



**Republic v Kirui & another (Criminal Case 31 of 2018)  
[2025] KEHC 2422 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2422 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 31 OF 2018  
SM MOHOCHI, J  
MARCH 3, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH KIPSIGEI KIRUI ..... 1<sup>ST</sup> ACCUSED**

**ALEX KIBET KIGEN ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. This case brings to the fore the notion of “herd mentality”, “mob mentality” or crowd mentality giving rise to mob violence of what is diabolically referred to as “mob violence”. This is a classical case where the deceased was subjected to a two and a half an hour, cruel inhuman degrading punishment from 12.30pm to 3am by a group of persons.
2. Joseph Kipsigei Kirui and Alex Kibert Kigen, were charged with counts of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that, on the 9<sup>th</sup> December 2017 at Kapsumbeyo Location Kuresoi South Sub-County, Nakuru county, jointly with others not before the court murdered Hezron Tonui.

**Prosecution’s Case**

3. PW1, David Kiprono Rugut Testified that, on 9<sup>th</sup> December, 2017 at midnight he was at his place of Tenwek as a security guard of the Tenwek Hospital and he was with another, Kesot and saw a young man walking going and coming back on the road flashing a torch on the shops at the town where they take tea at the center, away from the Hospital where his colleague Tessot was guarding.
4. The hospital neighbor’s the shops and they were having tea at the shops where Tessot guards the shop. They never spoke to him but shortly he came back and they followed him while he was proceeding and he went and hid somewhere, they saw him hiding at the end of the shops in a small bush.



5. That they went to the bush and found 2 young men and they had no IDs on them and were unresponsive when they spoke to them.
6. That they never knew them before and escorted them to an area with light and noted they were strangers. Tessot called chief, he said if they are strangers they bound them until morning.
7. That some young men watching football came and took over while they were preventing them from beating them. By then they were totaling to eight (8) people. That Alex Kibet was one of them assaulting, Kipsigei and Kipyegon started beating the 2 young men using Cyprus trees.
8. Both had the Cyprus trees. They stopped them as the chief had directed.
9. The 2 young men started screaming while being beaten and within short time the two suspects had been stripped naked.
10. Then Franklin called the police and the police were unresponsive. They tried to call the chief as they were concerned that the suspects will be seriously injured. He went to call Augustine Chessot who tried to stop them but they refused.
11. At 2.00a.m. Hon Lisa Chelule a woman rep, passed by and when the crowd saw a vehicle they fled. The women rep, sent his driver to see and he tried to ask and they were unresponsive.
12. The witness went and sent and tried to take him to Chelule and one agreed while one remained seated at verandah. They covered him as he was seriously injured he was 10 meters away at 4.00a.m. That he never saw external injuries or blood
13. That, at 6.30 a.m., Franklin came to check on him and found he was dead. They met Kipsigei headed home and he was with Kipyegon deceased whose second name he never knew. That they spoke to Kipsigei and told him.
14. The police came and took the body and left with Franklin who identified the perpetrators. He later recorded his statement. That Alex Kibet and Kipsigei were arrested while others are at large.
15. That he knew Kipsigei and Alex before. Witness identified accused 2 on the screen. That he does not know the suspect on the screen. (The witness unable to identify accused No. 1).
16. In cross examination the witness clarified that;The incident started at midnight and they were using electricity lighting.Along the road they had a torch, they pursued the suspects for 20 meters from town.He never knew the suspect who kept on going and coming back.He had initially gone for up to the end of the shops and coming back, he had a torch even as there was electric light.He was not speaking.He was in a jacket (grey) a shirt and t-shirt.The 2nd suspect was where the first suspect went to hide.It was in Tenwek. Yes, they now found them together next to one another 2nd suspect never had a torch.2nd suspect attempted to run and they suspected them as criminal.They never tied them until they went where there was light.He was with Kipsigei and Kipyegon.Kipsigei did not have any weapon.Kipsigei was with Kipyegon.They took the 2 suspects to where they work at the veranda.There were no other persons, where they were.Amongst them he had a fimbo and the rest had no weapon.They bound them with ropes, Tessot gave the rope. Tessot had a weapon.He has not seen the rope they used, the police took plus the suspects clothes, the police collected the pieces of stick, used in the assault.He and Tessot never assaulted the suspects.They pursued them to detect their mission.Chief ordered they tie them and stay with them to the morning.The crowd that came had weapon.The young men cut the weapon and beat them with the same.No, they never called for reinforcement to beat the suspect.The suspects raised alarm.That Kipsigei used his right hand to beat deceased with a freshly cut tree “fito.”The fito is not in court.Kipsigei was in a black jumper and black



trouser. The witness saw him hitting the deceased. When they surrounded the suspects, he saw him hitting the head. No blood. He has not seen the clothes which he gave the police. He called Tessot as he had to check on his cow, when he received call that suspect was dead. When he left the deceased was not dead and he left him with Tessot. He never killed deceased. Tirgaga he knows, Rasta, Akwero he doesn't know Kiprono. Franklin is nyumba kumi and he is the one who had the names. He knows Kibet, Kipyegon and Kipsigei. The mob beat them from midnight to 2.00a.m. He does not know who gave fatal blow.

17. PW2 Augustine Kiplagat Tembor, resident of Tendwet testified under oath that, he knew both the accused and the deceased who lived in their village same with accused number 2 in their village, same with accused 2.
18. He recalled that on 9<sup>th</sup> December, 2017 at 12. 30a.m he was asleep and heard a knock on the door upon opening he found it was a watchman of local center hospital who told him that had apprehended a thief, he accompanied him to the scene and found 2 persons whose hands were bound by ropes, at the road at the center. There was a crowd of 5 people:
  - i. Kipsigei – Accused 2
  - ii. Kibet – Accused 1
  - iii. Kiprono
  - iv. Akwero
  - v. Kipyego
19. The last 3 are not in court, that he found them with Cyprus branches they were beating the 2 suspects whom they said were thieves.
20. He urged them to lock them somewhere until dawn. The suspects did not have anything on them, he left them beating the suspects and in the morning was told one suspect died.
21. The Keringet Police came and collected the body and he went to the station and recorded his statement.
22. In cross-examination the witness stated that he is 70 years old.; At mid night he was asleep. He was called by David Rugut. Yes, David was there when incident occurred. He met Frankline but could not recall if he mentioned him. He does not know what accused 1 does but knows him as a villager in Tendwet and he bought land. He lives there with his mother and wife. That the witness was using center light mast to see, it was near 50 meters. That maybe a crowd formed after he left. That, he asked suspects where they came from, and one claimed he worked for women rep – Lisa, he survived. That he never recorded this as he was never asked by the police. That the suspects claimed they had come shopping. That he had not seen any weapon in court. That he later found deceased had been killed. That he did not know if accused were the killers.
23. In re-examination the witness stated that; It was in the morning when he found deceased had succumbed and died and that at the scene the deceased was alive bound together with another and both were alive. That, the ones (suspects) he described were beating suspects until he left them still beating suspects.
24. PW3 Frankline Kiplangat Keter testified that on 9<sup>th</sup> December, 2017 at 12.20 midnight he was asleep and his wife went out and heard of a commotion outside and she told him and he went out to the road and found 2 people who had been beaten. That the noise was from the road.



25. When he went there, he attempted to talk with one suspect and he was unresponsive. The 2<sup>nd</sup> suspect explained where he came and worked for Women Rep. Hon. Lisa Chelule. He tried to explain why he was there, and he was beaten to silence.
26. One of suspect had been beaten, naked and was unconscious. The 2<sup>nd</sup> suspect, was still with some energy but was naked, he found them being beaten with branches of Cyprus. He identified the attackers who were initially 6 and 2 more joined them.
27. He saw the accused there. That 1<sup>st</sup> accused is a villager in Tendwet also 2<sup>nd</sup> accused is a resident of Tendwet
28. He found the 1<sup>st</sup> accused beating suspects, he threatened him, should he stop them. 2<sup>nd</sup> accused came later and when he disembarked from his car he encountered a suspect who was trying to flee and the 2<sup>nd</sup> accused pushed the suspect. He never saw the 2<sup>nd</sup> Accused beating the suspects.
29. He called area chief, who told him that they confine them till morning, he called assistant chief, as well as the police who were unresponsive.
30. The vehicle of Mama County came, the driver came and identified one of their worker and she left. Mama County sent her team and took her servant and left the weaker one.
31. The next morning, he was told that that his body was still there, he saw that he was dead and called Keringet Police Station. The police came and took body to the mortuary.
32. When Mama County came to the scene the crowd dispersed. That the witness arrived at the scene before 2<sup>nd</sup> accused and remained there until Mama County arrived.
33. In cross-examination by Mr. Mongeri, the witness clarified that;His wife woke him up, she never recorded a statement.He found 6 people and watchman like people and two more joined.He saw PW1 when he arrived there and PW1 left him there. When PW1 left accused 2 had already arrived.At paragraph 2 of his statement witness reads, “between 9<sup>th</sup> to 10<sup>th</sup> December, 2017.Concurred that his statement states 15 people.That not all persons in the crowd were armedThey (the unarmed) were not amongst the accused.Reasserted he was telling the truthThey were naked which he never recorded in his statementThat the 2<sup>nd</sup> accused threatened him which he never recorded.He knows Kiprono.That Akweru was using bamboo and that Rasta and his brother was kicking the deceased.He saw kicks but not specifically all points where the deceased was being kicked.He was was trying to get police response like 5 meters away.He was there as well as PW1 and saw what he saw.The Accused 2 was not armed.That they dispersed when Mama County arrived.That is, he saw the weapons he can identify them, even after 5 years.That the branches were being pulled off the trees.There were a few broken pieces that were collected by a police officer Kambo.He concurred that when he left him at the centerscene the deceased was alive and breathing but found him dead on the opposite side inside the storm gutter/ditch.He never saw injuries and never went near the body.He never went to touch the body but went and saw.He knew because the body was still naked.He knew it was him as he called the police.He never saw a distinct mark on the deceased body.It was 1<sup>st</sup> time he saw deceased.He never saw any clothing.When he left him he was naked and clothing was all shredded owing to the beating.Deceased was stark naked.Accused 2 was using is right hand, using a Cyprus tree. He was hitting his private parts.Driver of Women Rep is Serem, second victim was Aron.Hon. Lisa Chelule the witness was not aware if they recorded statement.
34. PW4 Benard Kipkurui, Rotich, recalled that on 17<sup>th</sup> December, 2017 he was living in Tendwet and at 10p.m. he heard screams and came out, he woke his neighbor Tergaga and they went to see the person and found him being assaulted by the accused.



35. The screams were coming from adjacent to the tarmac road he was living 50 meters away from the scene of this incident. When he arrived there he found the person being assaulted was known to him, he was Benard he only know one name. There were 2 people being assaulted.
36. There was one person, kept aside and he had been tied on hands and bound on signboard. He never knew him. He was being assaulted with Cyprus tree branches. He could identify the assailants. They were Kipsigei, Kibet, Tergara, Kiprono, Kipkorir, Okwero and Rasta.
37. He identified accused 1 and accused 2 on the dock as the assailants. That the 1<sup>st</sup> accused was using the tree branches to assault deceased. That the 2<sup>nd</sup> accused was using his bare hands. That he had not seen the other assailants up to now. That the two accused were at the scene thought.
38. That, he went back to sleep in his house. The suspects were accused of being thieves. That he was there for 3 – 2 minutes when he identified them, he asked them to stop but they threatened him forcing him to re-treat back to his house.
39. That the one being assaulted was stark naked. The next morning, Keringet police came and collected the body from a ditch, he went to record his statement at Keringet Police Station.
40. In the morning alarm was raised and he came out and saw the body of the deceased the person that was being assaulted at night
41. In cross examination the witness concurred to have recorded his statement on 14<sup>th</sup> December, 2017 and read out Paragraph 2 agreeing that he mentioned those he saw. That as for Kibet and Kipsigei, Kipsigei is Chomba. That he never recorded Kibet in the statement.
42. That he does not name the full names of Kipsigei, he only knew 2 names Kipsigei Chomba, but in statement he only mentioned Chomba whom he had known since 2016. He drives a bookshop vehicle. Yes, Trigaga joined the assailants and started attacking victims. Yes, he took Cyprus tree from Chomba and used it. Trigaga escaped. Trigaga was assaulting the deceased. The suspect was tied up on pole by a rope. There was a street light illumination. Street light was almost 50 meters. The deceased was stripped naked. The clothes were aside, trouser was black and shirt was white. I don't know if police collected the cloths. I never saw Frankline at the scene. I know Frankline. I arrived at the scene between 10.00 – 10.10 and left after 2 – 3 minutes. Kibet was there when I was leaving. No he was there. I take alcohol. I take "best" I had imbibed a little "best" I was not drunk and was still in my senses. I was in my senses.
43. PW5 Aaron Kipkuri Ngetich testified how in December 2017 he was working at Tendwet, as a herder in the boma of Hon Lisa Chelule, she was a Women Rep. He never knew the deceased in this case nor the accused's.
44. That on 9<sup>th</sup> December, 2017, he was at work with Wilson when they finished work at 7 p.m. and headed to Tendwet. At Tendwet he went to Cheruiyot bar and they imbibed alcohol partook until he left him there and went home.
45. When the witness wanted to go back at 2.00a.m. on his way home, he found 10 people who demanded for his Identity card which he never had on him and he was accused of being a thief and forced return to the "Center" 2 km away
46. That he was beaten together with another one person whom he never knew. When they met the crowd he could not defend himself as he was inebriated. That they beat him up with Cyprus branches. The witness could not recall those who assaulted him for almost for 3 hours and he lost consciousness until



morning. That he regained consciousness in the house, his employer came by and intervened while he was unconscious.

47. In cross examination the witness stated that;He is Alf Ngetich Kipkurui and on 9<sup>th</sup> December he went to Imbibe at 7 p.m. and left at 2 am.Yes I left at 2 a.m.I am certain of my time.Yes I met the crowd.They started.I was at the bar until 2 a.m.I was beaten after 2 a.m.At 10p.m. I was in the bar and not by roadside to be beaten.I never saw anyone else being assaulted.I was not by roadside at 10, 11, 12 or 1 a.m.I never identified my attackers.
48. PW6 Dr. Biketi, testified how he conducted the postmortem on 13<sup>th</sup> December, 2017 at 14.35 hours he found a body of 27 years old male.The body had superficial injuries and bleeding under the skin both hands and legs. The opened the body and found: -Hematoma under skullFractured skullAfter examining buds cause of death severe head injury due to blunt trauma to head.He produced the A23 for (post mortem report) as Exhibit 1.

### **Defence Case**

49. DW1 Joseph Kipsigei Kirui, the 1<sup>st</sup> accused testified that he was aware of the charges of killing and he does not know the deceased he first heard of him in this case.
50. He recalled that on 9<sup>th</sup> December, 2017 he left home at 5p.m. to watch soccer match at Pelican Bar, and started drinking while watching match until 10.20p.m. when he left the Pelican club and headed home. While he was outside he saw a crowd of over 12 people who had gathered and blocked the road.
51. When he arrived, he asked one of them what had happened and was told that they had apprehended some criminals. The crowd was beating them with branches of cypress tree.
52. That, he asked if there was a watchman and asked him to call chief to rescue those who were being beaten. That the watchman called chief and activated his speaker on his phone, chief told him to remain with those people until in the morning.
53. The crowd disintegrated and scattered and they left. He went home. He was with Mike Sitonik and was arrested after 6 months as he was playing pool in the same center.
54. In cross examination by Ms. Mburu prosecution counsel the 1<sup>st</sup> accused clarified that on the 9<sup>th</sup> he left his house at 5 p.m. and went to Lengwet trading centre within Keringet Division with Mike Sitonik
55. That he found a crowd assaulting 2 people who he never knew. When he left the club, David Kiprono PW1 was at the road he was the watchman. There were 2 watchmen. David was guarding the hospital.
56. He never spoke to David, but spoke to the watchman nicknamed “Mupya” to call the chief. That David greeted them outside the club and he would be lying if he is implicating him. That it is not true that David stopped him from assaulting the two and that David is just like a neighbor with normal relationship. He left club and found the crowd.
57. That he is a driver and used to drive a Pajero for someone who used to sell book as drove the school book vehicle.
58. That he did not know Augustine Temboi – PW4 who would be lying in implicating him that he saw him assaulting
59. That he saw the crowd he did not know their names but he can identify them. They were many over twelve and he could not tell the exact number.
60. That he saw Kirui, Kipkorir and he only identified three.



61. DW2 Michael Sitonik recalled on 9<sup>th</sup> December, 2017 he was leaving home at 4 p.m. and went to Tendwet center to watch soccer match. He was with Joseph Kisgei there until 11.30 the club is known as Day Club
62. When they left club they went on road and found a crowd gathering and they knew that two people had been forced to sit down, Kipsigei asked what was wrong and he was told that they had tried to talk to two people who were not responsive and were suspected to be thief.
63. That the Watchman called chief and activated his loud speaker. The chief told watchman to retain the suspects until the next morning.
64. The crowd scattered and they proceeded with Kipsigei whom he never saw assaulting anyone.
65. In cross examination the witness conceded that it's like the two were being beaten but he never saw them being beaten. They both left the club. He never saw them being beaten.
66. That both him and accused 1 are telling the truth. He identified the watchman nickname is piggy who he knew and he guards the center, he could not recognize anyone else.
67. That it was a soccer match day and people come from far, he never saw Kirui and Kipkorir and he does not know them.
68. That the person who was selling them beer was Rebecca who can confirm he was there.
69. DW3 Alex Kibet Kigen, 2<sup>nd</sup> accused knew of the charges facing him but never knew the deceased. He recalled that on 9<sup>th</sup> December, 2017 he was at work in a club in Keringet place 313 until 11 p.m. He was with his sister in law and he used to work with her, her name is Naomi Chepkurui.
70. That they worked until 11.20. Then they boarded the probox and went and found a crowd. They blocked him threatening to attack them. Shortly two cars came from behind hooting and space was created and he passed and went home.
71. That he never disembarked from the car or beat the deceased and never knew him. He prayed for forgiveness as he never committed the offence.
72. Cross-Examination by M/S Mburu Senior Prosecutions counsel the witness responded as follows;He closed business at 11.15He had a white Probox.He found crowd at center of Tendwet.I saw crowd it was at night and never knew what they were doing.They threatened to stone his vehicle.The crowd was huge. He bought land there and was still new having purchased shamba. That his bar is at Keringet 10 – 11 kilometers away.He had run the Keringet bar from 2015 just below 2 years.Patrons of Tendwet do not frequent bars in Keringet.At the time he was living in a rented house in Keringet. he lived in Tendwet and he was on way home.Had had lived in Tendwet for slightly above one year.He had started knowing a few people like accused 1 as he would come to Keringet.He cannot recall when he was arrested.He was arrested for selling alcohol after licensed hours.He recall being arrested.He never recorded any statement, he could not recall being interrogated.He never came of the Probox at that scene.He was with Naomi Chepkurui and she is here.He never identified any other person.He never saw anyone being beaten. That his vehicle being at the sceneThe next morning, he heard people were assaulted and one of the victim died. Anyone claiming he came off his car and attacked the deceased it is a lie. Never knew the witnesses. He closed at 11p.m. and he had my Probox.People were saying Kibet's vehicle was there. he was driving on his way home.



73. DW4: Naomi Chepkurui, testified that Allan Kibet accused 2 is her brother. She recalled 9<sup>th</sup> December, 2017, they were at work at Keringet at bar they closed at 11p.m. at 11.45 p.m. got to Tendwek, crowd blocked road threatening them.
74. They stopped and after 20 minutes it cleared and he went home. That Alex never disembarked all along.
75. In Cross-Examination by M/s Mburu Senior Prosecutions counsel the witness identified the 2<sup>nd</sup> accused person as her brother, same mother, she denied that the 2<sup>nd</sup> accused person was his in-law. That she was with accused 1 on the material day.
76. At Tendwet they found a crowd that blocked them but he did not disembark and none of them disembarked. She, heard the threat “Pita kama were ni mwanaume.”
77. She could not identify anyone as she never disembarked and it was dark. She could not identify anyone. She never knew what was happening for the 20 minutes as they never came out.
78. That she never had any interest to look outside the car as she was tired.
79. The one that came next was after 5 minutes she could hear the sound of the motor vehicle. That her evidence is not false. She came to say the truth.
80. In Re-Examination the witness reaffirmed that the 2<sup>nd</sup> accused person Alex is her brother and she was telling the court the truth.

### **Determination**

81. I have carefully considered all the evidence availed before court together with the extensive filed written submissions and the only issue in question in this case is whether the prosecution have proved whether the accused persons caused the death of the deceased persons and was there actual malice?
82. The offence and punishment for murder is provided for under Section 203 and 204 of the [Penal Code](#). The said provisions provide that;
  - “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
  204. Any person who is convicted of murder shall be sentenced to death.”
83. To establish the offence of murder, the prosecution is required to prove beyond reasonable doubt, proof of death, proof that the death was caused by the accused, by an unlawful act or omission and that, the unlawful act or omission was through malice aforethought.
84. 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.”

### **Proof of Death**

85. PW4 confirmed that he saw the body of the deceased the morning after the incident which evidence of death is corroborated by PW1.

86. The post mortem reports for deceased was produced byPW6 Dr Biketi as P-Exh 1. The post mortem report revealed that the cause of death severe head injuries, accordingly the prosecution has satisfied this condition beyond reasonable doubt.

Whether the death was caused by an unlawful act or omission by the accused

87. The motive of the killing the deceased person may not have come out clearly, or circumstances why the deceased had to be assaulted by a mob even after the chief had directed the suspects be detained and restrained until morning.

88. It was PW1’s evidence that;

“some young men watching football came and took over while we were preventing them from beating them. By then they were totaling to eight (8) people. That Alex Kibet (2<sup>nd</sup> Accused) was one of them assaulting, Kipsigei(1<sup>st</sup> Accused) and Kipyegon started beating the 2 young men using Cyprus trees”.

“Both had the Cyprus trees. We stopped them as the chief had directed. The 2 young men started screaming while being beaten and within short time the two suspects had been stripped naked”.

“That, Franklin called the police and the police were unresponsive. They tried to call the chief as they were concerned that the suspects will be seriously injured. He went to call Augustine Chessot who tried to stop them but they refused”.

“That he knew Kipsigei and Alex before. He identified accused 2 on the screen and was unable to identify accused No. 1 on the screen.”

“Kipsigei did not have any weapon”

89. PW2 responded to the scene he found a crowd of 5 people, Kipsigei – Accused 2, Kibet – Accused 1, Kiprono, Akwaro and Kipyego, he found them with Cyprus branches they were beating the 2 suspects whom they said were thieves. He urged them to lock them somewhere until dawn.

90. PW3 responded to the scene and when he went there, he attempted to talk with one suspect and he was unresponsive the 2<sup>nd</sup> suspect explained to him where he came from and that he worked for Women Rep. Hon. Lisa Chelule. He tried to explain why he was there, and he was beaten to silence.

91. That one of suspect had been beaten, naked and was unconscious. The 2<sup>nd</sup> suspect, was still with some energy but was naked having been beaten with branches of Cyprus. He identified the attackers who



- were initially 6 and 2 more joined them. That he saw the accused's there and that he recognized them as the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused are both residents of Tendwet village.
92. That, he found the 1<sup>st</sup> accused beating suspects, he threatened PW3, should he stop them. That the 2<sup>nd</sup> accused came later and when he disembarked from his car he encountered a suspect who was trying to flee and he pushed the suspect. That he never saw the 2<sup>nd</sup> Accused beating the suspects.
93. That, he called area chief, who told him that they confine them till morning, he called assistant chief, as well as the police who were unresponsive and vehicle of Mama County the crowd fled.
94. PW4 equally identified the accused's and their respective roles. That they equally did threaten this witness.
95. The fact that the accused persons in the company of others decided to subject the deceased and PW5 to a two-and-a-half-hour ordeal of torture from midnight up to 2am would be indicative of the harrowing cruel inhuman punishment. The 1<sup>st</sup> and 2<sup>nd</sup> Accused were not only identified as being at the scene but also participating the assault upon the suspects
96. The Identification of both the accused is unimpeached, the watchman PW1 involved in the initial apprehending of the Deceased, PW2, PW3 and PW4 positively identified them describing their role in the assault.
97. The action by the accused and the others not before court constitutes a criminal offence as was held in Republic v Mohammed Wanyoike & another [2017] eKLR the court had this to say about mob justice:
- “The concept of mob justice is nothing more than a group of people taking the law into their own hands. There is nothing justice in the unlawful acts committed by a mob. There is no principal of justice by the majority. The fact that the mob did not premeditate to commit the offence cannot be a good defence. Anyone who is part of the mob is duty bound to arrest the suspect and take him to court. Administering kicks and blows to the suspect in the pretext of mob justice does not make those acts lawful. The mob becomes the investigator, the trial court and the administer of the sentence. What is the extent of the punishment administered by the mob” One year, two years, life imprisonment or the death penalty. Such actions cannot be allowed in a country based on democracy and the rule of law.”
98. The offence is captured under Section 21 of the *Penal Code*. The section provides 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 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.”
99. Its beyond any doubt that the death of Hezron Tonui was not only unexpected and sudden but it was caused by an unlawful act to wit “mob violence” or “mob injustice”
100. The defence evidence can be summarized as mere denial while admitting that they were present for a significant period of time but did nothing, the same cannot be plausible. One defence witness alleges to have sat in as motor vehicle at the scene for almost 20 minutes without looking outside. The same is unbelievable.
101. While this court notes that, the offence was committed by the accused with other not before court that might have been prosecution witnesses this court nonetheless finds that effort at preventing the



ongoing assault was thwarted by threats made against those witnesses that wanted the violence to stop and the said threats were by the accused themselves.

102. In the case of *Bonaya Tutut Ipu and Another v R*, [2015] eKLR the Court cited with approval the persuasive authority of the Ugandan Court of Appeal case of *Chesakit vs UG*, Criminal Appeal 95 of 2004 where the court held:

“In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

103. And in its decision in the case of *Rex v Tuper S/O Ocher* [1945] 12 EACA 63 the predecessor of this Court held:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily, an inference of malice will now more readily from the case, say of a spear or knife than from the use of a stick...”

104. Furthermore in the cases of *Katana vs Republic (Criminal Appeal 48 of 2021)* [2024] KECA 463 (KLR); and *Ali Salim Bahat & another vs Republic* [2019] eKLR this Court observed that:

“...their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased Equally, it established malice aforethought on the part of the appellants”

105. As for the extreme violence meted upon two victims of severe beatings from 12.30 to 3.00am a period of 2.5 hours while threatening anyone who attempted to stop the violence, is a clear indication of the intended consequences, that is death thus malice aforethought is to be accordingly inferred.

106. In totality, having considered the evidence adduced in this case it is my finding that the prosecution has proved its case against the accused beyond reasonable doubt. I find the accused’s herein Joseph Kipsigei Kirui and Alex Kibert Kigen, guilty of the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* and is hereby convicted accordingly.

107. A pre-sentence report and a victim impact report shall be prepared and served to enable mitigation and sentencing.

It is so ordered.

**JUDGEMENT READ, SIGNED AND DELIVERED AT NAKURU THIS 3<sup>RD</sup> DAY OF MARCH, 2025**

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**MOHOCHI. S. M.**

**JUDGE**

