



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 20 OF 2015**

**(CORAM: J.A. MAKAU-J.)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**THADAYO OTIENO MISACH.....1<sup>ST</sup> ACCUSED**

**ISAAC ODUONG OLUOCH..... 2<sup>ND</sup> ACCUSED**

**GEORGE OMODI ALLECI..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The Accused persons: **THADAYO OTIENO MISACH, 1<sup>ST</sup> Accused, ISAAC ODUONG OLUOCH, the 2<sup>nd</sup> Accused, GEORGE OMONDI ALLECI, the 3<sup>rd</sup> Accused, PETER ODUOR OJWANG, the 4<sup>th</sup> Accused and STEVE BIKO ODONGO, the 5<sup>th</sup> Accused,** are charged with an offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.** It is alleged that on the 27<sup>th</sup> day of January 2015, at Wagai Sub-Location, Gem Sub-County, within Siaya County, they murdered one **ERICK ODHIAMBO OCHIENG.**

2. This matter commenced at Kisumu High Court, before Hon. Lady Justice Maina, who took plea for all the five accused persons. The case was subsequently transferred to Siaya High Court, upon establishment of Siaya High Court, on 31<sup>st</sup> July 2015. I took over the matter, on 30<sup>th</sup> September 2015, when only the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accuseds were arraigned before me. The State Counsel did not arraign the 4<sup>th</sup> and the 5<sup>th</sup> Accused persons, and no explanation was given for their absence, herein but the State opted to prosecute the 1<sup>st</sup>, the 2<sup>nd</sup> and the 3<sup>rd</sup> Accused only notwithstanding, the charge remained unammended.

3. The prosecution called eight (8) witnesses. Some of the witnesses are relatives to the 1<sup>st</sup> and the 2<sup>nd</sup> Accused. The facts of the prosecution's case are that:- PW1, Isaiah Oluoch Ochieng, brother to the deceased was at home studying at around 10.00 p.m., when he heard commotion from outside, he went out and saw two white cars. From one of the said cars Erick Odhiambo Ochieng was being removed from the car boot, while tied with ropes as they walked all the way to the gate. He was taken near a tree. That the 2<sup>nd</sup> Accused, Isaac, came out with a petrol poured it on Erick Odhiambo Ochieng, whereas one Wade struck a match box on the accused and when he started burning they all left. That after a short while Police came to the scene and took the deceased body to the Siaya Referral Hospital Mortuary.

4. That upon close of the prosecution's case, Mr. S.M. Onyango, Learned Advocate, for the three accused submitted that the prosecution had not made sufficient evidence to warrant the three accused being put on

their defence, whereas M/s. Mourine Odumba, Learned Prosecution Counsel, appearing for State, submitted that the prosecution had called sufficient evidence to warrant the three accused persons being put on their defence.

5. The three accused persons, faces a charge of Murder. The burden lies with the prosecution, to prove the charge against the accused persons, beyond any reasonable doubt. The accused persons are facing a charge of **Murder contrary to Section 203 of the Penal Code**.

The said Section defines **Murder** as follows:-

*“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”*

6. The prosecution in a murder charge must therefore 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 of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

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

7. I will now turn to examine, whether the prosecution proved that the accused persons, had malice afterthought or intentions to cause the death of the deceased or that they had knowledge that their acts or omission would probably cause death to the deceased herein.

8. As earlier on stated, the prosecution called 8 witnesses, PW1, Isaiah Oluoch Ochieng, told the Court that on 27.1.2015 at around 10.00 p.m., he was at home studying when he heard screams outside, he went out of the house and saw two white cars and after a while he saw the deceased, his elder brother, being removed from one of the car boots, tied with a rope from waist to the feet. That his top was undressed, that the people who were carrying him placed him near a tree. Isaiah, the 2<sup>nd</sup> accused, came out with petrol, poured it on the deceased's body and one Wade struck a match box on the deceased and when he started burning they all left. That when the vehicles came to the deceased home there were only five (5) people and when that was happening there were his siblings but his parents were not there, but were called over a phone and arrived as the body of the deceased was burning. That at the material night there was moonlight with moderate lighting. PW1, told court he could not see the two of the five people he saw at the material night. PW1, stated he knows the 1<sup>st</sup> and the 2<sup>nd</sup> accused because they are his uncles, being brothers to his father. He told court he does not know the 3<sup>rd</sup> accused.

9. On cross-examination, PW1, told the court his relationship with the 1<sup>st</sup> accused has been bad since the incident. He stated he does not know the 3<sup>rd</sup> accused and he had not seen him. He admitted that they met as family and discussed what had happened. PW1, stated that his father told him to go and give the name of the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons, as the assailants of the deceased and that he recorded his statement as his father had instructed him. That when he recorded his statement, he was with his father, mother and

investigating officer. He told the court that his father and mother told him to state Isaac Oduong, poured petrol, stating that his mother specifically told him to say so, whereas his father told him to say Thadayo struck the match stick. PW1, stated there was moonlight which was not bright and he could see notwithstanding, trees, houses were blocking his view. He stated the moon was covered by clouds and there were shadows from the trees. PW1, told court, he was bitter with the accused and he could tell the court anything to have them convicted. He also told court, that his father and mother have grudge with the 2<sup>nd</sup> accused and now they have an opportunity, to fix him. PW1, stated when the incident occurred he was with his brother, Victor, but he did not record statement with police, as his mother told him not to record statement, as she was the one who was planning what they were to tell police. That he stated, Victor does not lie, but tells the truth. PW1, stated his mother choose him, because he obeys what she tells him to do. He stated his parents were not at the scene of crime at 10.00 p.m. when the incident took place. He added if his mother says she was at the scene at 10.00 p.m. she would be lying. PW1, stated the jerrican, the 1<sup>st</sup> accused had was yellow, in colour and a 3 litre jerrican. He stated he did not see the 1<sup>st</sup> accused, strike the matchbox. In his statement to the police, PW1, admitted he never mentioned hearing the 1<sup>st</sup> accused speak. PW1, denied what was recorded in his statement to police, that he told police the 1<sup>st</sup> accused poured petrol on the deceased and struck match stick in presence of his father, mother and his young brother. He termed the statement as untruthful. PW1, told court, when he walked out, there were over 100 people outside. That there were two vehicles, which were trailed by many people including villagers. That the people were surrounding the vehicle and the deceased. PW1, testified he was 50 metres away from the group and relied on the light from moonlight, to see what was happening, while the two vehicles were surrounded by many people. PW1, stated he does not know why the crowd did not come to his brothers aid. PW1, testified that his mother got a call that the mob wanted to kill the deceased, at Apuoyo Market but instead the mob brought him at his home and killed him. That when his parents returned they found that the mob had killed the deceased at their home. PW1, stated the jerrican which contained petrol is still at their home and that it is the same jerrican that the 1<sup>st</sup> accused had thrown in the fire but was burned partly.

10. On re-examination PW1, stated that he saw the 3<sup>rd</sup> accused for the first time when his brother was killed. That petrol was poured by Isaiah, the 2<sup>nd</sup> accused and match stick struck by the 3<sup>rd</sup> accused. That the parents came after fire had started and at that time there was a big crowd.

11. PW2, Siprose Akinyi Achieng, told the court that she received a telephone call on 27.1.2015 at around 10.00 p.m. from a neighbor one, Grace Atieno, telling her to rush to Apuoyo Market as her son the deceased, had been brought to the said Market. PW2 and her husband (PW5), left for Apuoyo market, but on the way met two small cars going towards her home direction, on meeting the two cars they turned back though they did not know, who were driving the said cars, nor who were inside the cars. That on arrival at home, PW2, found the vehicle parked at their homestead. That she saw the deceased being removed from the boot of the vehicle and was taken out, put next to a tree on his stomach while his hands and legs were tied with ropes, the deceased was removed from the vehicle of Thadayo Misach, the 1<sup>st</sup> accused and Akwande, poured petrol on the deceased and Akwande struck the match stick and deceased started burning as he asked PW2 for some water. PW2, took nothing to him as Isaac, the 2<sup>nd</sup> accused told her to go away. That after the deceased was burnt to death the accused left. That Police came after 15 minutes, that when the deceased was burning, the accused chased the villagers away and PW2 was left alone with her small children. PW2, told court, the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused are well known to her as they are her brothers-in-laws. PW2, identified the 1<sup>st</sup>, and the 2<sup>nd</sup> accused, by their names and as brothers-in-laws, whereas, she stated, she saw the 3<sup>rd</sup> accused, who she described as Akwande, on that material night. PW3, stated that on 28.1.2015, she identified the body of the deceased, at Siaya Referral Hospital Mortuary and recorded her statement on 30<sup>th</sup> January 2015.

12. During cross-examination, PW2, stated, she had lived well with the 1<sup>st</sup> and the 2<sup>nd</sup> accused without any grudge, however, grudge arose following the killing of her son. PW2, stated, she witnessed what happened to the deceased, with her 4 children namely Mary Adhiambo, 8 years old, Jane Gillian Anyango, 10 years old, Isaiah Oluoch 15 years old and Victor Omondi, 18 years old. PW2, said, she would be surprised if PW1, stated, she was not at the scene of crime, when the incident occurred and that

what he told the court was what the parents had coached him to tell the court. PW2, said PW1, did not lie but told the court the truth. PW2, stated the vehicles she saw are not part of the prosecution's evidence, but she did not know their registration numbers. PW2, admitted in her statement to police, she did not mention the presence of the two vehicles within her compound as it was dark. PW2, stated there was moonlight though it was dark. PW2, stated the jerrican that had petrol was white in colour and is still at her home and that if anyone saw it burnt is lying. She said it was not yellow in colour but white and that it was a 5 litre jerrican.

13. During re-examination PW2 stated, there was only one vehicle at her compound when her son was burnt, that of Thadayo, the 1<sup>st</sup> accused whose registration number she does not know.

14. PW3, Michael Abaki Owiti, Assistant Chief, of Ndiinya East Location, stated that on 27.1.2015 at 8-9 p.m. he received a call from a member of public, of arrest of two Boda Boda riders, who used to transport thieves and stolen properties to Akala market, to connect to Kisumu Town. He proceeded to Apuoyo Market, where the suspects where and found a big crowd of about 30 – 40 people. He pleaded with the crowd to take the two suspects to the Chief's Office, within the Market. They were taken to Chief's Office from where PW3, questioned them and they agreed that they used to transport the thieves and stolen properties. PW3, did not recognize anyone in the crowd, so he called Aps from Wagai, who came and took the suspects away. PW3, knew one of the suspect as Owino. He later received information the suspects were released and were at Apuoyo Market. That at 9.30 p.m., PW3, received a call, that one who used to disturb him in the area had been arrested and taken to his home. PW3, proceeded to Apuoyo Centre and found a big crowd of people, questioning someone, to tell them where he used to take their items. PW3, called Police from Akala and rushed to Ndiinya North Sub-Location, to call his counterpart, who he met on the way. They then returned to the Centre but did not find anyone there. He stated it was dark and he did not identify anyone but he could hear people talking. The following day he heard someone had been lynched. PW3, went to Akala Police Station, the following day and was told the matter was under investigation. PW3, testified he did know the person who was lynched, neither a person by the name of Erick Odhiambo Ochieng.

15. PW4, Jared Otieno Ochieng, testified that on 27.1.2015 at around 8.00 p.m. he was at Apuoyo Market closing his Kiosk as he was going to show a video of football as his employee Erick Owino, had been arrested by Police Officers from Wagai on suspicion of being a thief. That as he opened his video place, he heard people saying a certain thief had been arrested and as he was showing the video he saw people rushing out of video hall which was near the road. He went out and saw lights of vehicle from the road which were about 50 metres away. There were two vehicles and he saw the two vehicles leave. That before the vehicle left he saw someone being beaten while, tied on one of the two vehicles. That after 30 minutes, PW3's wife. Rose Odhiambo, called him and told him she was attacked by people at home as they were looking for his cousin Erick Owino. Then latter Thadayo, the 1<sup>st</sup> accused, approached PW4 told him to go to his video hall, PW4, stated that he did not see who were beating the person he saw being beaten. PW4, stated he did not know Erick Odhiambo Ochieng. On cross-examination PW4, stated he did not see the accused persons murder anyone. He stated he does not know the 2<sup>nd</sup> and the 3<sup>rd</sup> accused.

16. PW5, Edward Ochieng Misach, father to the deceased herein, stated that on 27.1.2015 at 10.00 p.m. he was at his home with his wife PW2 and their children when PW2 received, a call that their son was held at Apuoyo Market ready to be lynched. The caller was Grace Atieno, who told them that their son who was about to be lynched, was Erick Odhiambo Ochieng. PW5 and PW2, proceeded to Apuoyo Market and on the way they met two cars being driven at a high speed, from Apuoyo Market, which was about 1 kilometre to their home. The vehicle were being followed by a group of people saying Ochieng's son had been put in one of the cars. PW5, turned and followed the people upto his home where he found his son tied on both hands and legs with a rope and already burning. That only one of the vehicles, was at his home while the other was parked next to the house of Oluoch Okello. PW5, saw Isaiah Oluoch, the 2<sup>nd</sup> Accused. carrying a petrol jerrican and when he saw PW5, he threw it at the boy's body, the deceased. He also stated the light of the vehicle was directed at the body, of the deceased and that enabled him to identify the 2<sup>nd</sup> accused, when he threw the jerrican at the deceased's body. PW5, also stated he saw another person called Akwande who Thadayo told him Akwande do his work. That Police

from Akala Police Station came after a short while and found the vehicle had been taken away. The Police took the body to Siaya Referral Hospital mortuary. PW5, later identified the deceased's body to the doctor for postmortem purposes in company of his wife and Police Officers.

17. During cross-examination, PW5, stated all his sons were at home., and gave their names but denied that Mary Adhiambo and Gillion Anyango who were not named by PW2 were his daughters. PW5, stated if PW2 named the two as their children she was lying. PW5, insisted all 7 children were at home and not 4 as stated by PW2. PW5, stated when the vehicle passed them it took them 15 minutes to reach home, however, PW2, was ahead of him. PW5, stated he did not hear the 2<sup>nd</sup> Accused tell PW2, that he would lynch her and that he did not see the 2<sup>nd</sup> accused pour petrol on the deceased's body nor see the 1<sup>st</sup> accused pour petrol on the body of the deceased or Akwande nor did he see anyone strike a match box to light fire and burn the deceased's body as he found the deceased body on fire. PW5, stated if Isaac, the 2<sup>nd</sup> accused had a jerrican with petrol he could have been burned from the distance he was to where the fire was thus a distance of about 3 metres. PW5, stated at the scene of incident there were many people. PW5, testified he only found one car within his compound. PW5, stated he does not know who set the deceased body on fire. PW5, stated the jerrican was white in colour and was a 5 litre jerrican and was partly burnt. PW5, stated at the material night there was no moonlight and was emphatic that if anyone said there was moonlight he or she was lying.

18. On PW5, being re-examined, he stated on arrival he found his son burning and the only people within the compound were his family and the three accused persons.

19. PW6, Doctor Biko Bidi, produced postmortem Report on the deceased carried out by Dr. Philip Brian, exhibit P1. That as a result of his examination he formed an opinion that, the cause of death was due to multi-system organ failure secondary to hypovolaemic shock and inhalational burns, victim received burns over 100% of the body surface area.

20. PW7, No. 48210 Cpl Morris Mangoli, the investigating Officer, told the court that on 28.1.2015 at 11.00 a.m. his DCIO instructed him to accompany him to Akala Police Station where a case of murder had been reported. That they proceeded to Akala Police Station, where they found the OCS of Akala Police Station who briefed them about the death of the deceased, Erick Odhiambo Ochieng. The OCS told them the deceased was brought from Kisumu by the accused persons on an allegation of being a thief and taken to his home from where he was lynched. That after the briefing, PW7, stated they decided to take up the matter and carry out further investigation. That PW7 and DCIO proceeded to the scene of crime and found the deceased's body had already been taken to Siaya Referral Hospital Mortuary. They returned where the deceased's body was lying. That on 29.1.2015 PW7 and the scene of crime personal, PC Wamalwa, (PW8), in company of PC Gathitu, revisited the scene whereby photographs were taken and PW7 drew the sketch plan of the scene, photographs were taken showing the body was lynched in front of the father's house where there were bloodstains on the ground. That on 23.2.2015 the postmortem was conducted at Siaya District Hospital Mortuary and photographs taken of the deceased's body at the mortuary in presence of PW7, by the Scene of Crime personnel P.C. Wamalwa. PW7, identified the photographs as MFI-2 (a), (b), (c) and (d). The body of the deceased was then handed over to the relatives for burial arrangements. That on 4.2.2015, PW7 and DCIO who had the names of the suspects from the relatives with team of officers from Siaya Police Station proceeded to Kisumu where the suspects were staying and arrested 4 suspects, thus the 1<sup>st</sup> and the 3<sup>rd</sup> accused and two others who were later after plea taking were released by the DPP Kisumu and proceeded with them to Siaya. The 2<sup>nd</sup> accused surrendered himself to Siaya Police Station, on 6.2.2015. That on 10.2.2016, the accused were booked for mental assessment and were subsequently charged with this offence. PW7, stated that the five suspects were charged, but does not as investigating officer know, on what grounds the 4<sup>th</sup> and the 5<sup>th</sup> accuseds, were released but they were to be treated as witnesses for the prosecution. PW7, stated during the investigation he came to discover the suspects were relatives to the deceased, save for the third accused who is not a relative nor a neighbor and that the deceased was arrested on suspicion of having stolen items from one of the accused person and that the DCIO took up the case due to some interests, as they were receiving many calls from different persons.

21. During cross-examination PW7, stated that as an investigating officer, he did not make his own discoveries but relied on what he was told, he stated there were some vital witnesses from whom they did not record statements. PW7, stated he saw no need of making his own findings. He stated he was not aware PW3 made a report to APs and OCS at Akala Police Station. PW7, admitted OCS told them he was the first person to reach at scene of crime and took the body to Siaya Referral Hospital Mortuary, but he did not tell them how he came to be aware of the lynching of the deceased. PW7, stated the Assistant Chief, did not tell them of the earlier arrest of the suspects and their release by APs. PW7, admitted on going through the statement of PW3, he was aware of the communication between PW3 and OCS of Akala Police Station. PW7, admitted that though the OCS Akala, Jared Nyausi, had all relevant evidence and information about the deceased's case he did not record his statement. PW7, admitted he did not record all relevant statements, to support the charge, as he did not read also statement from the APs Wagai, D.O's Offices. PW7, stated he was told that the person who struck the match box, was Major Apande, however, when he drew the charge sheet he did not put the name of Major Apande and admitted he has nothing on record to show who Major Apande is or evidence of having brought him before the Court. PW7, stated in his investigation, he was told nothing about a 5 litre jerrican of petrol and that he did not make any enquiry about the five litre petrol. He stated that though that was an important piece of evidence to enquire on the pieces of jerrican he did not do it as PW2, told him she did not have jerrican saying if she had told court she had it, he would be surprised. He stated she concealed this to him because the jerrican did not exist. PW7, said the persons who called them had an interest in the matter and he stated they took the matter because of persons with interests but refused to disclose such people as he stated it was a matter of interest of their office. He stated the omission of the statement of OCS was an error as he was best placed to give evidence in this case. He added the DCIO also should have been a witness as he would have shed some light as to what happened in this case. PW7, stated the sketch plan and the photograph at the scene support each other. PW7, stated the 4<sup>th</sup> and the 5<sup>th</sup> accused were removed from the charge sheet but he did not know why and on whose instructions.

22. On re-examination, PW7 stated he relied on information he received from the deceased's relatives and that he did not record statement of OCS and other Police Officers as his statement carried all that was needed.

23. PW8, No.86640 PC Douglas Wamalwa, of scenes of crime Department Siaya County, a Police Officer gazetted by Director of Public Prosecution vide gazette notice No. 217 of 28<sup>th</sup> December 2012, testified that on 29.1.2015 at 10.30 a.m. while with Cpl Maurice Mangoli, (PW7), they visited a scene of crime at Kadomo village, Dienya West Location, in Gem District within Siaya County, where one Erick Odhiambo Ochieng, was said to have been murdered on 27/28.1.2015. That as per request of PW7, PW8, took a photo showing the homestead of the deceased person within his father's compound (MFI- P 2 (a)). On 3.2.2015 at 1.00 a.m. in company of PW7, PW8, visited Siaya County Referral Hospital Mortuary where the body of the deceased was lying and took 3 photographs describing the body of the deceased (MFI – P 2(b) showing general side view of the body lying at the mortuary (MFI – 2 (c) general front view of the body lying at the mortuary and the photograph, MFI – P2 (d) showing general facial view of the deceased. PW8, took the photographs from the scene, supervised the printing of the same at CID Headquarters at Nairobi. He stated that he still has the original prints in his custody, and they have not been retouched in anyway and can be reprinted if required. He prepared certificate dated 29<sup>th</sup> October 2016 in respect of the photographs taken on 3<sup>rd</sup> February 2015 and processed on 29<sup>th</sup> October 2016. Certificate produce as P exhibit 3. The photographs P exhibit 2 (a), (b), (c) and (d).

24. On cross-examination PW8, on P exhibit 3 he stated it was prepared on 29.10.2016 and by then he was not with the certificate as it did not exist. PW8, admitted to have made the certificate on 1.11.2016 but dated it 29.10.2016 to match with the date he printed the photographs PW8, told court when he prepared and dated the certificate he did intend to mislead the court.

25. I have summarized the lengthy evidence given by the prosecution witnesses in support of the charge of murder against the three accused persons to prove murder. The prosecution has a duty to establish the following ingredients:-

***(a) Death of the deceased and cause of death.***

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

**(c) That the accused possessed an intention to cause harm/kill/ or and malice aforethought.**

The malice aforethought is therefore a very important ingredients for the offence of murder. The prosecution has to prove facts which establish malice aforethought.

26. In **R V Andrew Muech Omwenga (2009)** eKLR Hon Justice D.K. Maraga, as he then was, stated as follows:-

***“ ... What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused’s state of mind at the time; usually intention or recklessness is required. The Latin maxim-actus non facit reum, nisi mens sit rea – “the act itself does not constitute guilt unless done with a guilty mind,” encapsulates this principle.”***

27. The central ingredient of the offence of murder requires that malice aforethought or an intention to cause death must be proved to the required standard of proof. In **Republic V. Hezron Maina Wanga & Christopher Manyasia Lutomia [2016]** eKLR Hon. Lady Justice R. N. Sitati quoted with approval from the case of **Nyabuti & Another V. Republic (2009) KLR 409** in which it was held inter alia, that:-

***“ .... Mens rea, which is an ingredient under Section 206 of the Penal Code, namely the carrying out of the unlawful act or omission is satisfied when there is evidence proving any of the circumstances set out under the said Section. Regarding the establishment of malice aforethought where it is shown that the attack on the deceased was spontaneous with no evidence of there having been a prior plan to attack the deceased it cannot be said that the killing was with malice”***

28. The question that arises at this stage is whether the prosecution has tendered sufficient evidence tending to prove the ingredients of the offence of Murder against the accused persons to warrant them being put on their defence. The available evidence from PW1, PW2, PW5, PW6, PW7 and PW8, prove the death of the deceased. PW6, carried out the postmortem on the body of the deceased in presence of PW2, PW5 and PW7. The postmortem report was produced as exhibit P10. PW8, produced photographs exhibit P2 (a) (b), (c), and (d) of the deceased’s body which he had taken at Siaya Referral Hospital Mortuary. PW6, as a result of examination of the body of the deceased formed an opinion that the cause of death was multi-system organs failure secondary to hypovolaemic shock, plus inhalational burns as the victim received burns over 100% of body surface area. The findings of the cause of death by PW6 is consistent with the evidence of PW1, PW2, PW5, PW7 and PW8. I find the prosecution proved the death and cause of death of the deceased.

29. I now turn to the evidence as to who caused the deceased’s death? According to PW1, PW2 and PW5 the accused persons jointly and severally transported the deceased in their vehicles to PW2’s home, removed him from the car, put him under a tree with his hands tied with ropes, took petrol, poured it on him and struck a match stick on him and caused him to be burnt till death and prevented people from saving the deceased.

30. From the evidence of PW3, who PW7 referred to as the key prosecution witness, the deceased and another had been arrested by members of public, suspected to be transporters of thieves and transporting of stolen properties to Akala Market to connect to Kisumu Town. PW3, on arrival at Apuoyo Market found a big crowd with the suspect and he had the suspects taken to Chief’s Office, from where he interrogated them and they admitted they used to transport thieves and stolen properties. PW3 called APs from Wagai who came and took the suspects away. He later received information the suspects were later released and were at Apuoyo Market. He later received a report at 9.30 p.m. one of the suspects had been arrested and taken to his home. PW3, proceeded to Apuoyo Market and found a big crowd of

people questioning the arrested person to tell them where he takes their things, PW3 noted the size of the crowd and called Police Officers from Akala Police Station and rushed to call his counter parts and on return he did not find the crowd. The deceased in this case as suspected thief was attacked by the mob who beat them. PW4 stated that on 27.1.2015 at around 8.00 p.m. he was at Apuoyo Market, when he saw two vehicles with their lights on and someone being beaten while he was ahead of the vehicle. He was being beaten by mob. PW4 saw the 1<sup>st</sup> accused came to his place looking for him and called him to come to the video den as he was afraid to do so. PW4, did not bother to find out whether the 1<sup>st</sup> accused, wanted to rescue the person under attack from the mob or not. It could not be ruled out that the accused wanted to devise a way to rescue the deceased. There is evidence from PW1, PW2, PW5 and PW7, that the 1<sup>st</sup> and the 2<sup>nd</sup> accused are relatives to the deceased whereas the third accused is not a relative or a neighbor, PW1 and PW2 stated that the 1<sup>st</sup> and the 2<sup>nd</sup> accused were in good terms with the deceased before the incident. That they used to help the deceased. PW1, PW2 and PW5 and PW7, did not in their evidence prove malice on part of any of the three accused in this case.

31. In the case of **Republic V Albert Tirimba Ogeta (2014) eKLR Lady Justice R Sitati** held.

***“..... In other words, the prosecution must prove that the accused person herein had the intention to cause the death of or to do grievous harm to any person; that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who had committed or attempted to commit a felony.”***

32. In the instant case there are a lot of inconsistencies and contradictions in the evidence of PW1, PW2, and PW5. PW1 in his evidence stated the person he saw pour petrol on the body of the deceased, used a 3 litres jerrican yellow in colour, whereas PW2 and PW5 contradicted PW1, stating the jerrican was 5 litres and white in colour. PW1 and PW2 started at the material night there was moonlight shining very brightly and it enabled them to see everything, whereas PW5 who claimed he was at the scene stated that there was no moonlight at all and he used the light coming from the accused's car to see what was happening. PW1 and PW2 contradicted one another as to the children of PW2 and PW5, who were at home at the material time. PW1 stated when the incident occurred PW2 and PW5 his parents were not at home. Whereas PW2 stated the incident occurred when she was there. PW5 said at the home there were only his family members and the three accused persons whereas PW1 stated when he walked out he saw over 100 people who had accompanied the two vehicles, that the villagers present were surrounding the vehicle and they did not come to the aid of the deceased. The evidence of PW2 is that she was chased away and threatened by the 1<sup>st</sup> accused which was not corroborated by PW5 who was present.

33. In this case I had the advantage of seeing PW1, PW2 and PW5 in the witness box. The three did not strike me as credible witnesses. PW1 during cross-examination told the court that they sat down as a family and PW2 and PW5 told him what to tell the court. PW1 was categorical that PW5 told him to go and record the statement with police and give the names of Isaac Oduong Oluoch and Thadayo Otieno Misach as the people who killed the deceased and PW1 stated he gave the statement as his father told him to say. PW1 told court also his father and mother told him to state Isaac Oduong, poured petrol and added his mother specifically told him, to say so and also his father told him to say Thadayo, struck the match stick. I therefore find PW1, PW2 and PW5 conspired to fix the accused persons due to existence of bad blood between them, as PW1 stated he was unhappy that his brother died and that his mother and father have grudge with Isaiah, the 2<sup>nd</sup> accused and now have an opportunity to fix them. PW1 added that as he is bitter with the accused, he can say anything to have them convicted. In view of the foregoing, I do not believe PW1, PW2 and PW5 told this court the truth of what happened. I find them not to be credible witnesses. The offence occurred during the night in a dark area where the source of light was moonlight which PW5 states it was a dark night without moonlight. I find the source of light was disputed between PW1, PW2 and PW5 and I therefore find the condition was not conducive with large crowd of 100 people standing surrounding the deceased for PW1 to have seen what happened and who played what role. PW2 and PW5 who were, as per PW1 not at the scene, of crime when the incident took place could not be in a position to state therefore who did what. I therefore from the above find no

evidence to connect the accused to the deceased's death.

34. I agree with the defence Counsel that the prosecution's case, is riddled with irreconcilable, inconsistencies and contradictions especially the evidence of PW1, PW2 and PW5. I have examined the inconsistencies in the testimony of PW1, PW2 and PW5 and I am satisfied that there are fundamental inconsistencies, that dent the prosecution's case. The record support the submission by defence counsel that there was a mob at the PW2's and PW5's home, who did not do anything to aid the deceased but who had bayed for the deceased's blood for being suspected to be a thief. From Apuoyo Market to his parent's home no evidence has been adduced to show that the accused in transporting the deceased from Apuoyo Market, where he was being beaten to his parent's home, they were not trying to rescue him, but they were aiding the mob to kill him. There is no evidence that the accused had intention to cause death of the deceased and had that been the mission one would ask, why did they not let mob lynch the deceased at Apuoyo Market. There is no evidence of the accused having bad blood between themselves and the deceased. The third accused is a stranger to the deceased and no evidence has been adduced to connect him with the name of a third person called Akwande and/or Major Apende and no evidence has so far been adduced to show that the third accused is also called Akwande or Major Apende. There is therefore no evidence that the accused persons had planned to commit the offence. I find the evidence on record tend to point out that the deceased was a victim of mob justice for being suspected to be thief. I have considered the evidence of PW7, the investigating officer, who ignored to record evidence of the key witnesses, who included OCS, Akala Police Station, Jared Nyausi, the APs, from Wagai Police Station and members of public who were at the scene. PW7, in my view did not carry out thorough investigation as he stated, he relied only on what he was told by the relatives of the deceased. That though no number of witnesses are required to prove a fact as provided under **Section 143 of The Evidence Act**. The Said Section provides as follows:-

***“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

I find the failure to call vital witnesses giving any facts to outcome of this case.

35. It is my view that where material and relevant witnesses' evidence is deliberately not recorded or is recorded and not availed to court it is my view that the court should draw an inference that such evidence is not availed because it would be prejudicial to the prosecution's case. In this case of great interest is that PW7, stated CID proceeded to take over this matter because of undisclosed interest. I am not sure whether it was the same interest that led to important witnesses statements not being recorded and vital witnesses not being called, but the can draw inference that had the witnesses been called their evidence would not have been favourable to the prosecution and this is why they were availed given evidence.

36. The upshot is that upon evaluation of the whole evidence, the evidence raises a lot of doubts. The evidence adduced has failed to establish a ***prima facie*** case against the three accused persons. **Article 50 of The Constitution of Kenya**, presumes the accused innocent till proved guilty. From the foregoing, I have reached a conclusion that **THADAYO OTIENO MISACH, ISAAC ODUONG OLUOCH and GEORGE OMONDI ALLECI are not guilty of murder of ERICK ODHIAMHO OCHIENG**. I therefore acquit each one of them of the charge of **Murder under Section 306 (1) of then Criminal Procedure Code**, unless otherwise lawfully held and forthwith order that each of the accused persons are to be released forthwith.

**DATED AND SIGNED AT SIAYA THIS 14<sup>TH</sup> DAY OF DECEMBER, 2016.**

**J.A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**MR. S.M. ONYANGO FOR THE ACCUSED**

**M/S. ODUMBA FOR STATE**

**ACCUSED NO. 1 – PRESENT**

**ACCUSED NO. 2 – PRESENT**

**ACCUSED NO. 3 – PRESENT**

**COURT ASSISTANTS:**

**K. ODHIAMBO**

**L ATIKA**

**J. A. MAKAU**

**JUDGE**