REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 34 of 2008

REPUBLIC…….....…...…PROSECUTOR

VERSUS

STEPHEN KIPROTICH LETING…….....…….1ST ACCUSED

EMMANUEL KIPTOO LAMAI…...…….....……2ND ACCUSED

CLEMENT KIPKEMEI LAMAI…….....……..3RD ACCUSED

JULIUS NYONGIO RONO…….....……..4TH ACCUSED

JUDGMENT

I have, in this case, been called upon to adjudicate on one of the cases arising from the events that took place in our country at the beginning of last year that riveted the attention of literally the whole world to our country. These are the events that have been christened "the post-election clashes" which, if the media reports are anything to go by, led to the killing of over 1,300 people and the displacement of over 300,000 others and drove this country almost to the brink of precipice. They are events that I join every right thinking Kenyan in condemning in the strongest terms. They are events that as a country we will ill afford to have recur.

As I condemn those events I am fully alive to the onerous responsibility cast on my shoulders in this case. I have on the one hand the families of the victims who, as it were, are baying for the Accused persons' blood. I have on the other hand the Accused persons, their relatives and friends who are asserting the Accused persons' innocence and are seeking their immediate acquittal. It is a responsibility that my family and I have prayed over for divine guidance. Having said that I now wish to go into the facts of the case.

STEPHEN KIPROTICH LETING (the first Accused), **EMANUEL KIPTOO LAMAI** (the second Accused), **CLEMENT KIPKEMEI LAMAI** (the third Accused) and **JULIUS NYOGIO RONO** (the fourth Accused) are jointly charged with 7 counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charges against them are that on the 1st January 2008 at Rift Valley Province, jointly with others not before the court they murdered **JOSEPH KIMANI KARUGU, MITATI RUBIA, GEORGE MIRIU, JAMES MWIRIGI MBUGUA, PETER MWANGI, MARGARET WANJIRU MBURU** and **SIMON GATIMBA MBURU**. They all pleaded not guilty and the prosecution has, in its endeavour to establish the charges, called a total of 31 witnesses.

The prosecution case is that on 30/12/07 there was apprehension of security breach in the country and especially in Rift Valley as the 2007 general election results were being announced. That night some members of Kikuyu families from Kiambaa farm, fearing for their lives, took refuge at the Kenya Assemblies of God Church Kiambaa (the Church) where they prayed overnight. On the following day they were joined by about 160 other people from Kimuli farm, about 6 Km away, whose homes had been razed down. By 7.00 p.m. on that day the Church compound was full of people. They stayed there overnight praying.

On 1/1/2008, at about 10.00 a.m. between 700 and 4000 people, whose faces were smeared with what appeared like chalk, came from the direction of Accused 2 and 3's farm with arrows trained at them. Some ran away while others entered the Church with whatever valuables that they had managed to escape with from their homes. Within a short time the Church was surrounded. The attackers collected the mattresses which those people had slept on outside the Church, heaped them at the doors to the Church and set them on fire and in no time at all the whole Church was ablaze. Some of the people in the Church managed to escape but others, between 25 and 35, were burnt to death inside.

Police got information and rushed there and on seeing them the raiders fled. They took the injured to hospital and the bodies of the dead to the mortuary. After investigations they later arrested the Accused in this case and charged them with this offence.

In a nutshell that is the thrust of the testimony of the 31 prosecution witnesses. I do not need to recount what each of them said but I will in

the course of this judgment refer to the evidence that implicates the Accused.

At the close of the prosecution case I found that all the Accused persons had a case to answer and on calling upon them to defend themselves, save for Accused 3 who opted to say nothing, the other Accused persons testified on oath and called witnesses.

In his testimony Accused 1 denied murdering or being involved in the murder of any of the deceased persons in this case. Besides being a farmer and businessman, he said he is also a politician. During the 2007 general elections, he contested for the Ngeria Ward seat but lost. Ngeria Ward covers Kiambaa, Kimuli and Chebarus farms. Because of the tension prevailing in Eldoret area and many parts of the country following the announcement of the disputed election results, on 31st December, 2007 the Administration Police Officers who were attached to the Chief's Camp at Chebarus and who knew of his influence and popularity in the area, met him at Chebarus Centre and asked him to go and address a rally at Mapera and preach peace. With Dr. Butur and Mzee Sitienei, Accused 1 obliged, went to the meeting and exhorted people to live in peace as they had done in the past.

After that peace meeting which lasted almost two hours, he went back to his home in Chebarus. On the way home he met a group of about 20 Kalenjin youngsters on the boundary between Kiambaa and Chebarus. As he talked with them he saw another group of about 15 Kikuyu youngsters, including George Kinyanjui, PW7, and Joe Muigai, PW9, approaching them. Again with Dr. Butur he asked both groups not to provoke each other and instead to remain calm and maintain peace. Before they could part company, they heard gunshots from Kimuli and they all dispersed and went to their respective homes.

That night, more gunshots were heard from Kimuli and Rehema farms. That caused great apprehension to Accused 1 and his wife as their children had, after closing school, gone to stay with his parents in Plateau which is in the general direction of Kimuli where the gunshots were being fired. The following morning, he called his friend, David Tanui Kabaka, to take care of his home as he went with his wife to Plateau to see their children. Before they could leave, a Kisii lady family friend of theirs, by the name Margaret Kwamboka alias Mama Kemunto, went with her 3 children to take refuge at his home. On hearing that Accused 1 and his wife were going to Plateau she decided to go with them. They arrived at Plateau at about 11.30 a.m.

While Accused 1 was having lunch with the said family friend and his mother at his parents' home at Plateau, they heard over the radio that Kiambaa Village had been attacked and about 300 people who had taken refuge in the Church were feared dead. At 2.00 pm, he left his car at his parents' home and went to Chebarus on a bicycle. Because of the barricades on the road he arrived at Chebarus Centre at about 4.00 pm. His friend Kabaka told him that his home was intact and briefed him of the security situation around there. Later that day he went to his home. He was arrested on 9th April 2008 and later charged with this offence.

Accused 1 dismissed the evidence of Grace Nyakero Githutha, PW4, and George Kinyanjui, PW7, both of whom implicated him with this offence and said that Kiambaa Village where the two resided was one of his political strongholds. He could not therefore have attacked the same people on whose doors he had knocked for their votes. He had an explanation as to why the two witnesses testified against him. As for PW4, he said he had sidelined her towards the tail end of his campaign for ODM nomination and she thereafter started campaigning against him. One time she rang him to take her sick brother to hospital but he refused. On 31st December, 2007, at the height of the post-election skirmishes, she again rang him to go and rescue her parents from Kimuli but he declined. That infuriated her and caused her to falsely testify against him. As regards PW7, he could not pinpoint any reason why he testified against him. He, however, said that politicians have many enemies and PW7 could be one of his enemies.

Accused 1 called three witnesses. David Tanui Kabaka confirmed that he was left guarding Accused 1's home on 1st January, 2008 when he went with his wife to Plateau to see their children. Their family friend, Margaret Kwamboka, as well as his mother, Magdaline Leting, corroborated his alibi that on 1st January, 2008 Accused 1 was with them up to about 2.00 pm when he left on a bicycle to Chebarus after hearing of the attack at the Church.

As I have said Accused 2 also testified on oath and called witnesses. He also denied the charges against him. He said that on 31st December, 2007 at about 11.00 am, while at his home in Kabongo he saw groups of women from Kimuli pass by his home. On enquiry he was told they were fleeing to Kiambaa as their homes had been razed down the previous night. He gave them water from his well and they went away.

On 1st January, 2008 at about 10.00 am, about 500 people armed with arrows and bows and whose faces were smeared with a whitish substance passed by his home. When they got near Kiambaa they spread out and started running while shouting war dirges. Within a short time, he saw very many houses in Kiambaa on fire. Fearing that those skirmishes were going to spill over to his home which borders Kiambaa Village, he asked his wife and children to flee to his father's home. Before he could make any move, he saw many people running to the Church and in no time at all it was on fired. He ran there to see what he could do to help those in distress.

At the gate to the Church compound he heard children and women screaming. He shouted in Nandi and Kiswahili languages to the raiders and the others in the Church compound to open the doors of the burning Church for the women and children to get out. With the help of other people he pushed aside the mattresses that were burning at one of the doors, kicked the door open and many people, including Naomi Ngendo, PW5, and one Muraguri got out. From there he ran to the pit latrine where some old women, including Jane Mweru and Njoki Kimani, PW8, were being beaten and pleaded with the raiders in Nandi language to leave them alone. Though the raiders threatened him they nonetheless left those women alone. The women pleaded with him not to leave them. He promised to take them to his home but before he could do that he heard gunshots from the direction of his home and saw his wheat farm on fire. He left those women there and ran to his home. He said he did not know and could not have recognized any of the raiders as they had their faces smeared with chalk.

Accused 2 strongly refuted PW2's allegation that at about 10.00 am she met him going to the Church. That time, he said he was at his home having tea after taking his cows for pasture. He wondered how he could have attacked the Kiambaa people who had been his neighbours for over 30 years and some of them had children at Kipkabus Secondary School where he teaches. Most of them also worshipped with him in the Catholic Church situate on their farm and did casual work on their farm. Accused 2's wife, Elizabeth Lamai corroborated his alibi.

Accused 3, as I have said, opted to say nothing in his defence.

Accused 4, Julius Nyogio Rono, also denied all the charges in this case. He said he worked as a driver for Kimilili Wholesalers in Eldoret town. Due to the prevailing tension around Eldoret and lack of public transport, he was unable to go to work on 31st December, 2007. Being one of the only two Kalenjini families living with Kikuyus in Kiambaa farm, he was apprehensive about his family's safety. So on that day at about 7.30 pm he went with his family to the nearby AP camp where they stayed overnight. At about 7.30 am the following morning he went back to his home and took his cows to Outspan Farm for pasture. While there with his wife who had taken him some food, at about 11.00 am he heard screams and whistles and then saw smoke in Kiambaa. He ran with his wife to the AP's Camp where they were told that the whole of Kiambaa, including the Church had been torched. They remained there and their children joined them in the evening and told them that even their home had been burnt down. They took refuge at the village elder's home up to February when they returned to their home after the situation had calmed down. He was arrested on 21st April, 2008 and later charged with this offence.

Accused 4 attributed George Karanja Mutati, PW2's, testimony against him to the cold blood between his family and PW2's. He claimed that in 1998, PW2's young siblings took live ammunition to his young children. When the ammunition was discovered and its ownership traced to PW2's father, the father was arrested and charged under the Firearms Act with their illegal possession. He produced as **Ex. D9** a summons issued to his 10 year old daughter to go and testify in that case. He also called Abed Tallam, an Executive Officer at the Eldoret Law Courts who produced an extract of the register confirming that PW2's father was indeed so charged. The witness said the file in respect of that case had, with others, been destroyed pursuant to Gazette Notice No. 5871 of 28th July 2006.

Accused 4 also refuted PW7's allegation that on 1st January, 2008 he saw him among the raiders. He said while going to the AP's Camp on that day he met PW7 riding to Eldoret town. His wife, Hellen Rono corroborated his story.

Accused 4 also called his sister-in-law, Susan Chepkemei Lamai, who testified that on 9th April, 2008, at about 5.00 am, while asleep with her children police stormed into her home and demanded for her late husband, Richard Lamai, who had died way back in 2003, alleging that he was among those who burnt the Church. They refused to believe that her husband was long dead until they missed him in the house after a thorough search and were shown his grave.

At the close of the defence case both the defence and state counsel, filed written submissions.

In his written submissions Mr. Limo, counsel for Accused 1 Accused 4, contended that the charges against the Accused persons were politically motivated to cover the police's ineptitude in failing to stem the post-election violence. As proof of this contention, he asked me to consider the evidence of Susan Chepkemei Lamai, DW10, into whose home police stormed on 9th April 2008 seeking to arrest her husband who had died five years previously, alleging that he was one of the murderers of the deceased persons in this case and the fact that no finger has been raised against Accused 3. Citing the case of **Republic Vs Mohamed & 3 Others, [2005] KLR** he further argued that the prosecution having not even attempted to adduce evidence of any pre-arranged plan by the Accused to commit this offence, the issue of common intention raised by the learned Assistant Deputy Public Prosecutor in his submissions falls a cropper.

As regards Accused 1, Mr. Limo submitted that the only evidence against him is that of PW4 and PW7 both of whom, for good reasons, cannot be relied upon. He dismissed the evidence of PW4 as having been actuated by spite and malice because Accused 1 dismissed her as one of his campaigners thus denying her the campaign funds and because he had refused to assist her relatives. As for PW7, counsel submitted that his evidence is totally unreliable. Given the state of shock in which the witness was, he wondered how he could have been able to identify Accused 1 out of 700 to 3000 armed raiders whose faces were smeared with chalk. He urged me to accept Accused 1's alibi and dismiss the charges against him.

Mr. Limo also urged me to accept Accused 4's alibi and dismissed the evidence of George Karanja Mitati, PW2, as actuated by malice and the grudge the witness bore against him for having caused his father's prosecution for illegal possession of ammunition. He said that witness' evidence is also unreliable because he claimed to have seen Accused 4 while he (the witness) was hiding in a 7 feet deep latrine.

Mr. Ogolla for the second and third Accused on his part submitted that the prosecution has miserably failed to prove the charges against all the Accused. Though he conceded that deceased persons in this case are indeed dead, he submitted that the prosecution has failed to prove that they were murdered on 1st January, 2008 leave alone at the Church. Taking me through the evidence on record and in particular the post mortem reports, he submitted that there is no proof that any of the deceased was murdered at the Church.

Citing the cases of **Joseph Mwangi Wambugu & 2 others Vs Republic, Criminal Appeal No. 11 of 2000** and **Roria Vs Republic, [1967] EA 584**, Mr. Ogolla submitted that with people running helter-skelter, screams renting the air, smoke billowing from the burning church and the general confusion caused by the state of shock and panic, it was impossible for the witnesses to identify any of the attackers estimated to be between 200 and 4000 and whose faces were smeared with a whitish substance.

Besides the conditions at the scene not being favourable for a positive identification, Mr. Ogolla cited other authorities and submitted that the evidence of the alleged identifying witnesses cannot be relied upon as in their initial reports they did not give the descriptions of the Accused to the police. He cited the cases of **Kiarie Vs Republic [1984] 744** and **Msembe & Another Vs Republic [2003] KLR 521** and concluded this aspect of the defence case that with their alibi defences having not been discharged the 1st and 4th Accused could not have been at the scene at the material time.

Mr. Ogolla urged me to accept Accused 2's testimony, which was corroborated by that of PW7 and PW8 as well as DW6, that he went to the scene not to attack but to save and did save lives. For Accused 3, he cited the case of **Ramanlal Bhutt Vs Republic, [1957] EA 32**, and submitted that nobody having mentioned him at all, there is absolutely no case made out against him and he should therefore be acquitted.

Mr. Ogolla's last point of submission was on common intention. He argued that other than Mr. Gumo's mere submission that the Accused persons had the common intention to kill the deceased persons, there is no evidence to prove that. To the contrary, he said the Accused denied even seeing each other on the date of murder. In the circumstances he urged me to dismiss the charges and acquit all the Accused persons.

On his part Mr. Gumo for the state made a short submission and urged me to find that the prosecution has proved beyond reasonable doubt the case against three of the four Accused persons. Dismissing Accused 1's alibi, he submitted that the crime having been committed in broad day light, Grace Nyakero Githuka, PW4, and George Kinyanjui, PW7, could not have been mistaken as to his identity as one of the raiders who murdered the deceased persons in this case. As for Accused 2, he relied on the evidence of Naomi Ngendo, PW5, and Njoki Kimani, PW8, and dismissed his contention that that he went to the scene for any other purpose than to execute the common unlawful intention "as envisaged within the meaning of section 21 of the Penal Code." Regarding Accused 3 he conceded that he should be acquitted as nobody has associated him with the charges in this case. But as for Accused 4, he said the evidence of George Karanja Mitati, PW2, and George Kinyanjui, PW7, implicated him and he should therefore be convicted.

I have carefully considered these submissions and the evidence on record. Because of the alleged joint commission of this offence I need to deal with the definition of murder in a little more detail. Before I do that, however, 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 the 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.

With these two important elements of crime in mind, I can now define murder as the unlawful homicide committed with "malice aforethought." Homicide of course is the killing of a human being by another. Murder is therefore the killing of a human being by another with malice aforethought.

Section 203 of the **Penal Code** under which the Accused persons are charged defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. It reads:-

"Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder."

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. Both the act, *actus reus*, and the intention, *mens rea*, must be proved to the required standard, which is beyond reasonable doubt, for there to be a conviction of murder. What is "malice aforethought?

Malice aforethought describes the *mens rea* or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If 'malice aforethought' is lacking the unlawful homicide will be

manslaughter.

It should be noted, however, that 'malice aforethought' is a technical term whose meaning implies neither ill-will nor premeditation. Thus a person who commits euthanasia out of motives of mercy or compassion to alleviate suffering may, nevertheless, be guilty of murder, just as a person who kills in the 'heat of the moment' without prior planning may also be guilty of murder. But these two aspects of 'malice aforethought' do not apply to this case. What applies is the definition contained in Section 206 of the Penal Code.

Section 206 of the Penal Code states the instances when malice aforethought is established:-

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance-

(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."

It is clear from this definition that there are three broad elements of 'malice aforethought'. They are express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.

From what I have stated above, it is clear that there are three elements of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See **Nyambura & Others-Vs-Republic, [2001] KLR 355).**

In the first element, there must be evidence proving that the death of a human being (the deceased) actually occurred. The evidence required to prove the death is usually the autopsy reports given by pathologists. But there are circumstances where the cause of death is too obvious to require medical evidence like where the deceased person was stabbed through the heart or where the head is crashed. Stating this principle in **Ndungu Vs Republic [1985] KLR 487** the Court of Appeal stated at p. 493 that:-

"**…**in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."

In the instant case Mr. Ogolla contended that the identity of the deceased persons has not been established as the evidence of the witnesses who purported to identify their bodies contradicted other evidence on record especially the post mortem reports. The two police officers who attended the post-mortem examinations did not know the victims and could not therefore identify any of them.

This contention is not entirely correct. Whereas the police officers who attended the post-mortem examinations actually said they did not know any of the deceased persons whose bodies they witnessed being examined, the relatives of some of the deceased persons attended and identified their bodies to the pathologists.

For the deceased in count 1, Joseph Kimani Kiragu, although PW2 said he saw him walk out of the Church, I do not agree with Mr. Ogolla that nobody said where he was murdered or where his body was found. PW2 said he saw him being clubbed outside the Church which is where his body, according to the post mortem report **Ex 13**, was found. Although the post mortem report states that Anthony Nganga Kimani and George Karanja identified his body to the doctor, Anthony was not called and George Karanja said he only identified the body of Benson Mutati Rubia. However, in court George Karanja identified the body of that deceased on one of the pictures in **Ex 1**. That deceased having been with the witness on the material date and there being no dispute that he was killed, I disagree with Mr. Ogolla that his death has not been established.

I also disagree with Mr. Ogolla that the death of Benson Mitati Rubia, the deceased in count 2, has not been established. PW2 clearly testified that this deceased, who was his father, was one of the people who were attacked around the Church and he assisted to take him to hospital where he died. He later identified his body to the doctor who performed the autopsy and they buried it on 5/1/2008. Mr. Ogolla's contention that that deceased was not murdered at the Church cannot therefore be correct. At the Church should not be taken to mean inside the church only. That description, in my view, includes the environs of the Church.

However, as regards the deceased in counts 3 and 5, I think Mr. Ogolla is on firm ground. The post mortem report **Ex. 17** states that the body of George Miriu, the deceased in count 3, was found in the mortuary on 4/1/2008 and that John Ngoche and Daniel Kibigo identified it to the doctor who performed the autopsy. Neither of these two people having testified, I agree with Mr. Ogolla that the murder of that deceased has not been established leave alone the claim that he was murdered by any of the Accused. I also agree with him that Peter Mwangi, the

deceased in count 5, was not murdered at the Church on 1/1/2008. His son George Kinyanjui, PW7, testified that when their home was set ablaze on 1/1/2008 he ran away leaving him and his brother behind. They found him with serious injuries in a banana plantation the following day and took him to hospital where he died on 7/1/2008.

Mr. Ogolla's contention that there is no independent evidence of where the body of James Mwicigi Mbugua, the deceased in count 6, was found is, in view of PW9, Joe Muigai Kihihu's evidence, fallacious. That witness testified that that deceased's body was among those collected from the burnt Church and that he identified it to the doctor who performed the post mortem examination on it.

Faith Wairimu Mburu, PW3, testified that on 1/1/2008 she ran with her husband, Simon Gathimba Mburu and mother, Margaret Wanjiru Mburu, to the Church for refuge. On getting there she realized that it was not safe either. As she was escaping from the burning Church she saw her husband being hacked to death and his body was later that day found in a bush about 20 meters from the Church. She identified it to the doctor who performed the post mortem examination on it. Mr. Ogollas' contention that there is no independent evidence of that deceased's murder and where his body was found is therefore also incorrect.

Whereas I agree with the defence counsel that the autopsy reports produced give different dates of death from the one stated on the information, having carefully examined those reports against the evidence on record I am satisfied that, save for the deceased in counts 3 and 5, as stated by witnesses, the other deceased persons were all killed either in or near the Church on 1 st January 2008, which is the date stated on the information, and their bodies were recovered from there and others were discovered by their relatives in the mortuary on different dates. The cause of death was in most cases cardiac arrest due to haemorrhage secondary to deep cut wounds and asphyxia. I am therefore satisfied that the prosecution has established the first element of this offence, that is, the death of the deceased persons in counts 1, 2, 4, 6 and 7.

As I have already said the other two elements of the offence of murder are whether or not the Accused committed the unlawful act which caused the death of the those deceased persons and if so whether or not the Accused had the malice aforethought. I have already stated what *actus reus* and *mens rea* of the offence of murder are. I would now like to go into the evidence in this case to see if it proves that the Accused persons, or any of them committed this offence and I wish to start with the issue of common intention.

As I have pointed out the four Accused are jointly charged with the murder of the deceased persons and Mr. Gumo's brief submission is that they committed that offence with common intention within the meaning of **Section 21** of the **Penal Code**.

What is common intention?

Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.

Section 21 of the **Penal Code** defines common intention as arising:-

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

This provision has been interpreted and the doctrine of common intention dealt with in several local cases. In **Solomon Mungai Vs [1965] E.A. 363**, the Court of Appeal held that in order for this Section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged. In **Abdi Alli Vs R., 23 (1956) E.A.C.A. 573** it was held that the test for joint responsibility is common intention. This is how the court stated the doctrine at page 575 which is repeated in **R Vs Cheya [1973] E.A. 500 at p. 204:**-

"It is sufficient for joint responsibility for an offence under this section that the offence actually committed was likely to occur as a result of several persons acting together, but that the existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under this section, the former by itself is irrelevant to the section. It is only when a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result that this section can he applied."

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

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

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

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

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

It is evident from the above definition and authorities that in order to secure a conviction under common intention, the prosecution must prove that the Accused had (a) a criminal intention to commit the offence charged jointly with others, (b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and (c) the accused was aware of this when he or she agreed to participate in that joint criminal act.

In the instant case, it is manifest from the evidence on record that a gang of up to 4000 people who had their faces smeared with a whitish substance and were armed with machetes, pangas, spears, clubs, arrows and bows attacked Kimuli, Rehema and Kiambaa farms. Fearing for their lives the residents of those farms took refuge in the Church. The armed raiders followed them there. Slashing and hacking some to death, they also set the Church ablaze thereby killing several others.

Given that scenario and the prevailing circumstances under which this offence was committed, particularly the fact that the raiders had smeared their faces with chalk and were chanting war dirges, I have no doubt in my mind that they must have had a pre-conceived plan. There is no question of common intention having developed in the course of committing this offence. One would therefore have expected common intention to have taken centre stage in the prosecution of this case. One would have expected the police to place before court evidence of the Accused having been part of the gang that pre-arranged to commit this offence. That, however, was not the case. The evidence on record does not show, leave alone suggest, the involvement of the Accused in any pre-arranged plan to execute any or any unlawful act.

I am under no illusion that the task of proving common intention is easy. I know that it is an undoubtedly difficult thing to prove even the intention of an individual and therefore more difficult to prove the common intention of a group of people. But however difficult the task is, like any other element of crime, the prosecution must lead evidence of facts, circumstances and conduct of accused persons from which their common intention can be gathered.

In this case there is absolutely no evidence of the raiders and/or any of the Accused having met to arrange the execution of any or any unlawful purpose. There is absolutely no evidence to show that the Accused and/or others had a pre-arranged plan to attack Kimuli, Rehema and/or Kiambaa farms and kill their residents. In the circumstances I have to dismiss the common intention theory as against all the Accused in this case.

At first I dismissed in mind as outlandish Mr. Limo's submission that the charges in this case are meant to conmflauge the police ineptitude in failing to stem the post-election violence in the country. But after re-evaluating the entire evidence adduced in this case, although I do not quite agree with that allegation, I have had second thoughts on the allegation. So before I leave this point I wish to make some observations which may not auger well with the security agencies in this country. However, as a citizen of this country and as a Judge of the High Court which handles some of the cases investigated by our security agencies, I feel duty bound to make these observations in the interest of justice and security in this country.

It is common knowledge that insecurity in our country has reached an all time high and is now of grave concern to everybody. The media, although I do not agree with everything they say, is splash with allegations of impunity. The cries of the victims of crime are splashed in the media daily. What I do not see are any real concerted efforts to stem or minimize crime.

Let no one think that I am naïve and I do not know that insecurity is all over the world. My concern is that as a country we do not seem to be taking serious steps to minimize crime. And it is not only serious crime; we have ignored even mundane but critical matters like the enforcement of traffic regulations.

I went to Rwanda recently, to digress a little, and noted that all the "boda boda" operators together with their passengers, without exception, wear helmets. I have seen that in other countries also. I believe our traffic regulations also require riders on motor bikes to wear helmets. I am yet to see a single rider, leave alone his passenger wearing one and yet several of them are dying in accidents where deaths could have been avoided had they worn helmets. We recently came up a regulation requiring passengers in all public transport vehicles to wear safety belts. Colossal sums of money were spent in fitting safety belts in all public transport vehicles. For the short time that regulation was enforced, deaths on our roads were drastically reduced. Soon thereafter the enforcement of that regulation was ignored and the results of that neglect are there for every one to see.

I can go on and raise issues with other sectors of our society including the general public and the way we are good at coming up with red herrings to side track real and serious issues.

One might wonder whether I am delivering a judgment or making a political speech. I am not a politician and I have never been one. I am only a judge who is outraged at the casual manner in which we are handling serious issues like security in this country and as a citizen of this country I think I am entitled to express my outrage.

The events preceding the commission of this offence cannot have eluded the police as the clouds for the gathering storm were there for all to see. As I have stated, the evidence on record in this case is that there was apprehension of security breach in Eldoret area from 30/12/2007. That is why on that day several residents of Kiambaa, farm, fearing for their safety, took refuge in the Church. The following day they were joined by others from Rehema and Kimuli. More people trooped in on 1/1/2008. If our security agencies were unaware of all that then we are in serious trouble.

At about 10.00 am on 1/1/2008, the Church was raided by a gang of about 4000 marauding youths whose faces were smeared with chalk and

were armed with machetes, spears arrows and bows and all manner of crude weapons. They slashed and hacked to death anyone they found outside the Church and set it on fire thus killing many more. This was obviously a planned attack. But there is not even a whiff of that plan in this case. There is no indication that the police ever investigated that aspect of the case and yet in my view, as I have said, that should have been the core of their investigations. We are told that up to 4000 raiders attacked the Church and killed about 30 people, including the deceased in this case. We have only four suspects in court. Where are the others?

The judiciary is being accused of acquitting criminals and unleashing them to society. Since I do not know if the critics have any specific cases in mind which they have not disclosed, I do not want to dismiss those complaints off hand. But what I know is that courts acquit accused persons if there is no evidence against them.

For God's sake let our leaders not lose sight of the fact that judicial officers are citizens resident in this country who, like anyone else are vulnerable to criminal attacks. As a matter of fact a magistrate was recently killed in Nairobi and others have been killed in the past. I cannot therefore imagine how a judicial officer can acquit an accused person against whom sufficient and credible evidence has been adduced.

The case before me is not an ordinary murder case but one relating to the post-election violence which, as I have pointed out brought this country almost to the brink of precipice, and coming at the time when allegations are rife that the courts are unleashing criminals to the general populace, I have to point out the shoddy police investigations in this case so that blame is placed where it belongs. Call it a blame game or what you like but that is the truth of the matter.

Given the importance of this case and for the benefit of the public I wish to state a truism in our criminal jurisprudence: out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. Because of that our law requires that for a conviction to result the prosecution must prove beyond reasonable doubt the case against an accused person. That is why many suspects are released. Courts therefore decide cases on evidence as by law required. If they fail to do that the critics will be the first ones to lambaste them with allegations of incompetence.

In this case, without placing any evidence on record, the prosecution wants me to find that the Accused had a common intent with the murderers of the deceased and were part of that joint enterprise. That cannot be. Our security agencies have to do their work and do it properly otherwise our people will be despondent and will take the law into their hands as is already happening in some parts of the country. And the consequence of that is obvious: total anarchy. If there is any problem in the police force like not being adequately facilitated to combat crime, that issue should be urgently addressed otherwise we will continue crying foul and crime will continue soaring. As I said at the beginning of this judgment we cannot afford to have a recurrence of the chaos we experienced in January 2008.

Having dismissed the common intention theory, I now wish to consider the case against each Accused to see if they or any of them was among that gang that killed or was in any way involved in the killing of the deceased in this case. I would like to start with the case of Accused 2.

The case against Accused 2 is founded on his own admission that he went to the scene at the material time and the evidence of Naomi Ngendo, PW5, and Njoki Kimani, PW8, who said they saw him there. PW5 said that while she was in the burning Church, she heard Accused 2 say, in a rescue voice, "fungulia mama na watoto watoke" (open for the women and children to get out). PW8 said that when she saw Accused 2, she asked him to help them (the victims) and he asked them to run away. She also said that Accused 2 was not armed and unlike the raiders he had not smeared his face with chalk. In the circumstances I find that the evidence of Naomi Ngendo, PW5, and that of Njoki Kimani, PW8, corroborates Accused 2's defence that he went to the scene not to attack but to save and he did save lives. Consequently I find that there is no evidence to implicate Accused 2 in the murder of any of the deceased and I accordingly acquit him of all the charges in this case.

Throughout the hearing of this case none has implicated Accused 3. None of the 31 prosecution witnesses mentioned Accused 3 and the learned state counsel conceded that he is innocent. In the circumstances I acquit him also of all the charges in this case.

Accused 1 and Accused 4, as I have already pointed out, gave alibi defences. Although I will make joint conclusion remarks on those defences, I would like to deal with them separately.

The main evidence against Accused 1 is that of PW 4 and PW7 both of whom said they were at the Church and saw Accused 1 among the raiders who set it ablaze. Grace Nyakero Githutha, PW4, testified that because of the fear that gripped Kiambaa Farm on 31/12/07 following the burning of houses at Kimuli, like many other Kiambaa residents, she went and slept at the Church. The following morning at about 9.30 a.m. they were invaded by about 3000 people who had smeared their faces with chalk. Of those she was only able to identify Stephen Leting Chemalel, Accused 1, whom she saw pouring out something from a 5 litre can. She said she had known him for about a year and had campaigned for him. In cross examination she denied the allegation that she was out to fix him because he had failed to pay her the campaign monies or because he had refused to take her sick brother to hospital or rescue her parents from Kimuli when it was attacked.

The evidence of George Kinyanjui, PW7, was that on 31/12/2007 after hearing gun shots from Rehema, he saw Accused 1 among the armed youngsters barricading the road near Kiambaa farm. On 1/1/2008 at about 10.00 a.m., while he was at his home with his 3 brothers and father they saw many people approach their home from Bore's farm. His father asked them to ran away remarking that he might be spared on account of his age. With other people from the surrounding homes, they armed themselves and tried to repulse the invaders. When they realized they were being surrounded, they ran to the Church. He identified about five people, including Accused 1 who he had known for about a year, from the group of the attackers. Realizing that it was not safe to remain in the Church compound where there was serious fighting and quite a number of people had been injured, he ran out towards the Tanning farm and as he did so he saw Accused 4 in another group of raiders from which he also identified several other people who are not in court. He said Accused 1 was in a short whose colour he cannot recall and a bright coloured T-shirt and sandals while Accused 4 was in a trouser and a shirt.

In cross examination PW7 maintained that though he was not in the front line of his group he was able to see the people he named and denied the suggestion put to him that he gave names of people simply because he knew them. He also said that although it was not in his police

statement some of the attackers including Accused 1 had smeared their faces. He said he had met Accused 1 on 31/12/2007 who had told him that there had been a security meeting in which it had been agreed that the groups should protect their respective homes.

The other evidence against Accused 4 was that of George Kinyanjui, PW2, who said Accused 4 and his son, both of whom he had known for over five years, were among the raiders who attacked the Church on 1/1/2008. He claimed Accused 4 actually attacked him with a rungu. In cross examination he grudgingly admitted that it was not in his police statement that he did not see his father being killed or identify 5 of the killers.

The evidence of these two witnesses is visual identification evidence. It is trite law that such evidence should be treated with caution and for a conviction to be based solely on it, it must be watertight. In the words of the Court of Appeal in Wamunga Vs Republic [1989] KLR 424 at p. 426:-

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

This is because as the Court of Appeal pointed in Enos Mbanja Okuru Vs Republic, Criminal Appeal No. 112 of 2005:-

"It is recognized that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In Kiarie Vs Republic [1984] KLR 739, this court said that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

In the same case, the court stated that:-

" it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken…Such evidence should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made. (See *Anjononi and Others V The Republic [1980] KLR 59 at page 60, [and] Wamungi V Republic [1989] KLR 424."*(emphasis supplied).

I am alive to the fact that this is not evidence of mere identification of strangers but evidence of recognition and as was stated by the Court of Appeal in **Anjononi & Others Vs R. [1980] KLR 59** "recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

Although the offence was committed in broad daylight I, however, agree with Mr. Ogolla that with people running helter-skelter, screams renting the air, smoke billowing from the burning church and the general confusion caused by the state of shock and panic, together with the fact that the raiders had disguised themselves, the conditions at the scene were not favourable for a positive identification. PW7 was not even in the frontline of his group to have been able to see Accused 1 and Accused 4. Besides this how did he manage to identify the two when PW2 said it was impossible to identify any of the raiders as their faces were smeared with a whitish substance?

Apart from the unfavourable conditions for a positive identification, I find myself uncomfortable with the evidence of both PW4 and PW7. Both had bones to pick with Accused 1 and Accused 4. Besides dismissing her from his campaign team thus denying her the campaign money, Accused 1 had also turned down PW4's requests for help. He had refused to take her sick brother to hospital and during the post-election skirmishes, he refused to go and rescue her parents from Kimuli when it was attacked.

In 1998, Accused 4's family was the "complainant" in Eldoret CMCr. Case No. 431 of 1998 in which PW7's father was charged with being in possession of ammunition and since then the relationship between the two families has been strained.

The evidence of PW2 also cannot be relied upon. He contradicted himself on identification. At one stage in his evidence in chief, he said it was impossible to identify any of the 1000 raiders he saw as their faces were smeared with a whitish substance. Later, still in examination in chief, he said he identified Accused 4 when he saw him clobbering Joseph Kimani, the deceased in count 1. He did not say if Accused 4 had not smeared his face with chalk for him to have been able to identify him. In cross-examination he said he gave Accused 4's name to the police when he reported the matter although he did not say he saw him clobber Joseph Kimani. In further cross examination he admitted that contrary to what is in his statement that he saw his father being killed, he actually did not see that.

It is clear from this witness' evidence and that of the other identification witnesses that part of their testimony is not in their statements to the police. PW7 in particular admitted that he did not give the police officers he met as he was running from the Church the names of Accused 1 and Accused 4 as being among those who were burning the Church. The Court of Appeal succinctly stated in **David Masinde & Another Vs Republic, Criminal Appeals Nos. 33 &34 of 2004 (consolidated)** what I would like to say about the evidence of these witnesses:-

"In every case in which there is a question as to the identity of the accused, the fact of there being a description given and the terms of that description are matters of highest importance of which evidence ought always to be given first of all by [the] person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given. See *R v Kabogo s/oWagunyu 23 (1) KLR 50.*

The omission on the part of the complainants to mention their attackers to police goes to show that the complainants were not sure of their attackers' identity."

My grave reservations about the identification evidence aside, as I have pointed out, both Accused 1 and Accused 4 raised alibi defences. The law is quit clear on alibi defences. "An accused who raises an alibi defence does not assume the burden of proving it.…The burden is on

the prosecution to rebut the same." -**Msembe Vs Republic, [2003] KLR 521**. See also **Kiarie Vs Republic, [1984] KLR 744**. As related above, at the material time Accused 1 had gone to see his children who were with his parents at Plateau. That testimony was amply corroborated by that of Margaret Kwamboka, DW3, and his mother, Magdaline Leting, DW4. Accused 4 said that at the material time he was at the AP's Camp far away from the scene. There is no suggestion that both Accused 1 and Accused 4 or either of them sprung up these alibis for the first time in their testimony in court and the prosecution did not have a chance of rebutting them. The fact of the matter is that the prosecution has not, as much as even attempted to challenge them. To the contrary, at the conclusion of Accused 1's alibi defence, Mr. Gumo for the state lamented his prosecution in this case.

Taking into account these alibis and what I have stated about the evidence of the identifying witnesses, I find and hold that Accused 1 and Accused 4 were not at the time of the murder of the deceased in this case.

For these reasons I find that the prosecution has also failed to prove the case against both Accused 1 and Accused 4 and I therefore also acquit them of all the charges.

In the upshot I acquit all the Accused persons of all the charges in this case. They shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 30th day of April, 2009.

D.K. MARAGA

JUDGE.