



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HCCRC NO. 12 OF 2016
(MURDER)
(CORAM: J. A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VS

MILTON OBOTE OGAYA *Alias* ADEM.....1ST ACCUSED

DANIEL OWINO OMONDI *Alias* ISRAEL.....2ND ACCUSED

J U D G M E N T

1. MILTON OBOTE OGAYA *Alias* ADEM (the 1st Accused) and DANIEL OWINO OMONDI *Alias* ISRAEL (the 2nd Accused) 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 charge are that on the 4th day of February 2016 between 0500hrs and 0700hrs at Nyamila village, Nyamila Sub-location, Boro Sub-County within Siaya County jointly with others not before court murdered **ERICK OMONDI OCHIEL**.**

2. The Prosecution called a total of 8 witnesses while the accused gave sworn defence and called three defence witnesses. Most of the Prosecution witnesses and Defence witnesses were relatives of the deceased and the accused persons. The facts of the Prosecution case are that the two accused persons on the 4th February 2016 at around 6:00am went to the deceased’s home armed with dangerous weapons, asked the whereabouts of the deceased, left and returned with other people, while also armed with dangerous weapons and found the deceased outside his house and left with him and was later murdered by the accused and others along the road.

3. PW1, B O O, a minor aged 11 years, son to the deceased testified that, on 4th February 2016 at 6:00am while at his parent’s home, preparing his breakfast, he heard someone calling saying you come out and asked PW1 where Omondi Ochieng’s home was and he confirmed that was his home. The person was by then armed with a rungu and a panga and was wearing black slippers, as he was standing next to the main door of the house of PW1’s father’s main house. As PW1 stood at the door of their outside kitchen at a distance of about 7 feet from where the said person stood, the person left and PW1’s father enquired from him who the person was that after about 2 minutes PW1 was shocked to see many people come to his father’s home while armed with pangas, rungus and spears, arrested his father, forced him out and at the gate PW1’s father, the deceased herein, called PW1 and told him not to go to school; and noticed one Adem Okal striking the deceased’s hand and at another shamba, more people, who had remained there joined the group as PW1 followed them from a close distance. That Francis Oduor Ochiel, (PW2), Uncle

to PW1 joined the group and enquired from Adem Okal what the deceased had done and he told PW2 to ask the deceased to tell him, where he had spent the night of Sunday. PW2 then moved aside with the intention to call police, but Adem stabbed PW2 at the ribs with the rear of the spear. The group then left with PW1's father as PW1 followed up to a river near Nyamila, from where he was chased by the members of the group; ran and hid in a certain home, from where he proceeded to Dire Police Station and made a report. PW1 had meanwhile witnessed his father being beaten as he was being taken away. PW1 returned home and went to inform his paternal grandmother and later learned the group had killed his father. PW1 stated that Adem Okal is a person known to him as a seller of locally made chairs. He stated he had seen him twice before his father was murdered. That he was amongst the people who had gone to their home. He also saw him spear Francis Owino (PW2) with a spear. That Dan was also known to him as he often used to see him going to Church using a bicycle. That on the material date, he saw him armed with a *rungu* and *spear*, leading the group and saw him arrest his father. PW1 identified the two persons he mentioned as the two accused in the dock, pointing at them. He urged at 6:00am when the incident took place, it was not dark as the sun was rising up.

4. PW2, Francis Oduor Ochiel, testified that from 5:00am of 4th February 2016, he heard his dogs barking, went out and saw Adem, who was known to him while in company of two others along the road at about 2 metres from his home. Milton Adem Ogaya asked PW2, where was the home of Omondi Ochiel telling PW2, he wanted Omondi Ochiel to go and make timber for him, as he had a power saw. PW2 then told him, that was his brother and showed him his home, and returned to his house. That after a short while, his sister-in-law Sarah Omige called PW2 asking him to come out as there were people who had gone and asked her for the home of Omondi Ochiel, while armed with pangas, *rungus* and spear. PW2 proceeded to Omondi Ochiel's home, where he found Milton Adem Ogaya; *Ja-Israel*, who he knew and Julius Owino, dragging PW2's brother from his home and who did not tell him why they were doing so. PW2's attempts to call police were frustrated by the two who took his phone, forcing him to proceed to Dire Police Post where he was advised to mobilize youth and follow the group. PW2 decided to proceed to Yala Police Station but before reaching there he got information from his wife that his brother had been murdered. That on the following day, PW2 made a report at Siaya Police Station and gave full names of his brother as Erick Omondi Ochiel and stated he was married with children who included B O (PW1). PW2 stated Milton Adem Ogaya, was a person known to him before the incident. He knew Milton Adem as a maker of local chairs for 3 years. He stated he had not known *Ja-Israel* before but he saw him at the material date. PW2 testified further that on 11th February 2016 in company of Fredrick Onyango Juma; Josephine Apiyo Omondi and a police officer, they identified the body of the deceased and noted that it had stab wounds on the chest, skull fractured and right leg fractured.

5. PW3, Steven Onyango Odhiambo, a *boda boda* rider, testified that on 4th February 2016 as from 6:00am he was on his usual duty when he met people carrying pangas, *rungus* and spears going towards Dile, in Gem Sub-county and on his way back he met the group at Nyamila, and on passing them and while at about 20 feet from the group, he noted they had stopped and were looking at him and as one of them whistled he stopped; the group called him and he came out of his motorbike, approached them and they asked him whether he knew the person who was in their custody. They told PW3, the man was a thief and were suspecting him to have stolen livestock in their village as their livestock had disappeared, and as they had arrested him, they were going to kill him. PW3 then went and returned to the scene, followed the group to Nyamila where he found Omondi Ochiel being beaten by many people using *rungus*, stones and pangas. PW3 moved to about 3 metres to where the person was being beaten by many people using *rungus*, stones and pangas. PW3 was able to see Daniel Owino, Adem and others. He could recognize them by their appearances as they were beating the deceased. PW3 testified he saw the 1st and the 2nd accused beating the deceased, who he stated he had known for a considerable period of time.

6. PW4, Von Ligai Otieno, testified that on 4th February 2016 at around 6:00am while at the gate to his home, he saw two people who asked him where the home of Erick Omondi Ochiel was, to which he gave the two the directions. That one of them was wearing the cap of "Israel Religion" while the hefty person was wearing a brown dust coat, short and *Akala* shoes and carrying a spear. That at around 8:00 am on his way to Alego at Jua Kali Area, he found around 5 people standing close to Erick Omondi Ochiel, who was lying on the ground bleeding from all over the body and saw the deceased being speared with a spear

by a person who is well known to him. He stated the person who speared the deceased is Milton Obote. He further stated the persons who talked to him while at his home are well known to him and gave their names as Milton Obote, *alias Ja-Alego* and the second accused who he identified him by his mode of dressing, having been in a cap of Kenya-Israel early in the morning. He stated there was moon light and he also saw them for the 2nd time on the same day at the place where he found the deceased lying and specifically saw Milton Obote, the 1st accused spearing the deceased as the 2nd accused was armed with a panga which was blood stained. He stated he used to see the two before and had no grudge with any of them. PW4 identified Milton Obote in the Court by pointing at him in the dock and the person he stated was wearing Israel cap (by pointing at the 2nd accused).

7. PW5, Josephine Apiyo Omondi, testified that on 4th February 2016 at around 9:00am, she received a telephone call from a neighbour, one Anna Atieno Otieno informing her that her husband had been murdered. She then went back to her home, found many mourners, then left for Siaya County Referral Hospital Mortuary where she saw her husband's body and observed it had burns on the chest, shoulders, private parts, hands and legs had injuries. She went and reported at the police and left for her home. She later went to the scene of murder and found pieces of her husband's clothes which she took and kept.

On 11th February 2016, she proceeded to Siaya County Referral Hospital Mortuary in company of Francis Oduor Ochiel (PW2) and Onyango Fredrick and identified the deceased's body to the doctor for postmortem purposes. PW5 testified that B O (PW1) is her 2nd born child, who was at her matrimonial home on 4th February 2016 when her husband was taken from her matrimonial home.

8. PW6, No. 235604, C.I. David Wanjala, the Investigating Officer in this case testified that on 4th February 2016, he was on duty at Siaya Police Station when he received a telephone call from OCS, C.I. Samwel Kombo informing him, that there was someone who was about to be lynched by members of public on suspicion of being a thief. He mobilized his police officers and proceeded to Nyamila whereby they found the deceased already dead, lying on the ground beside the road near Nyamila Primary School. The body was partly burned; they photographed it and carried the remains to Siaya County Hospital Mortuary. At the scene of crime, PW6 did not find anyone and they got the name of the deceased as that of Erick Ochiel, the following day from the deceased's relatives. He later recorded witnesses statements, organized postmortem to be carried out suspects were arrested and charged later. He identified the arrested persons as the 1st and the 2nd accused (pointing at them at the dock).

9. PW7, No. 231711, C.I. Mark Ropo Sirorei, Deputy DCIO, Siaya Sub-County, a joint Investigator with C.I. Wanjala (PW6), testified that he was handed over the investigation file by Snr. Sergeant Wambua, who had been handed over the file by C.I. Wanjala (PW6). He also received a duplicate file from ODPP, Siaya County with direction to have the suspects arrested; the suspects were: -

(a) Julius Owino Omondi

(b) Alias Adem who he came to know is Milton Obote Ogaya

(c) Daniel Owuor

(d) Adeya Ogaya

(e) Alias Controller

(f) David, a follower of Israel, (2nd accused)

(g) Oginga Murgor

That on 17th June 2016, PW7 in company of other police officers, proceeded to Nyamila arrested Milton Obote, the 1st accused at around 5:00am after being informed the reasons of his being arrested. That on

the way, they met a group of youths numbering around 50, fully armed with pangas, rungas, spears and axe, in which group, the 2nd accused was in. PW7 and his officers arrested the 2nd accused and Fredrick Oduol Oketch as the rest of the members of the group escaped, and after 400 metres, they arrested George Odhiambo Wahudi. At the station, they cross-checked the list given by ODPP and found the names of the 1st and 2nd accused were in the list given to them by the ODPP. The rest of other suspects he stated are yet to be made. He stated prior to the arrest of the accused persons, they were not known to them and were lead to their homes by the relatives of the deceased who also pointed the 2nd accused to them. PW7, identified in the Court, Milton Obote Ogaya, as the 1st accused and the 2nd accused as Daniel Owino Omondi alias Israel. PW7 testified that he received postmortem report on the deceased on 11th February 2016 and recorded his own statement. He identified the postmortem report (marked as MFI-P1).

10. PW8, Doctor Collins Otieno Ogiga, from Siaya County Referral Hospital, produced the Postmortem Report of the deceased Erick Omondi Ochiel, on behalf of the author of the same, Dr. Philip Brian Okoth, who he stated he had worked with him for 3years, knew his handwriting and signature. The Postmortem was carried out on 11th February at 2pm at Siaya County Referral Hospital Mortuary, over the body Erick Omondi Ochiel, male African aged approximately 25-35years. He produced the Postmortem Report as exhibit P1. The Postmortem Report reveals as follows: -

“External appearance of the body:

- a) Lacerations on the scalp (≈ 4 large ones) with deformity of the skull noted***
- b) Mixed 1st and 2nd degree burns; more concentrated on the right side of the body.***
- c) Multiple bruises over the entire body.***

Head:

Crush and laceration injury to underlying brain tissue. Fracture of the frontal, temporal and occipital bones with displacement of the fragments.

Nervous system:

Damaged brain tissue.”

That as a result of the examination, the doctor formed the opinion that the cause of death was due to severe head injury with skull fracture resulting from trauma.

11. When the accused were called upon to defend themselves, the 1st accused opted to give sworn statement and opted to call one witness whereas the 2nd accused opted to give sworn statement and call two witnesses.

12. The 1st accused, stated that his name is Milton Obote Ogaya and denied he is known as Adem. He stated he is a farmer and a carpenter from Nyamila village, Siaya County. He testified that on 4th February 2016, some livestock were stolen at around 1:00am in Nyamila village, where he is the Chairman of Nyamila Community Policing. That he heard alarm from people while sleeping at his home, came out and proceeded to the direction of the alarm armed with a torch and whip. He did not know the owners of the allegedly stolen livestock but he found the livestock on the side of Gem beside a river. That he found the Assistant Chief of Nyamila sub-location, one John Oduor Adala with Danny Oloo; the 2nd accused and the owner of the cows; who took them away as the Assistant Chief advised them to go and make report to the Assistant Chief of Ndere and that was around 5:00am. That the 2nd accused proceeded to his home with the cows, that the accused; the Assistant Chief of Nyamila John Oduor Adala and his youth all in all numbering 5 proceeded to Office of Assistant Chief of Ndere and woke her up; spoke to her and she advised them to report at Ndere Police AP Camp. That they proceeded to Ndere

Police AP's Camp, the five of them and at 5:30am met the Corporal who advised them to report to Siaya Police Station, and get warrant of arrest against the suspect. He testified he did not know the suspect. That he then went back home and did not go to Siaya. That the following day, he drove his cattle and proceeded to plough from 6:30am accompanied by Daniel Oloo from 7:00am upto to 11:00am. That it was from 11:00am when he heard people talking of someone who had been killed at Nyamila near a school; who was alleged to have been the person who had stolen the livestock. He denied having gone to the home of the deceased on 4th February 2016 between 5:00am - 6:00am or being a member of the group along the Nyamila road which was beating Erick Omondi Ochiel. He stated at the material night he had gone out, as the Chief permitted him to do so as the Chairman of the Community Policing in Nyamila; urging he was arrested in June 2016 yet the incident had occurred in February 2016. He denied having caused the death of the deceased.

13. DW2, Daniel Owino Omondi, the 2nd accused, denied the offence and testified that on 4th February 2016 while at his home at around 1:00am he went out of the house to check on the family livestock and found them safely in the shed but as he was sleeping, his younger brother called him and told him three cattle were missing. He checked, proceeded to pray, then he got torch and proceeded to search for them. He was then dressed in light blue shirt, navy blue long trouser and white hat; that on reaching at the boundary between Alego and Gem, DW2 in company of his younger brother Elijah Omondi, Isaac Oyodi Meda, Milton Obote Ogaya and Assistant Chief John Oduor Adala at around 5:00am recovered the livestock, which DW2 drove home as others proceeded to report to the Assistant Chief of Gem; arriving home at 5:30am. DW2 stated that he did not go to the home of the deceased nor to the scene of murder nor was he armed with a panga. He stated that he heard of the deceased's death at around 10:00am, when he heard people saying a thief had been killed. He stated further that he did not know any of the Prosecution witnesses adding that he was arrested in June 2016.

14. DW3, Isaac Ochieng Oyugi, from the same village with the two accused testified that on the night of 3rd February 2016, he heard screams relating to livestock theft, and as a Patron of the Community Policing in Nyamila location. He called Milton Obote Ogaya, Chairman of the Community Policing in Nyamila sub-location, who informed him he had also heard the screams, and he took a torch, whip and proceeded to where the screams were coming from. He met many people running towards where the screams were coming from and amongst the people he recognized included the 2nd accused; Onyango Oudia and others. That the 2nd accused told him that his livestock had been stolen, that they got the livestock after the bridge which the 2nd accused and the younger brother claimed to be theirs in the presence of Assistant Chief John Oduor Adala. The group left the 2nd accused with the livestock as they proceeded to make report to the nearest Assistant Chief. He further testified the accused persons accompanied them to the Assistant Chief's place who they saw and made the report to at around 2:00am and told the 2nd accused as he was the complainant, he should report at Siaya Police Station. That the 1st accused proceeded to his home whereas DW3, the Area Assistant Chief and the 2nd accused proceeded to the 2nd accused's home, where they found many people between 5:00am - 6:00am, where DW3 and the group stayed upto 9:00am.

15. DW4, Dalmas Oloo, testified that on 4th February 2016 at around 6:30am, the 1st accused called him, telling him to accompany him in ploughing, and as such he took his two bulls and added them to two of the 1st accused and proceeded to plough the 1st accused's shamba at Nyamila village from 7:00am to 11:00am, when they broke for lunch at the 1st accused's home. That after lunch, they parted at around 11:30am.

16. That upon close of the Defence case, both Mr. Okello, Learned Advocate for the accused and M/s M. Odumba, Learned Prosecution Counsel, made their respective submissions. Mr. Okello, Learned Advocate for the accused urged that the evidence on identification or recognition of the accused person is highly doubtful; contradictory on the mode of dressing of the accused persons on the material date; that identification parade ought to have been conducted as some of the witnesses had not known the accused before; and that the accused's *Defence of Alibi* was not dislodged; that evidence of PW1 a minor needed corroboration. M/s Maureen Odumba, Learned Prosecution Counsel on her part, urged, the Prosecution

has proved their case beyond any reasonable doubt. She urged the Prosecution proved all the necessary ingredients of an offence of murder; being the fact of the death of the deceased and the cause of death; who caused the death of the deceased and malice aforethought.

17. The Prosecution in a murder case must prove that the accused had formed the necessary intention to cause death or grievous harm to the deceased. **Section 206 of the Penal Code**, describes circumstances which constitute the same 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 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 person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;

c) An intent to commit a felony;

d) An intention by the act or omission facilitates the flight or escape from custody of any person who had committed or attempted to commit a felony.”

18. To prove a charge of murder, the Prosecution has a duty to establish the following ingredients:-

a) Death of the deceased and it's cause.

b) That the accused caused the death through an unlawful act or omission.

c) The accused possessed an intention to cause harm/kill or had malice aforethought.

19. The first issue for consideration is whether the Prosecution has proved the death of the deceased and its cause? PW2, brother to the deceased received a call of his brother's death on 4th February 2016 from his brother's wife Lucy Atieno Oduor. That on 11th February 2016, he viewed his brother's body at Siaya County Referral Hospital Mortuary in company of Fredrick Onyango Juma, Josephine Apiyo Omondi (PW5) and a police officer and proceeded to identify the deceased's body to the doctor who carried out the postmortem as indicated in the Postmortem Report. PW6, No. 235604, C.I. David Wanjala in company of other police officers proceeded to Nyamila village and found the deceased already dead lying on the ground, photographed the body and carried the body to Siaya County Referral Hospital Mortuary. The postmortem on the body of the deceased was carried out by Dr. Philip Brian Okoth on 11th February 2016 in presence of PW2 and PW5. PW2 stated he was with PW5 and a police officer, the evidence on behalf of the doctor was given by PW8, who is also a doctor, corroborated the evidence of PW2, PW5 and PW6, who testified that they saw the body of the deceased and PW6 who with other police officers picked the deceased's body to Siaya County Referral Hospital Mortuary. The death of the deceased is not in dispute. The Postmortem Report was produced as prosecution exhibit P1. The doctor opined the cause of death was due to severe head injury with skull fracture resulting from trauma (mob justice). I therefore find and hold the prosecution has established the death of the deceased and the cause of death to the required standard of proof.

20. Who caused the death of the deceased? According to the Prosecution witnesses, the incident occurred between 5:00am and 8:00am. PW1, a minor, a child of the deceased at around 6:00am while at his parent's home heard someone calling very loudly, **“you come out”**, he saw the person who was asking of whereabouts of Erick Omondi Ochieng, while armed with a panga as he was standing next to the door to the main house where the PW1's father was sleeping. PW1 was about 7 feet from the person; that after a while PW1 saw many people come to his father's home armed with crude weapons such as

pangas, rungas, and spears and dragged his father away. PW1 saw Adem, the 1st accused struck the deceased on his hand; as PW1 followed from a close range; he saw his uncle, PW2, Francis Oduor Ochiel joining the group and talked to Adem Okal, enquiring why they had arrested the deceased and also he witnessed Adem stab PW2 with rear of the spear at PW2's ribs. PW1 followed the group till at the river where he was chased away. PW2's evidence corroborates the evidence of PW1. He stated that on 4th February 2016, at around 5:00am while at his home, he saw Adem, who was well known to him with two others along the road about 2 metres from where he was. PW2 talked to Milton Adem Ogaya, the 1st accused who was enquiring where the home of the deceased Omondi Ochiel was. PW2 told him the deceased was his brother and directed them to the deceased's home. PW2 later proceeded to the deceased's home and found Milton Adem Ogaya and *Ja-Israel*, who were known to PW2, dragging PW2's brother from his home. They told PW2, he will hear of the result of their action later, which scared him and he called the police. PW2 told this Court he saw and recognized the accused persons clearly on the material date and described how they were dressed and how each of them was armed. He stated the 1st accused was armed with spear whereas the 2nd accused had a rungu. He further stated the 1st accused hit him with a rungu and speared him at the hips with a spear.

21. PW3, Steven Onyango Odhiambo, a boda boda rider testified that on 4th February 2016 while riding on the road from 6:00am through Sidindi to Ng'iya, he met a large group of people armed with crude weapons being pangas, rungas and spears moving towards Dile in Gem. He passed the group thrice, he stopped, talked to them and a person who was under their arrest one Erick Omondi Ochiel, as he knew him. They told him the person was a thief of livestock. One of the persons told PW3, they were going to kill the deceased. PW3 witnessed the deceased being beaten by the group using rungas, stones and pangas from a close range of 3 metres from the person who was being beaten. PW3 clearly from the distance of 3 metres saw Daniel Owino, the 2nd accused; Adem Ogaya, the 1st accused and others beating the deceased. PW3 stated he saw the two accused beating the deceased, whom he had known before and whom he used to talk to stating he had known the 1st accused for 1 year and that his step-mother is a member of Israel Church.

22. PW4, Von Ligai Otieno, testified that on 4th February 2016, while at his home at around 6:00am, he saw two people passing by and who enquired of the home of Erick Omondi Ochiel. He was standing at his gate 20 metres to the road, he noted one of the persons was wearing a cap of Israel Religion and the other was hefty in Akala shoes and was carrying a spear. That later at 8:00am, PW4 left for Alego and on his way at Jua Kali Area, he found 5 people and the deceased lying on the ground bleeding. He moved to a close range and saw Milton Obote stabbing the deceased with a spear. He stated Milton Obote was a person well known to him. He stated the two people who had talked to him while at his home are well known to him and gave their names as Milton Obote alias *Ja-Alego* and he identified the second person by his dressing as he had a cap of Israel. He said though it was early in the morning, there was sufficient moonlight and he saw the people very well and also saw them again, where he found the deceased lying on the ground at around 8:00am. He stated the 1st accused was armed with a spear whereas the 2nd accused was armed with a panga which was blood stained. He stated he had known the two before and that he had no grudge with any of them.

23. PW7, No. 231711 C.I. Mark Ropo Sirorei, who took over the investigation of this matter from PW6, stated that he got directions from ODPP, Siaya County, to arrest seven suspects who included the accused persons in this matter and as such had the accused arrested in June 2016 and charged with this offence.

24. The main contention in this case, is that the accused persons were not identified or recognized and further no identification parade was carried out. This offence was committed in a long process and not instantly. PW1, PW2, PW3 and PW4's evidence is that the offence was committed between 5:00am and 8:00am. It is the Prosecution's contention at the time the witnesses saw the two accused and others there was sufficient light to enable them see and recognize the accused. The Prosecution did not state the intensity of light as the sun had not arisen up but there is evidence there was moonlight. I take into account, that the incident did not happen in a flash of second, and the witnesses took time as they talked and observed the accused persons. They even described how the accused were dressed and gave their full names and/or description. There is evidence the accused were not strangers to PW1, PW2, PW3 and

PW4 as they had known them before. PW1, PW2, PW3 and PW4 were able to see the two after the sun had arisen up. They described how the two and others were armed; they talked to them and described the role each played. From the evidence of the prosecution witnesses, this Court has no doubt to state, that the conditions were favourable for positive recognition/identification of the accused persons.

25. In the case of **George Bundi M'Rimberia V Republic, Criminal Appeal No. 352 of 2006**, it was stated a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. Further in **Lasarau V Republic (1988) KLR 783**, the Court of Appeal emphasized that where identification is based on recognition by reason of acquaintance, there is no better mode of identification than by name. In the instant case, PW1, PW2, PW3 and PW4 gave description of the accused persons, mentioned their names and gave their occupation and stated the deceased was dragged from his home by the people they knew and/or they had known before the incident. I find that the conditions were favourable for positive recognition and/or identification of the accused who were properly identified and recognized by the Prosecution witnesses. I find the accused were specifically recognized and there is no doubt of them having been mistakenly recognized as the incident did not take place in a flash of seconds but was a long process from the time of arresting of the deceased up to the time he was killed.

26. The accused contend, that there was no identification parade carried out. I have gone through the evidence and indeed it is true no identification parade was conducted; however, PW1, PW2, PW3 and PW4 in their evidence clearly stated they had known the accused persons before the incident and had given their description, occupation and mentioned their names to the police. In view of the accused persons having been recognized or having been known to the accused before and even well described by their physical appearances and occupation and their names given, I find there was no need for identification parade, as the purpose of identification parade is where the witnesses do not know the perpetrator of the offence as of the time of the commission of the offence. I find such failure did not occasion any miscarriage of justice to the accused persons.

27. The accused contend, that the prosecution witnesses' evidence was inconsistent and contradictory. The defence urged PW1 and PW2 contradicted one another when PW1 stated PW2 was stabbed with a spear by the 1st accused. I have perused the evidence and indeed I find no contradiction as PW1 stated PW2 was stabbed with rear side of the spear at his ribs while PW2 stated he was stabbed at the hip, whether the stabbing was at the ribs or hip, PW2 was stabbed and both agreed it was done by the 1st accused. He urged further PW3, PW4 and PW7 were forgetful, however I have not found any material evidence of inconsistency or contradiction even if the two forgot some parts of the evidence which was not pointed out by the Defence. The Prosecution urged PW1, PW2, PW3 and PW4 gave contradictory evidence on the clothes the people were wearing when they saw them, urging PW1 stated the 1st accused was wearing a black jacket and white cap whereas PW2 talked of a brown jumper whereas PW3 talked of a brown cap and PW4 said the 1st accused was not wearing any cap; urging in the circumstances it is doubtful whether PW1, PW2, PW3 and PW4 were referring to the same and one person. I have very carefully perused the evidence of PW1, PW2, PW3 and PW4 on description of the dressing mode of the 1st accused person. PW1 told the court the 1st accused was wearing a white short trouser and black jacket and white cap and the 2nd accused wore brown long trouser and white tarban. PW2 said the 1st accused was wearing a short jacket and brown shirt; whereas the 2nd accused had a white shirt and white cap but he could not recall the trouser. PW3 talked of the 1st accused wearing an apron and whitish short and a brown cap in colour; whereas the 2nd accused had T-shirt brownish but did not identify the trouser. PW4 stated the 1st accused had a brown dust coat and short whereas the 2nd accused had a cap of Israel. I note from the evidence of PW1, PW2, PW3 and PW4, there are minor inconsistencies on how the accused were dressed. I note that though there are minor inconsistencies on the dressing of the accused on the material date the accused were recognized by PW1, PW2, PW3 and PW4 and the Prosecution was not relying on the identification of the accused but recognition. I take into account that in most cases when someone meets a person well known to him, recognizes him or her, he may not have been interested in observation of ones made of dressing because he or she has already recognized the person. In the instant case, I find the discrepancies are so minor, as they are merely based on the colour of the clothes worn by the accused persons. People perceive colours and things differently and may not distinguish colours and

there being no dispute of the clothes worn other than the colours, I find the inconsistencies so minor and not going to the root of the recognition of the accused, and I have to disregard the same. I find the inconsistencies so minor that they do not affect the prosecution case on the recognition of the accused persons

28. The accused's defence is a *Defence of Alibi*. The accused persons called two witnesses. The accused defence is that between 5:00am and 8:00am, they were not at the scene of incident and at no time did they get involved with the deceased's death. The 1st accused's defence is that between 1:00am to 6:00am, he and others were searching for stolen livestock of the 2nd accused and his brother. That he went back to his home at 6:00am and from 6:30am to 11:00am, he was ploughing with Daniel Oloo. DW3, Isaack Ochieng Oyugi, contradicted the evidence of the 1st accused, who stated contrary to what the 1st accused stated that when they recovered the livestock, the 2nd accused drove them home by stating, the 2nd accused did not drive the cattle home but proceeded with the group in which the 1st accused and DW3 and others were and went to report the matter to the Assistant Chief and at the AP's Camp. That they parted at around 6:00 am. DW3 stated after parting with the 1st accused at around 6:00 am, he did know where the 1st accused went. DW4, Dalmas Oloo, stated that he was with the 1st accused ploughing from 6:30 am upto 11:00am. He stated he is not known by any other name and he is not known as Daniel. The 1st accused did not mention ploughing from 6:30am to 11:00am or at any time on 4th February 2016 with DW4, Dalmas Oloo. He never mentioned as stated by DW4, using two of DW4's bulls to plough jointly with his. I find that DW4 contradicted the evidence of the 1st accused. The defence of 1st accused is similarly contradicted by DW3 in that the 1st accused stated, that on finding the livestock the 2nd accused left for his home with livestock whereas DW3 said the 2nd accused continued to be with the group that proceeded to report to the Assistant Chief of Gem.

29. On the *Defence of Alibi* of the 2nd accused, he stated after recovering of the livestock on 4th February 2016 at around 5:00am, he drove them home, as others proceeded to make report to Assistant Chief of Gem. That on arrival at home, he did not go anyway. DW3 Isaack Ochieng Ochieng Oyugi, contradicted the evidence of the 2nd accused, when he stated the 2nd accused and the 1st accused on recovery of the livestock both of them and other members of the group proceeded to go and report to the Assistant Chief of Gem. He stated it was the younger brother of the 2nd accused, one Elijah Omondi, who drove the livestock home and after reporting DW3; the Assistant Chief John Oduor Adala and the 2nd accused went to the 2nd accused's home and found many people between 5:00am and 6:00am, where they stayed upto 9:00am. DW3 was categorical the 2nd accused did not return the livestock and urged if the 2nd accused said he did he lied. The 2nd accused in his evidence did not mention being in company of DW3 at his home from 6:00 am upto 9:00am. I find if that was so, the 2nd accused would have said so. The evidence of DW2 and DW3 in view of the above is in my view incredible.

30. The Prosecution through the evidence of PW1, PW2, PW3 and PW4, placed the 1st and the 2nd accused persons at the scene of crime. They were well known to the prosecution witnesses, who recognized them, gave their description, mentioned their names, how they were armed and role played by each of the accused person. I find the prosecution witnesses dislodged the accused *Defence of Alibi*. I find the 1st accused and the 2nd accused's *Defence of Alibi* unsustainable and reject the same as an afterthought. I therefore find and hold the 1st and the 2nd accused were members of the group with caused the death of the deceased and the 1st and the 2nd accused persons actively participated in the killing of the deceased. The Prosecution has proved that the 1st and the 2nd accused in company of others not before Court caused the death of the deceased.

31. Whether the 1st accused and the 2nd accused had malice aforethought? PW1's and PW2's evidence is that in the morning hours of 4th February 2016, they met and saw the 1st accused, the 2nd accused with a group of people armed with crude weapons namely; pangas, rungas and spears at the deceased's home, from where they dragged the deceased out of his compound from around 5:00am. Some hours thereafter, PW1, PW2, PW3 and PW4 witnessed the accused and other members of public

beating and torturing the deceased. From the time of the arrest of the deceased to the time he met his death is approximately 2 to 3 hours. The 1st accused and the 2nd accused and the group which claimed the deceased had stolen livestock in the village has had sufficient time to surrender the deceased to authority, either the Village Manager or the Area Assistant Chief or Chief or to the nearest police station but did not do so, for unexplained reasons. There is no evidence the deceased did not cooperate with the perpetrators. There is no evidence produced by the Prosecution that the accused persons and the group which arrested, tortured and killed the deceased, had met and agreed or had planned to attack the deceased following the alleged theft of the 2nd accused's and the 2nd accused's brother's livestock during the night of 4th February 2016. From the evidence of the Prosecution witnesses, the attackers were rowdy and the attack was not spontaneous. In the circumstances, though the accused's aim was to punish the deceased for suspecting him to be involved in stock theft; I am unable to find that the accused had in doing so planned to kill the deceased. I find malice aforethought having not been proved to the required standard of proof. I have nevertheless no doubt that the 1st accused, the 2nd accused and the mob including those who are yet to be apprehended and charged, attacked the deceased and caused his untimely death. From the evidence on record, it cannot be stated, the 1st accused and the 2nd accused had planned the murder of the deceased. For the above reason, I will find the 1st accused and the 2nd accused killed the deceased without intention to do so and that malice aforethought is therefore not proved.

32. Accordingly, I find the 1st and the 2nd accused guilty of lesser charge of Manslaughter under Section 202 as read with Section 205 of the Penal Code and accordingly I convict the 1st and the 2nd accused of Manslaughter.

DATED AND SIGNED AT SIAYA THIS 8TH DAY OF DECEMBER 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

M/s M. Odumba: for State

Mr. Okello: for the Accused

1st Accused - Present

2nd Accused - Present

Court Assistants:

1. Laban Odhiambo

2. Atika Leonidah

J.A. MAKAU

JUDGE