUNG’U V REPUBLIC [1985] KLR 487**. It was incumbent upon the prosecution to prove the cause of death and not the manner in which the deceased died. It is further submitted that the prosecution failed to prove that the 1<sup>st</sup> accused caused the deceased’s death. Only one witness, PW5, testified that the deceased told him the names of the boys who had beaten him. This was an attempt to bring in a dying declaration. The evidence of PW5 is not corroborated and is of no evidential value. There was evidence that the deceased was not talking and it could not be possible that he told PW5 the names of those who attacked him. There was further evidence that the 1<sup>st</sup> accused simply stood by while holding a whip. The prosecution evidence establishes that the deceased died of injuries inflicted by the mob. PW6 testified that the deceased had been assaulted by unknown people because he had stolen cash and a mobile phone. In the absence of medical evidence indicating the cause of death, the charge against the 1<sup>st</sup> accused must fail. There is no direct or circumstantial evidence against the 1<sup>st</sup> accused.

Counsel for the 1<sup>st</sup> accused further submit that there was no attempt to prove malice aforethought on the part of the 1<sup>st</sup> accused. The deceased was killed by unknown people at the spur of the moment on account that he had stolen cash and mobile phone. There is no proof of common intention amongst the accused. Counsel relies on the case of **AUGUSTINO ORETE & OTHERS VERUSS UGANDA (1966) E.A. 430**. In that case, it was held that there was no common intention where there was unlawful beating of suspected thieves. The evidence on record does not prove the offence of murder.

Mr. Muranje, counsel for the 2<sup>nd</sup> accused submit that it is not clear from the prosecution evidence how many people assaulted the deceased. The charge sheet refers to only two (2) people. PW4 and the investigating officer (PW6) testified that the deceased was assaulted by four (4) people. The evidence shows that there were many people at the scene and it was a case of mob justice. The medical evidence does not show the cause of death. The deceased died about 10 days after being assaulted on 27.7.2012.

A post mortem was produced but it was not filled. The doctor testified that the cause of death can only be determined after a post mortem is conducted. The witness testified that the cause of death was not determined. The past medical history of the deceased did not constitute a medical report. The deceased's wife testified that the deceased was a drug addict and he ran away or disappeared from her house to look for drugs and his alleged money and bicycle. The investigating officer testified that it was a case of mob justice. This makes it difficult to determine the cause of death.

The court is being called upon to determine whether the two accused persons committed the offence of murder. The main ingredient of the offence of murder is the presence of malice aforethought. Section 206 of the Penal Code provides for scenarios when malice aforethought shall be deemed to be established. This includes an intention to cause death or grievous harm or an intent to commit a felony.

The prosecution case is based on the evidence of PW2 and PW4. It is the evidence of these two witnesses that they saw the two accused persons assaulting the deceased. According to PW2, he saw the deceased with the 2<sup>nd</sup> accused. The second accused called his colleagues and two other boys including the first accused appeared. The 1<sup>st</sup> accused had a whip made of tail fish and started assaulting the deceased. PW2 saw the 2<sup>nd</sup> accused assaulting the deceased with a stone. It is PW2's evidence that the deceased was not assaulted by the mob. PW4, SAUMU ABDUL is the one who took the deceased to hospital. It is her evidence that she was at Sea Breeze area on 27.7.2012 when she saw the deceased bleeding from the mouth. It was about 2.00 pm. She saw the 2<sup>nd</sup> accused assaulting the deceased using a big stone. The first accused was standing by while holding a whip made of a fish tail. PW2 and PW4 knew both accused. The incident took place during the day. The defence of the 1<sup>st</sup> accused is that the deceased was attacked by members of the public after he had stolen from his house. He was present when the deceased was assaulted. According to PW3, the deceased had injuries all over the body. These must be the injuries inflicted using the whip the 1<sup>st</sup> accused had. PW2 saw the 1<sup>st</sup> accused assaulting the deceased using a whip.

The accused through their respective counsels have raised the issue of the medical evidence. It is submitted that the medical evidence does not establish the cause of death. No post mortem on the body was conducted. PW1, Dr. Muumin testified that the cause of death was not established.

The provision of section 203 of the Penal Code is that one is held to be guilty of murder if he/she causes the death of another person with malice aforethought using an unlawful act or omission. It is therefore important in a murder case that the prosecution establish the cause of death. The cause of death must not of necessity be proved through the production of a post mortem report. There are instances where the cause of death is either obvious or can be determined through a set or series of circumstances. When for instance a road traffic accident occurs and two or three people die on the spot, can't it be concluded that the cause of death is the accident? Must the bodies undergo post mortems for the cause of death to be proved? My view is that in such circumstances, the cause of death would be the road traffic accident. Whether one would subsequently die at the spot due to excessive bleeding or cardiopulmonary arrest due to shock is immaterial. The cause of death would still be traced to the accident.

Similarly, where someone inflicts injuries to another person where the victim undergoes treatment but subsequently succumbs to the injuries, the cause of death can be traced to the initial injuries and the perpetrator of those injuries should be held culpable. Section 213 of the Penal Code provides for the circumstance of causing death. The section states as follows: -

**“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases: -**

**a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case, it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good**

**faith or was so employed without common knowledge or skill;**

**b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;**

**c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused;**

**d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;**

**e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.”**

Section 215 (1) of the Penal Code states as follows: -

**“A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.”**

A post mortem is normally conducted in murder cases so as to determine the cause of death. The mere fact that a post mortem is not conducted does not mean that the cause of death cannot be determined. If robbers invade a house and in the process shoot their victim dead using a rifle and he passes on, the absence of a post mortem report cannot be a good defence if the robbers are ultimately apprehended and charged with the offence of robbery with violence or murder. A post mortem report is not a condition prerequisite to the offence of murder.

In the current case, the deceased was assaulted on 27.7.2012. He died on 3.8.2012. According to PW1 the deceased was referred to undergo a C.T. Scan. The scan was conducted on the same date of his death on 3.8.2012. The results of the scan indicate that the deceased had multiple fractures on the front part of the head leading to blood clot on the brain. The evidence shows that before the deceased was assaulted, he was living his normal life. According to PW5 the deceased went to his place on 28.7.2012 at 2.00 pm. He was in bad shape. The deceased asked for porridge. The deceased told PW5 that he had been assaulted by three boys, Janja, Boi and Nature. At that time, there was no doubt that the deceased was still suffering from the injuries sustained on 27.7.2012. PW5 took the deceased to his grandfather. Thereafter, the deceased was taken to hospital and he passed on at Pandya hospital after undergoing a C.T. Scan. The evidence shows that the evidence could talk between 27.7.2012 and 28.7.2012.

The above scenario gives the circumstances under which the deceased met his death. The cause of his death is the injuries inflicted upon him on 27.7.2012. The deceased's family are Muslims and they objected to the post mortem process. It cannot be concluded that the deceased died of natural diseases such as malaria, or pneumonia. The injuries inflicted upon the deceased were serious and they ultimately led to his death. This conclusion is not derived from abstract. The sequence of events leads to only one conclusion that the deceased died due to the injuries suffered on 27.7.2017. This is not the mode of death but the cause of his death.

The accused have raised the issue of common intention and that the deceased was assaulted by a mob. The 1<sup>st</sup> accused contends that if it is found that he was at the scene, then his presence was only passive and did not participate in the assault of the deceased. The mere fact that it was alleged by PW4 that the 1<sup>st</sup> accused was at the scene while holding a whip cannot be sufficient evidence to find him guilty of the offence.

Section 20 of the Penal Code provides for parties to an offence as well as principle offenders. A principle offender includes the one who commits the offence, the one who aides or abets another person to commit the offence and the one who procures the other person who commit the offence. Section 21 of the Penal

Code provides as follows:-

**“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.”**

Section 10 of the Evidence Act (Chapter 80 Laws of Kenya) states follows: -

**“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.”**

The investigating officer testified that the deceased could have been killed by mob justice. Counsels for the accused reiterate that there were many people at the scene and it is difficult to determine who committed the offence. From the evidence on record, it is established that the deceased was assaulted during the day. PW2 was categorical that the mob did not attack the deceased. PW4 tried to assist the deceased but was threatened by the killers. That is the evidence on record. However, assuming that the deceased was assaulted by a mob of people and subsequently died out of those injuries, can it be said that the mob was justified in attacking the deceased. The concept of mob justice is nothing more than a group of people taking the law into their own hands. There is nothing justice in the unlawful acts committed by a mob. There is no principal of justice by the majority. The fact that the mob did not premeditate to commit the offence cannot be a good defence. Anyone who is part of the mob is duty bound to arrest the suspect and take him to court. Administering kicks and blows to the suspect in the pretext of mob justice does not make those acts lawful. The mob becomes the investigator, the trial court and the administer of the sentence. What is the extent of the punishment administered by the mob? One year, two years, life imprisonment or the death penalty. Such actions cannot be allowed in a country based on democracy and the rule of law. Every person within the mob who assaults the victim is individually liable for his/her criminal acts.

Common intention does not need to be foreplanned. It can be inferred from the acts of the perpetrators of the offence. In the case of **NJOGU V REPUBLIC [2007] 2 KLR, 123**, it was held inter alia that:

**“Under section 21 of the Penal Code (Cap 63), 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.”**

In the case of **LININGUSHU & OTHERS V REPUBLIC [2005] 1 E.A. 229**, the deceased’s wife organized for the killing of her husband. Her defence was that she did not participate in the killing. The trial court summarized her role as follows: -

**“She was the mastermind of the operation to eliminate her husband. She procured the killers and agreed to pay for their services. At the scene, she directed the operations although she did not strike the fatal blow. She paid part of the agreed price after the work was done. She was a principal offender and therefore guilty as charged.”**

The Court of Appeal in the case of **LININGUSHI & OTHERS** (supra) agreed with the above findings and dismissed her appeal. In the current case, the 1<sup>st</sup> accused testified that his premises were broken into and his phone and money was stolen. It is clear from the evidence that he must have informed his friends about the incident. The 1<sup>st</sup> accused was told that the deceased was the one who broke into his premises. The 2<sup>nd</sup> accused managed to trace the deceased and according to PW2 called the 1<sup>st</sup> accused. They

cornered the deceased and assaulted him. The 1<sup>st</sup> accused had a whip and inflicted injuries on the deceased. It does not matter whether the deceased died of the head injuries or the injuries inflicted by the whip. The 1<sup>st</sup> accused is a principle offender.

The next issue is whether the accused committing the offence while driven the malice aforethought. It is clear to me that the deceased was suspected to have broken into the 1<sup>st</sup> accused 's house and stole some properties. It is the evidence of the 1<sup>st</sup> accused that his neighbours told him that it was the deceased who stole from his house. It is the 1<sup>st</sup> accused's position that he returned to his house on 27.7.2012 at about 10.00 am. He made enquires to find out who had broken into his premises. The deceased was attacked at about 2.00 pm on the same day. The 2<sup>nd</sup> accused's position is that he was at the scene but tried to stop the mob from assaulting the deceased. PW2 saw the 2<sup>nd</sup> accused with the deceased. The 2<sup>nd</sup> accused made a phone call and the 1<sup>st</sup> accused appeared shortly with another person. PW2 saw the 2<sup>nd</sup> accused hitting the deceased with a stone. That evidence is corroborated by the evidence of PW4 who also saw the 2<sup>nd</sup> accused assaulting the deceased with a stone. I do find that the fact that the 2<sup>nd</sup> accused was arrested two years later does not absolve him from blame. He was at the scene and participated in the commission of the crime. He is a principal offender. In the case of **NJOGU V REPUBLIC** (supra) the court of Appeal dealt with the issue of mob justice and noted the following: -

**“There was no evidence that the people who beat the deceased, whoever they were, met together and agreed to attack the deceased. It was a spontaneous act. In those circumstances, although as Mr. Kaigai said, the appellant did not heed entreaties to stop further beating of the deceased, we are unable to read malice aforethought in his action. The evidence shows an unruly mob attacked the deceased. In those circumstances, it cannot be said the circumstances support the finding that the killing was with necessary malice aforethought.”**

**“In the circumstances, we think that the appellant should have been found guilty of the lesser charge of manslaughter contrary section 203 as read with section 205 of the Penal Code. Accordingly, we set aside the appellant's conviction for the offence of murder under section 202 as read with section 204 of the Penal Code and the sentence of death, and substitute therefor, a conviction for the offence of manslaughter, aforesaid.”**

From the evidence on record, it is my finding that the accused did not have malice aforethought to kill the deceased. The 1<sup>st</sup> accused was provoked when he found that his premises were broken into and some of his items stolen. The offence occurred less than four hours after the 1<sup>st</sup> accused found out who had broken into his premises. The 2<sup>nd</sup> accused was briefed of the theft and participated in the process of looking for the suspect. The two accused took the law into their own hands. No report was made to the police. Even if part of the mob participated in the assault, which I find it did not, the acts of the accused cannot go unpunished.

In the end, I do find that the accused had no malice aforethought in committing the offence. The accused are not found guilty of the offence of murder as charged. The accused are found guilty of the lesser offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and are convicted of the charge accordingly.

**Dated, signed and delivered in Malindi this 23<sup>rd</sup> day of March, 2017.**

**S.J. CHITEMBWE**

**JUDGE**