



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**H.C CRIMINAL CASE NO. 35 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ERNEST OJIAMBO MULEFU ALIAS MUSEVENI .....1<sup>ST</sup> ACCUSED**

**STEPHEN WANDERA MULEFU ALIAS MZEE PUNDA .....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

1. Through an Information presented to Court on 15<sup>th</sup> July, 2014 Ernest Ojiambo Mulefu *alias* Museveni(**the 1<sup>st</sup> Accused**) and Stephen Wandera Mulefu *alias* Mzee Punda (**the 2<sup>nd</sup> Accused**) face two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 6<sup>th</sup> and 7<sup>th</sup> day of February 2010, at Nangoma Village, Matayos Division within Busia County jointly with others not before Court, they murdered Agaitano Babu Ochieno (the 1<sup>st</sup> Deceased). The second count is in respect to the murder of Silvester Ojanji (the 2<sup>nd</sup> Deceased) alleged to have happened at the same time and place.

2. The State called ten witnesses to prove its case. Paul Wanyama Almidi (PW1) hails from Mundaya. On 6<sup>th</sup> February 2010, the witness returned home after he had been discharged from Hospital. At about 5.30pm, he was visited by the 1<sup>st</sup> and 2<sup>nd</sup> Deceased Persons. They left at about 6pm and the witness retired to bed. At about 8pm, he heard a knock at his door and before he could open, the door was forcefully opened. Some intruders made entry.

3. Immediately, they started to whip him using whips popularly known as 'Nyaunyo'. It was his evidence that the 1<sup>st</sup> Accused asked him for his mobile and then dialed his number and when his phone rang, he took it. Thereafter the intruders forced him to accompany them to the house of the 1<sup>st</sup> Deceased. As they walked to the house of the 1<sup>st</sup> Deceased he was able to recognize the 1<sup>st</sup> Accused and the 2<sup>nd</sup> Accused by voice. And that he was also able to see them using the moonlight. PW1 also recognized others being Clement Musanya, Tabu, Nabwire and Wanyama.

4. On reaching the home of the 1<sup>st</sup> Deceased, the intruders knocked down the door of that house and ejected the 1<sup>st</sup> Deceased. The 2<sup>nd</sup> Accused then used a rope to tie the hands of the 1<sup>st</sup> Deceased to the hands of the witness. They then set off to the home of one Pitus Sombi. He too was forced out of the house and he joined the 1<sup>st</sup> Deceased and himself. The captives were then returned to the home of the 2<sup>nd</sup> Deceased. They first visited the house of his 1<sup>st</sup> wife but the 2<sup>nd</sup> Deceased was not there. They took one Tobias and Rosemary Onyango (who was the 1<sup>st</sup> wife of the 2<sup>nd</sup> deceased) to the house of the 2<sup>nd</sup> wife. The 2<sup>nd</sup> Deceased refused to open the door to them. The intruders then knocked down the mud wall of

the said house. When the wall collapsed, the 2<sup>nd</sup> Deceased emerged running. But his escape was short lived as they caught up with him and tied him to the other three.

5. The four were then frog marched towards St. Eugene School Nangoma. On reaching the school the intruders turned on them and assaulted them viciously. The witness was cut severally on the forehead and the limbs. PW1 sustained a fracture to his jaw and had wounds on many parts of his body. Although Sombe did not suffer serious injury, the assailants inflicted fatal wounds on the 1<sup>st</sup> and 2<sup>nd</sup> Deceased persons. The assailants left them for dead but Sombe assisted the witness by untying his hands. The witness passed out because of the injuries and lay helpless at the scene until 8am when one Kelvin Wanyama picked him and took him to Busia Hospital.

6. Roselyn Ndeda Babu (PW4) is the wife of the 1<sup>st</sup> Deceased. She was at home with the 1<sup>st</sup> Deceased when on the night of 5<sup>th</sup> February 2010 at about 10pm some people knocked and forcefully opened their door. The house was lit by a tin lamp and she was able to see one Musanya and the two Accused persons enter into the house. It was her evidence that the two Accused persons were each armed with a fimbo and a panga. Each of them carried a torch. That the three were in the company of twenty other people. It was the evidence of this witness that the 1<sup>st</sup> Accused person entered the 1<sup>st</sup> Deceased's bedroom and dragged him out. The others inspected the house using some torch lights. They then commanded the 1<sup>st</sup> Deceased out of the house.

7. After they left, PW4 took his children to the home of his mother in-law by the name Jenta Okumu (PW3). At that home, she only able to find some children. The witness left her children there and sought help from one Benson Aleke. She requested Benson to call the Area Chief. Later at about 6am, she returned to her home. She heard loud screams, and together with her mother in-law went towards the screams and at Nangoma they found the badly severed bodies of the Deceased persons. Her husband was literally beheaded and his hands were tied to that of the 2<sup>nd</sup> Deceased using a rope. Some Police Officers later came to the scene and removed the bodies.

8. Jenta Atieno Okumu (PW3) is the mother of the 1<sup>st</sup> Deceased. Her house and that of her son are separated by a live fence. On the fateful night, at about 10.00 pm, she heard bangs on the doors and windows of the house of the 1<sup>st</sup> Deceased and when she went out to see what was happening, she saw many torch lights in the 1<sup>st</sup> Deceased's compound. It was her evidence that as the torch light appeared to move away from the compound she heard the 1<sup>st</sup> Deceased call her out in distress. She ran to the house of her other son Patrick Ouma and alerted him. After she did so, she took cover in some bushes. From her hider out, she was able to hear and recognize the voice of the 2<sup>nd</sup> Accused. After the invaders had left the scene and all was clear she returned home and stayed with the children and wife of the 1<sup>st</sup> Deceased. It was at daybreak that she found her son dead together with the 2<sup>nd</sup> Deceased.

9. Rosemary Anyango Ojanji (PW5) is wife to the 2<sup>nd</sup> Deceased. On the night of 6<sup>th</sup> February 2010, at about mid night, she was alone at her house when she heard a bang on her door. She was ordered by some people who were on the outside to open the door. The door was broken open and ten people entered into the house and started assaulting her. They asked for her husband and she told them that her husband was in the house of her co-wife one Mary Nekesa (PW6). She says that she was able to recognize three of her intruders as the Accused persons and one Clement Musanya. The intruders forced her to accompany them to the home of PW6 after also forcing out her son Tobias Ochola.

10. At the house of PW6 the 1<sup>st</sup> Accused commanded her to call out the occupants of the house. They forced their way into the house and ejected the 2<sup>nd</sup> Deceased whom they took away. Later in the morning, at about 6am, she found the body of her husband lying at Nangoma. The body of her husband had a cut to its head, back, shoulder, mouth, nose and neck. He had a stab wound to his abdomen with his intestines exposed. Later, Police Officers removed the body from the scene.

11. On that night the 2<sup>nd</sup> Deceased was in the house of Mary Nekesa (PW6) when at about midnight she

heard the voice of PW5 calling out her husband. The door and windows were banged open and some people entered into the house and started to assault the 2<sup>nd</sup> Deceased using pangas and clubs. The intruders also assaulted her using whips. They forced her husband out but allowed her to remain in the house as she had a small baby. She says that she was able to recognize some of the intruders from the light from the torches they carried. She was able to recognize the 1<sup>st</sup> Accused and the 2<sup>nd</sup> Accused. She was also able to recognize them using the moonlight. Later, she learnt that her husband had been killed and she was able to see his badly mutilated body.

12. Prior to the incident that led to the Death of the two Deceased persons, a Chief's Baraza had been held on 1<sup>st</sup> February 2010 at Mundaya 'A'. One of the people who attended the meeting was Gonsaga Omondi Baraza (PW2) who was at the material time an Assistant Chief of Ganjala Sub-location. The Agenda of the meeting was the growing insecurity in the Area. One Musanya dared the witness and the Chief to name the thieves in the area. He also declared that he would ensure that the thieves were dealt with. On the night of 6<sup>th</sup> and 7<sup>th</sup> February 2010 at about midnight the witness was called by the Chief and informed of the arrest of three people. The following morning he and some people including the Village Elder found two bodies near St. Eugene Primary School. The witness was able to recognize the bodies as those of the Deceased persons. The witness called the Chief and informed him and Police Officers from Funyula Police Station about the deaths. The bodies were later recovered from the scene by the Police.

13. P.C Chalres Kitea (PW9) was at the fateful time attached to Busia Police station. On the morning of 7<sup>th</sup> February 2010, at around 9am, he was called by the then Officer Incharge (OCS) of Busia Police Station and informed that two people had been killed in Nangoma village. PW9 recorded the Statement of the relatives of the Deceased Persons. The witness later accompanied the OCS to Busia District Hospital Mortuary where the bodies of the two Deceased persons lay. While at the Mortuary, he got information that a third person by the name Paul Wanyama (PW1) who was with the Accused persons when they were assaulted had suffered serious injuries. PW9 visited PW1 at the Hospital and found that he was in a critical position.

14. Superintendent Mwangi Wanderi (PW10) was then the District Criminal Investigation Officer, Busia. On the nights of 6<sup>th</sup> and 7<sup>th</sup> February 2010, he received information that a group of persons between 4 to 10 in number, and armed with pangas, machetes and clubs were moving from house to house picking some male occupants who were later found murdered within Nangoma area. On 8<sup>th</sup> February 2010, the investigation file was passed on to Inspector Abanga and Sergeant Odenyo as PW10 was leaving to Thailand on a short course.

15. On his return, PW10 found that the file had been prepared. He forwarded it to the State Counsel's Office at Bungoma with recommendation that four people be charged. These are the two Accused persons, Clement Musanya and one Ababu.

16. Postmortem examinations were carried out on the bodies of the two Deceased persons by Dr. Kisilu. The Postmortem Reports prepared by the Doctor were produced in Court by Dr. Patson Obuta (PW8). On the body of the 1<sup>st</sup> Deceased the Doctor observed the following on the external appearance;-

"3 deep cut wounds right side of the neck. One extending from occiput to submandibular.....one mid - neck..... severing vertebra body.....Rope marks both wrists, bruises both elbows, shoulder".

On the internal appearance, the Doctor observed that there were 3 deep cut wounds on the right neck with fracture of the vertebral column. There were also injuries to the spinal column. It was severed through the cervical vertebral. To the spinal cord, there was a cut through the cervical area. The Doctor formed the opinion that the cause of death was cardiac arrest following severe hemorrhage resulting from trauma by sharp objects.

17. On examination of the body of the 2<sup>nd</sup> Deceased person the Doctor noted that following on the external appearance:-

'Deep cut wounds on left maxillafacial.....Nose,.....Ear right side cut half way, anterior neck..... trachea exposed fully, left shoulder..... posteriorly and right shoulder.....lumbar area midline.....subumbilical area of the abdomen.....left frontal area swelling and Rt wrist cut wound'.

Internally, the Doctor found a cut wound on the abdomen that penetrated through the small bowel. He also observed three cut wounds at the anterior neck. One cut wound to the throat that exposed the trachea and major vessels. The Doctor formed the opinion that death was caused by cardiac arrest following trauma by sharp objects causing severe hemorrhage.

18. At the close of the Prosecution case, the Court found that the evidence was sufficient to require the Accused persons to make their Defences in respect to both counts. The 1<sup>st</sup> Accused gave a sworn Statement. The Accused denied the charges and said that the case was malicious. He asked the Court to note that he was arrested 6 months after the incident and all this while he was at home leading his usual life. He further stated that his names are Ernest Ojiambo Mulefu and showed Court his ID. No. 7896118. He also told Court that his Co-Accused is Stephen Wandera Mulefu (ID No. 4235548). He said that he is not known as Museveni. The Accused referred this Court to the Statement recorded by PW7 in which the witness stated that there was no information forthcoming from the crowd as to who had killed the Deceased persons and that the crowd was uncooperative. The Accused further asked the Court to note that from the statement of PW6 it was not possible for her to identify the members of the group of twenty people who invaded their home.

19. Lastly, the 1<sup>st</sup> Accused told Court that he was linked to the incident because as Chairman of Mundaya School he had differences with PW4 in respect to some financial issues of the School.

20. As to the 2<sup>nd</sup> Accused person, he too gave a sworn Statement in which he denied the charges. He told Court that PW5 and PW1 knew him but PW2 did not. He denied that he was aware of frequent thefts in the Village at around the time of the death of the Deceased persons. He told Court that while he knew both Deceased persons, he did not know their homes. The witness denied speaking to PW1, PW4, PW5 and PW6 on the nights of 6<sup>th</sup> and 7<sup>th</sup> February 2010.

21. Hellen Irene Ngombe (DW3), is the Chief of Nangoma Location and at the time of giving evidence, had held that position since September, 2008. She is known to both Accused persons. She got information from the Village Elder of Mulipuko Village on the morning of 7<sup>th</sup> February 2010, that two people had been killed and their bodies were lying at the Village. She visited the scene and at about 5.45am she found two bodies. Present at the scene was the Village Elder and handful of other people. DW3 informed her District Officer of the incident and he too visited the scene in the company of Administrative Police Officers. It was her evidence that one of the wives of the Deceased told her that her husband was assaulted by a group of people but she was unable to identify any of them. That further, none of the people present had information about the persons who may have been responsible for the Death of the Deceased persons and that no one came forward with names and information of suspects.

22. I turn to give the highlights of the arguments made by Counsel at the close of the taking of evidence. Mr. Ipapu submitted that the Prosecution evidence had glaring loopholes that created doubt which should benefit the Accused. In respect to PW1, Counsel made the argument that he was a self-confessed cattle rustler who could not be believed. Counsel argued that without material on the call logs to his mobile telephone this Court should regard his evidence. As to PW2 Counsel pointed out that in the meeting said to have been organized to discuss security issues, the Accused persons were not implicated and there was no evidence that they attended.

23. The evidence of PW3 was criticized as Counsel submitted that the witness never gave names of any suspects to the authorities. As for PW4, it was suggested that her evidence was vindictive and intended to settle a score with the 1<sup>st</sup> Accused. Counsel further submitted that the delay in the arrest of the Accused persons was prove that there was no evidence against them.

24. It was argued for the Defence that an analysis of the evidence of PW6, PW6, PW9 and PW10 would lead to the conclusion that the Deceased persons were assaulted by a gang of unidentified persons. The Court was asked to find that the Defence case was consistent.

25. For the State, Mr. Obiri asked the Court to find that there was direct evidence by PW1, PW3, PW4, PW5 and PW6 implicating the Accused persons. Counsel argued that the evidence was consistent and corroborative. In respect to whether there was malice aforethought it was submitted that the Postmortem revealed the gravity of the injuries. That the Accused persons were motivated by the desire to kill the Deceased persons. The Court was asked to give regard to the murder weapons as further prove of the intention of the Accused persons. The weapons used were pangas and rungas.

26. The State argued that the direct evidence put the Accused persons at the scene and failure to provide mobile data did not weaken the Prosecution case. Further that it was immaterial that the Accused persons were not present in the meeting that discussed stock theft. In respect to the delay in the arrest of the Accused persons, it was argued that there is no timeline imposed on the Police to complete investigations and to effect arrest.

27. On the morning of 7<sup>th</sup> February 2010, the bodies of two people were found near St. Eugene School, Nangoma. The bodies were of two male adults and were badly mutilated. Amongst those who saw the bodies was PW2. He recognized both bodies. One was of the 1<sup>st</sup> Deceased and the other was the 2<sup>nd</sup> Deceased. The bodies were beside a footpath and about 2-3 metres apart.

28. Another witness who saw the bodies at the scene was PW3. She is the mother of the 1<sup>st</sup> Deceased. In shock, she passed out on seeing the bodies. PW4 also visited the scene and saw the bodies. She is a wife of the 1<sup>st</sup> Deceased. She was able to recognize her husband. His neck was severally cut while the body of the 2<sup>nd</sup> Deceased had cut wounds all over. The hands of the 1<sup>st</sup> Deceased were tied together with a manila rope and those of the 2<sup>nd</sup> Deceased with a rope.

29. PW5, wife of the 2<sup>nd</sup> Deceased was also at the scene that morning. She readily recognized the 1<sup>st</sup> Deceased whose neck was badly severed. She was at first unable to recognize the 2<sup>nd</sup> Deceased. But on closer examination, she recognized his legs. Her husband had severe injuries which included cuts to his hand, back, shoulder, mouth, nose and neck. He had a stab wound and his intestines were exposed. The Bodies were removed from the scene by Police Officers who included PW7 and taken to Busia District Hospital where Postmortem Examination was carried on them by Dr. Kisilu. The Postmortem confirmed the severity of the injuries on the bodies. In respect to the 1<sup>st</sup> Deceased the Doctor formed the opinion that **“the cause of Death was Cardiac Arrest following severe hemorrhage resulting from trauma by sharp objects”**. In respect to Sylvester Ojanji (the 2<sup>nd</sup> Deceased) the Doctor’s opinion about the cause of death was that it was **“Cardiac Arrest following trauma by sharp object (s) causing severe hemorrhage”**.

30. The Postmortem Reports revealed that the Deceased persons did not die of natural causes and issues the Court would have to determine are:-

(1) Did the Accused persons, either alone or together with others not before Court, inflict the serious injuries on the two Deceased persons or either of them?

(2) If the answer to (i) above is in the affirmative, did the 1<sup>st</sup> Accused and/or the 2<sup>nd</sup> Accused possess the requisite malice aforethought?

31. The Prosecution was confident about the strength of its case because of what it believed was direct evidence that incriminated the two Accused persons. That evidence is said to have been provided by PW1, PW3, PW4, PW5 and PW6. That evidence requires an analysis.

32. PW1 alleges that he is a victim of an attempted murder. An attempt that was made in the same

incident in which the two Deceased persons lost their lives. He narrated how on the night of 6<sup>th</sup> February 2010 at about 8.00pm, he was attacked by a group of people who forced their way into his house. The intruders whipped him using whips popularly known as Nyaunyo and tied his hands using telephone wires.

33. He first recognized the 1<sup>st</sup> Accused as one of the assailants when the 1<sup>st</sup> Accused spoke and asked him for his mobile telephone handset. The assailants ejected him from the house and frog marched him to the house of the 1<sup>st</sup> Deceased. It was the evidence of the witness that using moonlight he was able to see and identify his tormentors. One of them was the 1<sup>st</sup> Accused. That he also recognized the voice of the 2<sup>nd</sup> Accused and one Clement Musanga. The witness also recognized Taabu, Nabwire and Wanyama.

34. At the home of Babu (1<sup>st</sup>Deceased), PW1 was forced to sit outside the house under the guard of 3 people. From there, the witness heard a bang to the door of the house of the 1<sup>st</sup> Deceased. After a short while the assailants removed the 1<sup>st</sup>Deceased from his house. An attempt was made to tie hands to those of PW1 but as the wire was short the 2<sup>nd</sup>Accused got a rope and tied the hands of the two captives together.

35. After this, they set off to the house of Pitos Sombi which was about 1 ½ km from the house of the 1<sup>st</sup> Deceased. At the home of Sombi, the 1<sup>st</sup> Deceased and PW1 were left at the gate under the guard of some of the Assailants as the rest entered the home. Sombi was forced out and he joined the 1<sup>st</sup> Deceased and PW1.

36. Clement Musaiya then directed the group to turn back to the house of Sylvester Ojanji (the 2<sup>nd</sup> Deceased). The assailants did not find the 2<sup>nd</sup> Deceased at the home of his 1<sup>st</sup> wife (PW5). They asked her (PW5) to accompany them to the home of his 2<sup>nd</sup> wife (PW6). The 2<sup>nd</sup> Deceased was at the house of PW6. When he was called out, he resisted. PW1 says that the assailants then forced down the door and in the process, the mud wall caved in. The 2<sup>nd</sup> Deceased emerged running but was chased and caught up.

37. The four captives being the 1<sup>st</sup> Deceased, the 2<sup>nd</sup> Deceased, Sombe and PW1 were then escorted towards St. Eugene School Nangoma. It was near the school that the assailants turned on them and viciously assaulted all the four captives. PW1 showed Court the scars that were left from the said attack. The Court saw scars on the back of his head, on the back of right lower leg, on his right foot and two missing teeth. The witness told Court that he had scars on his buttocks and had sustained a fracture to his jaw.

38. The evidence of PW1 is that the 1<sup>st</sup> and 2<sup>nd</sup> Deceased persons were killed in the attack while Sombe was slightly injured. The witness said that he feigned death so that the assailants would leave him. Sombe helped untie the hands of the witness and left. PW1 was overcome by the injuries and was only able to walk a short distance where he lay until morning. He was picked from the scene at about 8.00am by one Kevin and taken to Busia District Hospital where he was treated and admitted.

39. PW1 told Court that both the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons were well known to him as they were his Uncles. He told Court that he had known the Accused persons since childhood and that both hailed from Murayo Village which is 1 ½ kms from his home. The witness was steady in his testimony and was not broken down in the lengthy cross-examination. Was his evidence corroborated?

40. PW4 is the wife of the 1<sup>st</sup> Deceased. On the night of 5<sup>th</sup> February 2010 (perhaps 6<sup>th</sup> February 2010) at about 10.0pm she was at home with the 1<sup>st</sup> Accused when she heard noises outside her house. After a short while she heard bangs on the door. People claiming to be Police Officers ordered them to open the door. Their door was broken open and her husband stood next to the bedroom door.

41. The house was lite by a tin-lamp and she saw some people enter in. She was able to recognize one Clement Musanya and the two Accused persons. Each of the two was armed with a fimbo, and pangas.

Each together with Clement had a torch. The three were in the company of many people who she put at about 20 people.

42. It was the evidence of PW4 that the 1<sup>st</sup> Accused entered the bedroom and dragged the 1<sup>st</sup> Deceased out. The others searched the house and they then left with the 1<sup>st</sup> Deceased. The witness says that she was able to recognize the 1<sup>st</sup> Accused as she knew him well as they were both members of the School Committee of Mudaya Primary School. A fact that was confirmed by the 1<sup>st</sup> Accused when he gave his sworn Statement. He also knew the 2<sup>nd</sup> Accused well as he used to bring Construction water to the Primary School using his Donkey.

43. As the intruders left with her husband, PW4, took her children to the house of her mother in-law Jenta Okumu (PW3). Although she did not find PW3 in the house, she left the children there and went to the house of one Benson Aleke. Using Benson's telephone she informed the Chief about what had happened. While she admitted in cross-examination that she did not give any names to the Chief, it was her evidence that she spent the rest of the night in a thicket.

44. When on that night PW4 visited her house, PW3 had left her house to call her son Patrick Ouma. P.W3 did this after she had heard noises from the home of the 1<sup>st</sup> Deceased who was her son. The home of the 1<sup>st</sup> Deceased is within earshot of the house of PW3. When she heard the noises, she went out to see what was happening. She then saw many torch lights and she heard the 1<sup>st</sup> Deceased call her out in distress.

45. After calling out Patrick, PW3 hide in a bush. While in hiding some people passed by. Although she was not able to see who the people were because of the thickness of the thicket, she was able to recognize the voice of one of them. It was the voice of the 2<sup>nd</sup> Accused who she referred to as Ambuko. The witness says that she heard the 2<sup>nd</sup> Accused say, "*call Boi, lets go and cut the rope*". The witness says that she knew the voice of the 2<sup>nd</sup> accused since he was a child and that they spoke often.

46. The evidence of PW3 corroborated that of PW4 that PW3 had left her house on that night when PW4 took her children there. It also corroborated the evidence of PW1 and PW4 that the 2<sup>nd</sup> Accused was amongst the people who took away the 1<sup>st</sup> Deceased from his home. It also supported the evidence of PW1 that a rope was used to tie the 1<sup>st</sup> Deceased to PW1. It is not also lost to this Court that the Postmortem Examination on the body of the 1<sup>st</sup> Deceased revealed that there were rope marks on both wrists.

47. PW5 is a first wife of the 2<sup>nd</sup> Deceased. On 6<sup>th</sup> February, 2010 at about midnight she was asleep in her house at Mudaya when she heard two bangs to her door. She was ordered,

***'open the door, we are Police Officers'.***

She did not oblige immediately and after a third, fourth and fifth bang, the door was broken open. Ten people entered the house and confronted her violently. They inquired about her husband. Her husband was the 2<sup>nd</sup> Deceased. She told them that he was at the house of PW6 her co-wife. They forced her out of the house.

48. It was the evidence of PW5 that while in the house, the torches carried by the invaders provided sufficient light for her to recognize Clement Musanya, the 1<sup>st</sup> Accused and the 2<sup>nd</sup> Accused. She told Court that the two Accused Persons are her relatives.

49. Outside the house were another 50 people. She was forced to accompany this crowd of people to the house of PW6 where she was ordered by the 2<sup>nd</sup> Accused to call out the occupants of the house. She was then pushed onto the door of the house by amongst others Clement and the 2 Accused persons. That the 2<sup>nd</sup> Accused demanded that 2<sup>nd</sup> Deceased gives them his phone and when he did not do so they started to

assault him.

50. They forced the 2<sup>nd</sup> Deceased out of the house and the 2<sup>nd</sup> Accused ordered PW5 to return to her home. The crowd of people left with the 2<sup>nd</sup> Deceased. That was the last time she would see her husband alive.

51. Under cross-examination, PW5 gave further detail of how she was able to recognize Clement, and both Accused persons. She reiterated that there was sufficient torch light for her to see the three. In addition she was also able to recognize their voices. In her Statement to Police she referred to the 2<sup>nd</sup> Accused as Abwoko, while he positively identified him in Court. It was her evidence that she spoke to both Accused persons frequently and had spoken to them hardly one (1) week prior to the incident.

52. PW6 gave evidence that supported that of her co-wife (PW5). It was her testimony that on that fateful night PW5 called out for PW6 and the 2<sup>nd</sup> Deceased. The door was banged open and some armed people entered the house. They began to assault the 2<sup>nd</sup> Deceased using pangas and clubs. She was asked to remain in the house as the intruders took her husband away. It was her evidence that the people who entered the house had torches on and she was able to recognize a few using the torch lights. That the torch lights were bright enough to enable her see the intruders. She was able to recognize both Museveni( 1<sup>st</sup> Accused) and Stephen (2<sup>nd</sup> Accused). She correctly pointed out the two during trial. She also used moonlight to see them.

53. Answering questions put to her in cross-examination, the witness told Court that both the Accused persons spoke as they confronted the 2<sup>nd</sup> Deceased. That the 2<sup>nd</sup> Accused touted to the 2<sup>nd</sup> Deceased,

***“you claim to be a man, show us”.***

While the 1<sup>st</sup> Accused declared,

***“this shall be your last cry”.***

PW6 claimed that she was able to recognize the voices of the two.

54. It would appear that evidence of the eye witnesses was strong and consistent. The Accounts of PW1, PW3 and PW4 supported each other in material particular. The evidence of PW5 and PW6 was consistent and corroborative of each other. In addition that evidence supported the account given by PW1 as to how a crowd of people forced the 2<sup>nd</sup> Deceased out of the house.

55. Amongst those who removed the 1<sup>st</sup> and 2<sup>nd</sup> Deceased persons from the houses and later assaulted them to death were the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons. PW1, PW4, PW5 and PW6 saw and recognized them by face and by voice. The two Accused persons were well known to the witnesses. The two were not only related to the witnesses but resided in a nearby village, about 1 ½ km away from the homes of the witnesses. The voices of the Accused persons were well known to the witnesses as they spoke frequently. Although PW3 was not able to see the assailants, she was able to recognize the voice of the 2<sup>nd</sup> Accused person.

56. The witnesses described the quality of light provided by the torches and the moonlight that enabled them to see and recognize the Accused persons. Those who recognized their voices were persons who frequently talked to the Accused persons and had recent conversations with them. This no doubt was strong evidence.

57. That said, these evidence must be considered in the light of the Defence raised by the Accused persons. A line of Defence was that the Deceased persons may have been killed by a mob whose members are unknown. It was the evidence of PW7 that the Deaths of the Deceased persons was because of mob justice. This evidence was in conformity with his recorded Statement (D Exhibit 3). It was also

pointed out that PW6 did not name the assailants in her initial Report to the police and in her recorded Statement of 7<sup>th</sup> February 2010(D Exhibit 4).

58. The Defence further sought to discredit the Prosecution case by questioning the unexplained delay in having the Accused persons arrested and charged. It was argued that this confirmed that the persons responsible for the death of the Deceased persons were unknown.

59. No doubt, the Accused persons were not arrested and charged promptly. No doubt the Accused persons acted within a mob. But what is to be said of the strong, credible and consistent evidence that the two Accused persons were members of the mob that ejected the two Deceased persons from their houses and inflicted deadly blows on them that resulted in their deaths. Evidence that would not be weakened even if the evidence of PW6 and PW7 were to be excluded. Evidence that would still remain strong even if the mobile data of the telephones of PW1 and the 2<sup>nd</sup> Deceased were not subjected to analysis.

60. Are the two Accused persons to get away merely because the Police may have been less than diligent in not charging them promptly? Are they to escape Criminal liability because they acted within a mob? I think not. In their Defences, the two Accused persons denied the Charges. However they did not lead any corroborated evidence that would place them away from the scene at the time of commission of the crime. The strength of the Prosecution evidence overawes the mere denial made by the Accused persons.

61. Even if the theory of the motive as suggested by PW2 is discredited because there was no evidence of the attendance of the two Accused person in the meeting, the sheer brutality of the assault on the Deceased person established malice aforethought.

62. Under the Provisions of Section 206 of the Penal Code, malice aforethought may be established by proving, inter alia;-

(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 may not be caused.

63. From the Medical evidence, 1<sup>st</sup> Deceased was virtually beheaded while the attack on the 2<sup>nd</sup> Deceased left him with a cut wound on the anterior abdomen and a cut wound on the throat that exposed the trachea and other major vessels. Those who caused these injuries could only have had one intention; that of killing the victims.

64. Even if it is accepted that the death of the 1<sup>st</sup> and 2<sup>nd</sup> Deceased persons was caused by a mob, there was evidence that the two Accused persons participated actively in their murder. The two Accused persons cannot hide behind the numbers to avoid Criminal responsibility for their individual roles. The two are Principal offenders as set out in Section 20(1) of The Penal Code which provides:-

“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 offence;

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

(c) Every person who aids or abets another person in committing the offence;

(d) Every 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 counseling or procuring its commissions”.

65. From the evidence on record, this Court can only reach one decision. That the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons are guilty as charged. That both of them, jointly with others not before Court, murdered Agaitano Babu Ochieno and Sylvester Ojanji. This Court finds the 1<sup>st</sup> and 2<sup>nd</sup> Accused persons guilty of the Offence of Murder contrary to Section 203 as read with Section 204 of The Penal Code and convicts them accordingly.

**Dated, Signed and Delivered in Court at Busia this 16<sup>th</sup> day of August, 2016.**

**F.TUIYOTT**

**JUDGE**

**PRESENT:**

Ipapu for Accused person

Owiti for State

Ochuli - Court Clerk