



REPUBLIC OF KENYA



**Republic v Wafula & another (Criminal Case 37 (E013) of 2020)
[2025] KEHC 3262 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 37 (E013) OF 2020
AC MRIMA, J
FEBRUARY 13, 2025**

BETWEEN

REPUBLIC STATE

AND

EDWARD WAFULA 1ST ACCUSED

VINCENT WEPUKHULU 2ND ACCUSED

JUDGMENT

Introduction:

1. Protus Wasilwa Wanyonyi, the deceased in this case, faced an extremely horrendous, excruciating and brutal death. His head was chopped off and several parts of his body mutilated. Upon conclusion of investigations by the police, Edward Wafula and Vincent Wepukhulu, the accused herein, were charged with the murder of the deceased. Edward Wafula, the first accused, was a nephew to the deceased. His father and the deceased were brothers. Vincent Wepukhulu was a brother to the deceased.
2. The particulars of the offence are that in the night between 8th and 9th day of November 2020 at Chemi-chemi village, Saboti Location within Trans Nzoia County murdered Protus Wasilwa Wanyonyi.
3. The accused pleaded not guilty.

The Prosecution's case:

4. Eleven witnesses testified in this matter. They were Polycarp Lutta Kweya, a Government Chemist Analyst attached at Kisumu [PW1], Rosie Isinza Mativo who was the wife of the deceased [PW2], Hudson Juma Wanyonyi was a brother to the deceased and the 2nd accused in this case and also the father of the 1st accused. He was a retired teacher who testified as PW3. A friend to the 1st accused testified as PW4. He was John Wanjala. Another friend of the deceased whom they shared a drink a



day before the deceased was killed testified as PW5. He was Joachim Wamalwa. Dr. Dennis Nanyingi, a medical officer who conducted the post-mortem examination on the body of the deceased testified as PW6. A cousin to the 1st accused testified as PW7. He was Alfred Wanyonyi Marango. A Scenes of Crime officer testified as PW8. He was No. 236139 Insp. Fredrick Simiyu Sirengo. A retired Chief of Machewa Location one Cosmus Baraza Ngacho testified as PW9 while the current Chief of the said Machewa Location one Pius Boyo Chemengichi testified as PW10. The investigating officer No. 49084 SS Samson Kataka testified as PW11.

5. The prosecution gathered that the deceased was killed as a result of family disagreements over land. Six witnesses testified on the dispute. They were PW2, PW3, PW5, PW7, PW9 and PW10. As a wife to the deceased, PW2 knew of the boundary dispute over a swampy area of the family land between her husband and the accused. She was aware that the deceased had even reported the accused to the police over threats on his life. PW2 confirmed that the deceased was a Night Watchman at a local Dispensary and that he returned home in the morning of 8th November 2020. That, she left the deceased at home with their two children as she attended a Church service. On returning, the deceased was not at home as the children informed her that he had gone back to work. As the night fell, PW2 frantically called the deceased in vain. She thought the deceased had decided to spend at work and she slept. On the following day at around 7am, PW2 heard screams from the river and rushed there. She was astonished to find the deceased brutally killed. She witnessed the police processing the scene and who eventually removed the body. She later recorded a statement.
6. It was PW3 who testified on the issue of the land dispute in great length. As stated, PW3 was a brother to the deceased and the 2nd accused. He was also the father to the 1st accused. PW3 stated that their family was embroiled in a very acrimonious succession matter in which he was the Administrator. That, the 2nd accused had poisoned the mind of their mother, uncles and some of their children including the 1st accused to believing that PW3 had stolen their land despite him repeatedly explaining that he had just been appointed by the Court as an Administrator to oversee the distribution of the estate of their father. According to PW3, the deceased understood the matter well and supported him thereby falling into disharmony with the rest including the accused. In fact, the 1st accused, being a son to PW3, was so convinced that their land which he would inherit had truly been stolen. The accused, therefore, variously threatened the accused with death and the matters were reported to the local administration and the police. Attempts by the deceased and PW3 to have a survey over the land undertaken to aid in the distribution were thwarted by the rest who were led by the 2nd accused, as the leader, and the 1st accused as the frontline general. There was also a pending police case where the 1st accused assaulted the wife of the deceased over the very land.
7. PW3 last met the deceased in the morning of 8th November 2020, a day before the deceased was killed. On the following day at around 6am, PW3 heard screams from the river and rushed there. He found the deceased viciously laid in pieces. He was present as the police processed the scene and collected the body. He later recorded a statement. PW3 recalled hearing the 1st accused threatening to cut off the head of the deceased or to strangle him on a day he had called a surveyor to identify the boundary of their land. He was aware that the deceased reported that particular incident to the police and the village elder. It was PW3's further testimony that the accused would collectively not approve of any attempt by PW3 and the deceased to deal with the land and had severally vowed to extinguish the deceased accordingly.
8. There was also the PW3's testimony on the recovery of a jacket and a walking stick. To him, the family had gathered a couple of days after the death of the deceased planning for the burial. A village elder came and informed them that a jacket and walking stick stained with blood had been found near the



- river. PW3 rushed to find the police already at the scene. He witnessed the police retrieve the items which were lying not far from the river. He recognized the jacket as belonging to his son, the 1st accused.
9. As the Area Chiefs, PW9 and PW10 had also encountered the land longstanding disputes involving the accused, on one hand, and the deceased and PW3, on the other hand. Both had dealt with cases where the deceased reported threats to his life by the accused. PW9 and PW10 testified that despite their efforts to reconcile the warring parties, they had not been successful. They had also asked the deceased to report the incidents to the police.
 10. PW10 also testified on the recovery of the jacket and a walking stick. He stated that a day or so after the death of the deceased, he was called by one of his village elders, Wycliffe Barasa [not a witness] and informed of the items lying near the river. It was suspected that it could have been a case of a foiled attempt to dispose of the items into the river. PW10 informed the police and they proceeded to where the items were. He witnessed their recovery.
 11. As a friend to the deceased, PW5 had a drink with the deceased a day before the deceased was killed. It was around 11am at the home of one Evelyne [not a witness]. In the course of drinking, the deceased told PW5 that he was so apprehensive as his life was in danger. On enquiry, PW5 was told that the deceased feared for his life as a result of the several death threats he had been receiving from the 1st accused.
 12. PW5 stated that the deceased was not drunk when he told him as much as they had just started drinking. He was so shocked to learn of the brutal killing of the deceased the day after.
 13. PW7 was a cousin to the 1st accused. He testified that the 1st accused went to spend at his home in the night of 6th November 2020. He arrived there at around 8pm. The 1st accused left in the morning at around 6am and returned in the evening and requested to be allowed to once again spend at PW7's place. It was then when PW7 enquired whether there was any problem at the home of 1st accused. PW5 learnt from the 1st accused that there was a serious family disharmony, but the 1st accused refused to disclose what it was all about. PW7 told him to go back home and find a solution to the problem. PW7 had the 1st accused leave his home in the evening of 7th November 2020.
 14. The police were called and rushed to the scene. They included PW8, PW11 among other officers. The Chief was also present. PW8 processed the scene before the body was removed. He also took photographs which he later processed and produced in Court as exhibits. The body was taken to the Kiminini Cottage Mission Hospital mortuary for preservation and further police action.
 15. While at the scene, the police interrogated several people and readily gathered that the killing was most likely a result of the family land feud. PW11 also learnt that matter had been handled by the Area Chiefs and that there was an assault report at the station under OB No. 14 of 31/10/2020 where it was alleged that the 1st accused assaulted PW2 over land-related issues. PW11 also learnt that the 2nd accused was the one leading the fracas in the family with the 1st accused. It was on that basis that the accused, who were present, were arrested. PW11 interrogated the accused at the station and then released them. However, the accused were arrested when they went to record their statements with the police.
 16. In the morning of 11th November 2020, PW11 received information from PW10 [the Area Chief] that there was a jacket and a walking stick suspected to belong to the accused near a river which was not far from the scene where the body of the deceased was found. PW11 went to that place. He was accompanied by PW10 and the villagers including PW4. PW11 found the two items. They were a blue jacket and a metallic walking stick which were hidden near the river, but around 200m from where the body of the deceased was found. PW11 observed the items and noted some bloodstains on them. He recovered them for further investigations.



17. It was PW4 who confirmed that both the jacket and the stick belong to the 1st accused. PW4 was a friend to the 1st accused for such a long time and had severally been with the 1st accused while dressed in the jacket and usually used the walking stick. PW4 did not have any difficulty in recognizing the said items.
18. PW11 organized for and a post mortem examination on the body of the deceased was conducted on 16th November 2020 by PW6 at Kiminini Cottage Mission Hospital mortuary. The body was identified by Ben Wafula and Chrispinus Simiyu Sinoko.
19. It was PW6's evidence that the deceased had a regularly-shaped wound measuring 10cm by 8cm on the left-side of the face that exposed both the mandible and maxillae. Both ears were missing. The 2nd to 5th fingers on the left hand were also chopped off. There was a deep cut wound on the neck which had cut through all the muscles and the head was only held in place by the outer neck muscles and the trachea. Internally, the heart was normal, but had no blood. Ligaments on C3 and C4 of the spinal cord were also cut.
20. PW6 formed the opinion that the cause of death was excessive bleeding and traumatic spinal dissection secondary to assault. He took blood specimens for further analysis. He also filled in a Post Mortem Report and signed it. He produced it before Court in evidence.
21. PW11 then forwarded the blood samples, the jacket and the walking stick to the Government Chemist in Kisumu for analysis. He also had the 1st accused's buccal swab taken. It was PW1 who carried out the analysis, prepared a Report and produced it in evidence. According to PW1, the bloodstains on the jacket belonged to the deceased while the bloodstains on the walking stick belonged to an unknown single male person.
22. On conclusion of investigations, PW11 recommended that the accused be jointly charged since he was satisfied of their culpability and forwarded his recommendation to the Office of Public Prosecutions. The Learned Prosecutor readily agreed with the recommendation and the accused went through mental assessments. They were then formally charged on 16th March 2021.
23. At the close of the prosecution's case, the Court was satisfied that prima-facie cases against the accused had been established and the accused were placed on their defenses.

The Defence:

24. Each of the accused gave sworn testimony. The 1st accused did not call any witness. The 2nd accused called his wife one Margaret Kipkoech Wepukhulu [hereinafter referred to as 'Margaret'] as a witness.
25. Edward Wafula, the 1st accused, once again denied committing the offence. He acknowledged that the deceased was his uncle who was his father's [PW3] young brother. He testified that he was also astonished to learn of the death of the deceased on the 9th November 2020 as people rushed to the scene near the river. He had by then gone to work in the neighbourhood.
26. The 1st accused denied that there was any dispute over land in their family especially between him and the deceased since their farms were way apart. According to the 1st accused, he had inherited his land from his grandfather whereas the deceased had inherited his land from his father, therefore, there would ordinarily be no dispute. He only recollected a boundary dispute between the deceased and his grandmother which matter was handled by the Area Chief.
27. The 1st accused denied any animosity in their family. He stated that he related well with the deceased and denied ever assaulting PW2 and that no case had been instituted against him. He admitted that



- the jacket and walking stick were his items. He, however, contested that he did not participate in their recovery as he was long arrested when they were recovered. He also stated that when he was arrested, he left the keys to his house with his father [PW3]. He testified that he had seen the deceased a month before he was killed. The 1st accused was emphatic that he was being framed in the case.
28. Vincent Wepukhulu, the 2nd accused, also denied the information. He stated that he spent the entire day at Kamukuywa market on the 8th November 2020 with Mzee Rodgers [not a witness]. He admitted that the deceased was his brother, but denied there having been any land dispute between him and the deceased. He was, however, aware of a perennial land dispute between the 1st accused and PW3 over the land PW3 inherited from their father. He was surprised to be connected with the death of the deceased since he lived well with him and had even hosted the deceased and his wife in his house for 3 years and that they got their first 2 children under his roof. According to him, the death was caused by the longstanding land dispute between the deceased and PW3.
29. Margaret confirmed that the 2nd accused had truly spent the 8th November 2020 at Kamukuywa market. She also stated that on return the 2nd accused remained at home and even spent there. To Margaret, there was no way the 2nd accused had left their home in the night to kill the deceased.
30. The defence cases were subsequently closed. Parties filed and exchanged written submissions whose content will be considered in the analysis part of this judgment. In a snapshot, the defence contended that the prosecution failed to prove its case against any of the accused whereas the prosecution vouched for convictions on the basis of the evidence on record.

Analysis:

31. Having comprehensively captured and appreciated the parties' respective cases and evidence, the only issue that arises for determination is whether the prosecution proved the information of murder against the accused or any of them and if so, beyond any reasonable doubt.
32. In Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari -vs- Republic [2014] eKLR, the Court of Appeal established the elements that, if proved, constitute the offence of murder. It enumerated them as follows: -
- (a) the death of the deceased and its cause;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
33. This Court will, hence, interrogate each of the elements in turn.

The Death and its cause:

34. There was consensus between several prosecution witnesses and the accused that the deceased truly died. As regards the cause of the deceased's death, PW6 produced a Post Mortem Report on the findings from an autopsy he conducted. As a result of his examination, PW6 formed the opinion that the deceased died when he was slaughtered through the neck.
35. Since there was no other contradictory evidence on the cause of death, this Court, therefore, conclusively forms a finding that the deceased died from excessive bleeding and traumatic spinal dissection secondary to assault.
36. The first limb for the offence of murder is answered.



Who caused the death?

37. The totality of the evidence is that there was no single witness who testified on witnessing any of the accused killing or assaulting the deceased. The upshot is that the matter now revolves on circumstantial evidence. In such a scenario, this Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -
- (i) The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;
 - (ii) The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
 - (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
38. The foregone principles were set out in the locus classicus case of R -vs- Kipkering arap Koske & Another (1949) 16 EACA 135 and have repeatedly been used in subsequent cases including the Court of Appeal cases of GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR among many others.
39. The Court of Appeal in Musii Tulo (supra) in expounding the above principles expressed itself as follows:-
4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'
40. Further, the Court of Appeal in Sawe- Vs- Republic [2003] KLR 364 at page 372 had this to say regarding circumstantial evidence:
- In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.....
41. Later, the Court of Appeal in Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR had this to say on circumstantial evidence: -
- However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence



can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21:

It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial....

42. Returning to the case at hand, whereas several prosecution witnesses testified of a family land dispute involving the parties before Court, the 1st accused vehemently denied of such. Surprisingly, the 2nd accused also confirmed that their existed such a longstanding land dispute between the deceased, PW3 and the 1st accused.
43. This Court has carefully analyzed the evidence regarding the dispute. It is a fact that PW3 testified on the matter at length. He discussed how the dispute began, his role as an Administrator of their father's estate, the resistance he received from the accused where the 2nd accused was the leader, the fact that the deceased supported him and thereby became an enemy to the accused, the efforts PW3 and the Chiefs took to reconcile with the accused in vain and the accused's grandstanding that they will kill the deceased. The evidence on the prevailing dispute was well corroborated and this Court finds no difficulty in finding that indeed there was a dispute over the family land pitting at least the deceased, PW3 and the accused. Therefore, the 1st accused was untruthful in his defence.
44. Having found as much, this Court must now answer the question as to whether the dispute could have led to the death of the deceased. Generally speaking, not all land disputes lead to deaths of the parties. However, there are some instances where such eventualities occur. In this case, the deceased expressed his fear over his life based on the threats he severally received from the 1st accused. Such was attested to by PW2, PW3 and PW5. Each of these three witnesses interacted with the deceased differently. PW2 was the wife. She was well aware of the death threats her husband received from the 1st accused. The deceased even lodged complaints over the same to the Chief and the police. PW3 was the father of the 1st accused. He was also the Administrator of their father's estate. He was clear on the acrimony propagated by the accused over the land. It was that PW3 and the deceased had colluded and stolen land belonging to the accused. The 1st accused had severally vowed to slaughter the deceased. One such instance was when PW3 and the deceased had caused a Surveyor to visit the land. The accused chased the Surveyor away and the 1st accused openly told the deceased that he will either kill him or slaughter him. The Chiefs were also aware of the acrimony. There was also PW5. He was a close friend of the deceased. The deceased had told him of his fear that the accused wanted to finish him a day before he was killed.
45. Coupled with the above is the fact that the 1st accused's jacket was found to have the deceased's blood. One would naturally ask how that happened. According to the 1st accused, the recovery of the jacket happened when he had been arrested and he was not involved. He suspected PW3 who he had left him to watch over his house to have framed him up. As a result of the acrimony between the 1st accused and PW3, it will be a tall order for one to reasonably believe that indeed the 1st accused left the keys to his house with PW3 when he was arrested for two reasons. First, the 1st accused did not know that he was going to be arrested when he went to record his statement. This Court so states since the accused had earlier on been arrested, interrogated and released. There is evidence that many villagers were summoned by the police to record statements including the accused. Therefore, unless the 1st accused knew that he was going to be arrested and even if so, why would he intentionally leave the keys



to his house with someone they never related well with. That is quite baffling. The Court declines the invitation that the 1st accused left behind the keys to his house with PW3 and also rejects the assertion that the deceased's blood on his jacket was a way of framing him.

46. The second reason is that when the 1st accused's jacket and the walking stick were recovered; the post mortem examination on the body of the deceased had not been conducted. Therefore, even if it is to be taken that [though firmly untrue], PW3 had access to the 1st accused's house one would wonder where PW3 would have obtained the deceased's blood such that it would have been implanted on the jacket. It is, hence, apparent that the narrative that the manner in which the deceased's blood on the jacket was unknown to the 1st accused cannot hold. The 1st accused knew or reasonably ought to have known how the deceased's blood was on his jacket.
47. Given the longstanding acrimony the accused had with the deceased and the cumulative effect of the entire body of evidence including the persistent death threats, it can only be either that the 1st accused was the one who killed the deceased while wearing the jacket or alternatively he was present and wore the jacket when the deceased was killed for the blood to find its way to his jacket. It is also reasonably true that when the 1st accused realized the deceased's blood on his jacket, he decided to dispose it. However, since the 1st accused knew the jacket would be easily identified when found in the river, he instead decided to hide it away from the scene hoping that it would not be found. Further, this Court takes note of the fact that the deceased was slaughtered just like what the 1st accused repeatedly stated he will do unto him.
48. Whereas there was no evidence, whether directly or otherwise, that the 2nd accused was also present at the scene when the deceased was killed, there is ample and credible evidence that 2nd accused was the one spearheading the rivalry in the family. The 1st accused had teamed up with his uncle [the 2nd accused] to further their joint pursuit of what they believed was their stolen land against the deceased and PW3. Therefore, the accused had common intention which was well executed at the end of the day, but first is a legal discourse on the doctrine of common intention.
49. Section 21 of the [Penal Code](#) is on the doctrine of common intention and states as follows: -
- When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes 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.
50. The Court of Appeal in Nairobi Criminal Appeal No. 49 'A' of 2017 *Stephen Ariga & another v Republic* [2018] eKLR discussed the said doctrine in a case where police officers who had shot and killed a motorist who was stopped on a road block, but refused to obey the order to stop were convicted on account of the doctrine of common intention by the High Court.
51. In its judgment, the appellate Court stated as follows: -
- Turning to the issue of common intention, Section 21 of the [Penal Code](#), defines common intention as follows: -
- When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes 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.



What common intention implies was set out by the predecessor of the Court in *Wanjiru d/o Wamerio versus Republic* 22 EACA 521 as follows: -

Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

52. In dissecting the doctrine further, the Court stated as under: -

The ingredients of common intention were enunciated in *Eunice Musenya Ndui versus Republic*, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows: -

- (1) There must be two or more persons;
- (2) The persons must form a common intention;
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- (4) An offence must be committed in the process;
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

53. In applying the above ingredients to the facts of the case, the Learned Judges had the following to say: -

Applying the above ingredients to the rival submissions on the proof or otherwise of the elements of common intention as against the appellants, it is our finding that it was not disputed that the appellants are the only members of the patrol crew who shot at P.W.2' vehicle during the second shooting incident. This therefore satisfies the first ingredient of the need of two or more persons being participants in the execution of the act complained of. The second ingredient requires the forming of the common intention. It does not say that the said forming of a common intention must be before the execution of the act complained of. Both appellants were categorical in their testimonies and correctly so in our view, that their sole but separately formed reason for shooting at P.W.2's vehicle from the rear was to immobilize it. There is no evidence that the two consulted each other before firing at P.W.2's vehicle. The common intention which was to immobilize the vehicle was formed in the course of their separately intending to shoot at the rear of the vehicle with a view to immobilizing it. Ingredient two (2) is therefore also satisfied.

As for the 3rd ingredient, the unlawful purpose in the instant appeal does not result from the decision to shoot but from the end result of the shooting act complained of. We find nothing in the said ingredient to suggest that the unlawfulness of the act complained of can only result from factors that go to prove the onset of the action and not from the end result of the action. We find ingredient three (3) satisfied. As for ingredient four (4), it is undisputed and as correctly found by the trial Judge that the action resulting in the fatal shooting was not premeditated. That is why the Judge termed it unlawful, because it was unintentional. What the appellants intended by shooting at the rear of P.W.2's vehicle, which was accepted by the trial Judge was to immobilize the vehicle. Unfortunately for them, one bullet fatally injured the deceased. Ingredient four (4) was satisfied.

As for ingredient five (5), we find as did the trial Judge that P.W.2's vehicle was in motion. The intention to fire at P.W.2's vehicle was on impulse, allegedly provoked by the alleged



failure by P.W.2 to stop. The appellants ought to have known that since it was at night, there was the possibility of their ability to focus only on the rear tyres of the vehicle could have been impaired, resulting in the bullets landing on other parts of P.w.2's vehicle as it in fact did happen. That is why there were bullet holes at the rear of the vehicle instead of these being concentrated on the tyres as the appellants intended target. In this regard, we agree with the Judge's finding that the very fact that P.W.2's vehicle was in motion should have been warning enough for the appellants to anticipate the possibility of the presence of a person or persons other than the one propelling it. Likewise, it is also our view that there was the possibility of the occupants of P.W.2's vehicle being injured in the process of the appellants' attempt to immobilize it which was not also remote and could not be ruled out. The appellants therefore must be taken to have intended the consequences of their actions, and especially for their failure to exercise some restraint when discharging their firearms, especially at night and directed at a moving vehicle.

54. The above decision, therefore, gives this Court the appropriate guidance on how to handle the issue of doctrine of common intention as it unfolded in the instant case.
55. The first ingredient was satisfied in that there is cogent evidence that the 1st and 2nd accused acted together in their pursuit of the stolen land from PW3 and the deceased. That also settles the second ingredient on the common intention. On the third ingredient, the accused purposed to 'silence' the deceased by either killing or slaughtering him as repeatedly said by the 1st accused. That was an unlawful action poised against the deceased. As the deceased was eventually slaughtered, that settles the fourth ingredient that an offence was committed. The last ingredient was also satisfied since the death of the deceased was a probable consequence of the prosecution of the accused's unlawful purpose.
56. The upshot, therefore, is that Section 21 of the *Penal Code* is applicable in the circumstances of this case. This Court is satisfied that the accused jointly and with common intention committed the offence. As such, on the basis of the doctrine of common intention, this Court finds and hold that the accused, committed the unlawful act which caused the death of the deceased.

Malice aforethought?

57. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
58. Section 206 of the *Penal Code* defines 'malice aforethought' 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.



59. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.
60. In *Joseph Kimani Njau vs Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki vs Republic* (1993) KLR 171, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions* (1975) AC 55". (emphasis added).

61. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -
- a. The nature of the weapon used; whether lethal or not;
 - b. The part of the body targeted; whether vulnerable or not;
 - c. The manner in which the weapon is used; whether repeatedly or not;
 - d. The conduct of the accused before, during and after the attack.
62. Evidence has it that there was a longstanding land dispute in the family and that the accused vowed to ensure that the deceased was eliminated so that they could get their land which was allegedly 'stolen'. The 1st accused had threatened the deceased with death and on a day before he was killed, the deceased told his friend as much. The threats were real.
63. Further, the deceased was not just killed, but he was slaughtered just like the 1st accused had vowed to do. The accused definitely disregarded any lawful process of adjudicating upon the land dispute and took it upon themselves to end the life of the deceased. The accused, therefore, deliberately decided and planned to kill the deceased.
64. Having regard to the nature of the period of the unsettled dispute and the manner in which the accused executed their intentions on the deceased, there was a clear state of mind on the part of the accused to cause harm to the deceased.
65. The prosecution proved malice aforethought in this case.



Disposition:

66. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and was eventually elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
67. Having said as much, the State proved all the ingredients of the offence of Murder. As such, the Accused, Edward Wafula and Vincent Wepukhulu, are hereby found guilty of murdering Protus Wasilwa Wanyonyi.
68. Each of the accused is accordingly convicted of Murder pursuant to Section 322(2) of the *Criminal Procedure Code*.
69. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Kimani, Learned Counsel for the Accused.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.

