



**Republic v Soita & another (Criminal Case 38 of 2016)  
[2025] KEHC 4854 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4854 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 38 OF 2016  
JRA WANANDA, J  
APRIL 25, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**EDWIN NYONGESA SOITA ..... 1<sup>ST</sup> ACCUSED**

**PRISCAH NANJALA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on 10/05/2016 at Jerusalem village in Mbaraka sub-location in Lugari District within Kakamega County they murdered one Gregory Augo. The accused persons are mother and son.
2. From the record, the accused persons were first presented before Court on 19/05/2016 before G.K. Kimondo J. Mr. Marube Advocate was appointed to represent the accused persons. They were then taken to the Moi Teaching and Referral Hospital where mental assessment was conducted and both accused persons certified fit to stand trial. After a series of hiccups, they eventually took plea on 14/06/2016. They denied the charge and a plea of not guilty was entered.
3. After further proceedings touching on the issue of bail/bond and attempted plea bargain and several adjournments, the hearing eventually commenced on 3/10/2018 before S.M. Githinji J who partly took the evidence of one witness. Subsequently, by consent of the parties, the trial commenced afresh before E. Ogola J who took the evidence of PW1 – PW6 after which the prosecution closed its case. During the intervening period, Mr. Mathai Advocate had taken over as Counsel for the accused persons. Upon the Judge being transferred, I took over the matter and during taking of directions under Section 200(3) of the Criminal Procedure Act, the defence elected not to ask for recall for any witnesses and both parties then asked that the matter proceeds from where it stopped. It was then agreed by



consent that I proceed to rule on “case to answer” on the basis of the material on record. Pursuant thereto, the proceedings were typed and by my Ruling delivered on 3/11/2023, I returned a verdict of a “case to answer” against the accused persons and placed them on their defence. Both accused persons elected to conduct their defence by giving unsworn statements.

4. I will now proceed to recount the testimony given by the respective witnesses.
5. PW1, Caroline Nekesa testified that the deceased was a “child” that she had lived with, that on 10/05/2016 she was seated in her compound and the deceased was working at a neighbour’s home when at around 9 am, she saw the accused persons approach the deceased whom they called, and that she heard the 1<sup>st</sup> accused ask the deceased to touch the 2<sup>nd</sup> accused’s ears if he were man enough. He also stated that the accused persons were mother and son. She stated that she heard the accused persons asking the deceased why he was involved with one Mama Osama, that after some altercation, she saw the accused persons hitting the deceased, the 1<sup>st</sup> accused hit the deceased on the stomach then took a big stick to hit him on the left side of the neck and the deceased fell down, the 2<sup>nd</sup> accused then used the back of a hoe to hit the deceased 3 times on the head while the deceased lay down, a crowd formed and the deceased was taken to a nearby medical facility and later to Lumakanda hospital where he was pronounced dead. She identified the alleged murder weapons – a hoe and stick. In cross-examination, she stated that neither of the accused persons was initially armed, and also that after the altercation, the deceased also tried to look for a stick to fight but did not find one.
6. PW2, Scholastica Nafula Situma testified that the deceased used to school with her children and the accused persons were her neighbours, that on 10/05/2016, her son and the deceased were working at a neighbour’s home, she was inside the house when at 9 am she heard the raised voice of the 2<sup>nd</sup> accused arguing and asking the deceased why “he was bringing” issues of one Mama Osama to the home of the 2<sup>nd</sup> Accused. PW2 stated that Mama Osama was also a neighbour, that in the course of the argument, the 1<sup>st</sup> accused emerged and took a log from the fence which he used to hit the deceased in the middle part of the body, the deceased fell down, the 2<sup>nd</sup> accused then used a hoe to hit the deceased 3 times, PW2 screamed and a crowd formed and the accused persons ran away. She added that the deceased had wounds on the head, nose and shoulders, he was rushed to hospital and she later heard that he had died. She, too, stated that the accused persons were mother and son and she too, identified the alleged murder weapons - log (stick) and hoe. In cross-examination, she stated that to her knowledge, the relationship between the accused persons and the deceased was good and that in her view, the disagreement between the accused persons and the deceased arose when the 2<sup>nd</sup> accused stated that the deceased was also a man as the 1<sup>st</sup> accused.
7. PW3, Raphael Masoni, testified that on 10/05/2016 he was working together with the deceased in the compound of a neighbour “smearing mud” on a house when at about 9 am, the 1<sup>st</sup> accused appeared and called the deceased who went as called, soon an argument ensued between the 1<sup>st</sup> accused and the deceased culminating into a fight, the deceased fell down when the 1<sup>st</sup> accused hit him with a log, the 2<sup>nd</sup> accused then joined in, came with a hoe which she used to hit the deceased on the neck while he was already down, and that the 1<sup>st</sup> accused also hit the deceased on the neck. He stated that the 2<sup>nd</sup> accused even threatened to also cut him (PW3) with the same hoe when he tried to intervene. He added that they rushed the deceased to Lumakanda hospital where he was pronounced dead. She, too, identified the alleged murder weapons – log (stick) and hoe. He, too, stated that he did not know of any bad blood between the accused and the deceased and reiterated that the accused persons are mother and son. In cross-examination, he, too, stated that initially, the 1<sup>st</sup> accused had no weapon. In re-examination, he reiterated that the 1<sup>st</sup> accused continued to beat the deceased even when he was already down.



8. PW4, Jackson Nyagol, testified that the deceased was his 1<sup>st</sup> born child, and that in May 2016 he attended the post-mortem exercise for the deceased and identified the body. He stated that the body had injuries on the head.
9. PW5, Constable Michael Cherutich testified that he was the investigating officer in the case, that on 10/05/2016 he accompanied the DCIO to the scene of murder which had been reported at around 12.30 pm, where they found the body of the deceased lying at his mother's house. He stated that the deceased was bleeding from the mouth, nose and ears, the e accused persons' house had been set on fire, at the scene he collected the alleged murder weapons - jembe and stick - by that time the accused persons had already been arrested. He testified that he took testimonies from some witnesses at the scene, on 12/05/2016 he attended the post mortem and he is the one who moved the body to the mortuary. He stated that during his investigations, he gathered that the deceased had picked a quarrel with the accused persons upon which the 1<sup>st</sup> accused used a stick to beat the deceased while the 2<sup>nd</sup> accused used the jembe to hit the deceased on the head. He stated that the accused persons and the deceased were neighbours and they had a good relationship. He then produced the jembe as Exhibit No. 1 and the stick as Exhibit No. 2. In cross-examination, he stated that it is the deceased who first attacked the 1<sup>st</sup> accused. He also reiterated that initially, none of them was armed, and that the exhibits did not have any blood stains.
10. PW6, Dr. Edward Vilembo, testified that he works at Bungoma County Hospital as a doctor, that he performed the post mortem on the body of the deceased and also filled in the Report, and that he formed the opinion that the cause of death was severe head injury due to assault. He then produced the Report. On his findings, he stated that the body had a scalp haematoma on the mid-parietal bones with obvious bone fractures and also, injuries on the neck and right shoulder.
11. As aforesaid, by the Ruling delivered on 03/11/2023 after the Prosecution closed its case, this Court found that the accused persons had a case to answer and placed them on their defence. As further stated, both accused persons then gave unsworn statements and were not therefore cross-examined. They did not also call any other witness.
12. DW1 was the 1<sup>st</sup> Accused, Edwin Soita Nyongesa. He testified that on 10/05/2016, he left work at Pan Paper and headed home to herd his cattle, when he finished herding, he walked to the gate outside and while standing at the gate, he saw the deceased coming from his gate which was adjacent to theirs and he had a stick in his hand. He stated that the deceased jumped and grabbed him by the neck, he (1<sup>st</sup> accused) let go of his shirt which the deceased was holding him by and ran to his home but the deceased followed him, telling him that he must die "today". He stated that the deceased then hit him on the head with the stick and he started bleeding, that he grabbed the stick from the deceased and hit him on the back of the neck and it broke, and the deceased ran to his home stating that he was going to bring a panga. He stated that he fled to the Pan Paper Police Post and reported the matter and then went to the clinic for treatment, that while there, the police came and arrested him and took him to the police station and that when his mother came to visit him, she, too, was arrested. The 1<sup>st</sup> accused stated that the Friday before 10/05/2016, the deceased had been arrested and taken to Turbo police station as he had slashed somebody with a panga, that the deceased's mother went to the 1<sup>st</sup> accused and asked him to give her some money to enable her get the deceased released and he gave her Kshs 10,000/- upon which the deceased was released and the deceased being a drug addict and drunkard, the 1<sup>st</sup> accused was to deal with the 2<sup>nd</sup> accused (1<sup>st</sup> accused's mother) and he did not know whether it was the loan that irritated the deceased and led to the attack. He maintained that it is him who was attacked and that he only acted in self-defence.



13. DW2 was the 2<sup>nd</sup> accused, Priscah Nanjala. She stated that the 1<sup>st</sup> accused is her son. She testified that on 10/05/2016, she woke up in the morning to prepare her children for school, after they left, she went to her farm in the forest and at around 9-10 am, the deceased's mother phoned her, asking where she was and asked her to return home because there was an incident. She stated that when she returned, people received her and started beating her, the sub-chief came and put her in his motor-cycle and she could see her house was on fire, a land-rover from the police station came and took her away and she was later taken to Court and charged.
14. Upon close of the defence case, the parties filed written Submissions. The defence, through Messrs Mathai Maina & Co, filed the Submissions dated 11/11/2024 whereas the State, through Prosecution Counsel Okaka A. Leonard, filed the Submissions dated 8/11/2024.

### **Defence Submissions**

15. Mr. Mathai, Counsel for the accused persons cited the case of Elizabeth Waithiegeni Gatimu vs Republic [2015] eKLR and also the case of Moses Nato vs Republic [2015] eKLR in respect to the requirement on the Prosecution to prove the case beyond reasonable doubt. He also cited the case of Republic vs Andrew Omwenga [2009] eKLR. He then submitted that death of the deceased is not disputed in this case. On whether the death was unlawfully caused, he cited Article 26(i) of the Constitution and submitted that not all homicides are unlawful. He cited the case of Republic -Versus-Guza Mbizi Sio Wesonaa 1948 15 EACA 65 which, he submitted, articulates that death is excusable by law in circumstances of reasonable defence to oneself, property, as a result of accident or misadventure, or in protection of life or property of a third party. He urged that in proving the cause of death, Section 213 of the Penal Code provides acts and circumstances which an inference as to death can be made by way of evidence to prove the cause thereof. He also cited the case of Republic -Vs- Smith 1959 ALL ER 193. Counsel submitted that the post mortem Report produced herein confirms that the deceased died of cardio-pulmonary arrest due to severe injury T Card transaction and STI following assault, that from the evidence of PW1, a fight broke out between the 1<sup>st</sup> accused and the deceased whereby the 1<sup>st</sup> accused hit the deceased with a stick while the deceased was also trying get a stick from his parent's house and that as such, the 1<sup>st</sup> accused was defending himself against the perceived threat that was posed by the deceased and that therefore, the death was not caused as a result of unlawful means but as a result of self-defence.
16. On "malice aforethought", Counsel submitted that it describes the mens rea or the mental element required for conviction for the offence of murder, that the term imports a notion of culpability or moral blameworthiness on the part of the offender and that if "malice afterthought" is lacking, then the unlawful homicide will not be murder but manslaughter. He cited the case of Rex Versus Tubere S/O Ochen 1945 IZEACAc63, the case of Conliffe vs Goodman 19501 ALLER 724 and several others and submitted that Courts have sufficiently inferred "malice aforethought" from the nature and type of weapon used and multiple severe bodily injuries to the victim. According to him, the prosecution has failed to demonstrate that the accused persons committed the act with "malice aforethought", that PW1 stated that when she passed the 1<sup>st</sup> accused, he was alone and not armed with any weapon nor did he have the alleged stick stated to have been used, that PW1 also stated that when the 2<sup>nd</sup> accused called the deceased, the intention was to solve the conflict that arose on 19/05/2016 and she was not armed with any weapon.
17. He submitted further that PW1 also stated that the 2<sup>nd</sup> accused was between the 1<sup>st</sup> accused and the deceased initiating the talks between the two and unfortunately a fight broke up between the deceased and the 1<sup>st</sup> accused and the 1<sup>st</sup> accused rushed to get a stick while the 2<sup>nd</sup> accused ran and came back



with a jembe. He also submitted that PW1 stated that the 2<sup>nd</sup> accused called the deceased in a friendly tone and that according to PW2, the two were discussing an issue concerning one Mama Osama who apparently was having sexual relationships with both the 1<sup>st</sup> accused and the deceased and it is this issue of Mama Osama which sparked the fight as was also confirmed by PW1. Counsel urged that from the said evidence, it is clear that the use of the stick and jembe was a spontaneous reaction as a result of the fight that broke between the deceased and the 1<sup>st</sup> accused and that in any event, a stick cannot be equated to a dangerous weapon or to the least, a weapon. He reiterated that the 1<sup>st</sup> accused was also defending himself from being attacked by the deceased. He cited Section 17 of the [Penal Code](#) and urged that applying it to the facts of this case, the deceased was trying to get a stick from the fence of his parent's house in order to assault the 1<sup>st</sup> accused but fortunately for the 1<sup>st</sup> accused, he was able to get a stick of his own and which he used to hit the deceased who fell down and it was therefore as a result of the 1<sup>st</sup> accused protecting himself. He submitted that had the deceased not run to get the weapon, the 2<sup>nd</sup> accused would not have also gone to look for something to defend herself. In conclusion, he submitted that the prosecution has not proved the offence of murder beyond reasonable doubt and urged that they be acquitted under Section 215 of the [Criminal Procedure Code](#).

### Prosecution Submissions

18. In respect to the essential ingredients of the charge of murder, Mr. Okaka, Prosecution Counsel, cited the case of *Roba Galma Wario v. R* [2015] eKLR. On the expert opinion on record, he submitted that the testimonies of PW1, PW2, and PW3 who saw the deceased being hit on the head could easily provide cogent basis for accepting the opinion that the cause of death was severe head injury due to assault. On whether the accused committed an unlawful act that caused the death, he urged that the recognition by PW1, PW2 & PW3 was in broad daylight, that they not only lived in the same neighbourhood with the accused but also recognized them as the persons who beat up the deceased and which beatings had not been sanctioned by law. On “malice aforethought”, he submitted that Section 206 of the [Criminal Procedure Code](#) provides ways that this ingredient could manifest and that Courts acknowledge that it is more frequently established by, or inferred from surrounding circumstances. He cited the Court of Appeal case of *Bonaya Tutu Ipu & another v. R* (2015) eKLR and also the case of *Tube re s/o Ochen vs. R* [1945]12 EACA 63.
19. He submitted that the multiple internal and external injuries discernible from the post-mortem Report should be telling, that the recovery of the weapons of choice - a hoe and a club, including the multiple times the deceased was struck, remained unshaken during cross-examination. He urged further that if choice of weapon, manner of use, delicate sites the strikes were directed at (head, neck and stomach) were all to be considered, anyone could safely infer that those beatings evinced intention to cause grievous harm, if not death. On whether the accused acted with “common intention”, Counsel cited Section 21 of the [Penal Code](#) and also the case of *Njoroge v R* (1983) 1 KLR 197. He urged that the accused persons' roles at the scene are on record, and that for some reason, both weaponized what was thought to be an interrogation of the deceased about a Mama Osama. According to him, when the deceased was called, the objective harboured ensued, that witnesses saw the 1<sup>st</sup> accused strike the deceased down, that as he lay down, the 2<sup>nd</sup> used that opportunity to inflict fatal injuries and that as such, what to infer of the 1<sup>st</sup> accused's acts should be straightforward. On the limb of “motive”, he urged that Section 203 is crystal and that displeasure with how the deceased could have dealt with the said Mama Osama should be irrelevant. He cited Section 9(3) of the [Penal Code](#) and submitted that to the extent that death was caused by malice afterthought, murder, as an offence should be complete, proof of motive notwithstanding.



20. On the “alibi” defence, Counsel urged that why belated disclosure of “alibi” often goes to the credibility of such defences should not be ignored, that by claiming that she was in a forest at the times material, the 2<sup>nd</sup> accused seems to foster an “alibi”, for the first time, via unsworn statement. He cited the Court of Appeal case of *Ganzi & 2 Others vs. R* (2015) 1 KLR 52 and urged that weighed against her unsworn statement should be the probative value of the recovered hoe and the credibility of direct evidence from 3 eye-witnesses, each placing her at the scene. According to him, the witnesses’ testimony should be capable of belief considering they withstood cross-examination and bore no grudge. He urged the Court to find that the prosecution evidence displaces the “alibi”. On the issue of “self-defence” or “provocation”, Counsel urged that although the 1<sup>st</sup> accused alleged that the deceased came on his own and attacked him, the circumstances of the incident do not lend credence to that assertion considering that PW1, PW2 and PW3 all saw the 1<sup>st</sup> accused come and call the deceased, how he was interrogated and fatally wounded was detailed by PW1 and others, only the 1<sup>st</sup> and 2<sup>nd</sup> accused were seen armed and weapons recovered, that no one else saw the deceased grab 1<sup>st</sup> accused’s shirt, let alone assault him, that after deceased succumbed, beatings from a mob were directed at the perpetrators as testified by PW7 and the admission by the 2<sup>nd</sup> accused just before her rescue. He submitted that in view of the mob, reasons why the 1<sup>st</sup> accused would carry an injury even as he fled for refuge at a police post should not be a surprise.
21. He observed that the story told in his defence was not put to the witnesses during cross-examination. According to him, the 1<sup>st</sup> accused was not a man defending himself. He cited the Court of Appeal case of *Victor Nthiga Kiruthu & Anor v R* (2017) eKLR and submitted further that the circumstances hardly establish any imminent danger, no one saw the deceased return with a panga, both accused remained in control of the events before the 2<sup>nd</sup> accused inflicted the fatal blow multiple times. He cited the case of *Abraham Sindani Makasi v Republic, Eldoret Cr. Ap No. E004/2020 [2024] eKLR* and urged the Court to convict.

### **Determination**

22. Section 203 and 204 of the *Penal Code* under which the accused is charged provide for the offence of murder and the punishment for it. Under these provisions, the prosecution has a duty to prove, beyond reasonable doubt, that the accused, by an unlawful act or omission caused the death of the deceased through “malice aforethought”. The sections read as follows:
  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.”
23. In order for the Court to determine that an accused person committed the offence of murder, the prosecution must establish the following elements; (a) the death of the deceased, (b) proof that the accused person(s) committed the unlawful act which resulted in the death of the deceased: and, (c) malice aforethought.
24. The death of the deceased and cause thereof are not disputed. The deceased was pronounced dead on arrival at Lumakanda hospital on 10/05/2016 and from the post mortem performed by PW6, the cause of death was established to be a severe head injury due to assault.
25. On whether there is proof that the accused persons committed the unlawful act which resulted in the death, PW1 narrated that she was seated in her compound at around 9 am and the deceased was working at a neighbour’s home when she saw the accused persons approach and call the deceased, she heard the 1<sup>st</sup> accused ask the deceased to touch the 2<sup>nd</sup> accused’s ears if he were man enough. She stated



- that she heard the accused asking the deceased why he was involved with one Mama Osama, after some altercation, she saw the accused persons hitting the deceased, the 1<sup>st</sup> accused hit the deceased on the stomach then took a big stick and hit him on the left side of the neck and the deceased fell down, the 2<sup>nd</sup> accused then used the back of a hoe to hit the deceased 3 times on the head while the deceased lay down.
26. The above evidence was corroborated by the testimony of PW2, who testified that her son and the deceased were working at a neighbour's home, she was inside the house when at around 9 am she heard the raised voice of the 2<sup>nd</sup> accused arguing and asking the deceased why "he was bringing" issues of one Mama Osama to the home of the 2<sup>nd</sup> accused. PW2 stated that Mama Osama was also a neighbour, that in the course of the argument, the 1<sup>st</sup> accused emerged and took a log from the fence which he used to hit the deceased in the middle part of the body, the deceased fell down, the 2<sup>nd</sup> accused then used a hoe to hit the deceased 3 times, PW2 screamed and a crowd formed and the accused persons ran away. There was further corroboration of this account in terms of the testimony of PW3 who testified that he was working together with the deceased in the compound of a neighbour "smearing mud" on a house when at about 9 am, the 1<sup>st</sup> accused appeared and called the deceased who went as called, soon an argument ensued between the 1<sup>st</sup> accused and the deceased culminating into a fight, the deceased fell down when the 1<sup>st</sup> accused hit him with a log, the 2<sup>nd</sup> accused then joined in, came with a hoe which she used to hit the deceased on the neck while he was already down, and that the 1<sup>st</sup> accused also hit the deceased on the neck. He stated that the 2<sup>nd</sup> accused even threatened to also cut him (PW3) with the same hoe when he tried to intervene.
27. On his part, PW6, the doctor who performed the post mortem on the body of the deceased testified that the cause of death was severe head injury due to assault. The Report indicates that external examination of the body revealed the presence of mid parietal scalp haematoma, obvious bony crepitus, blunt injury to posterior cervical region (nape), obvious echymosis and also bruising of the right shoulder. These injuries are no doubt consistent with the blows that PW1, PW2 and PW3 claimed to have seen the accused persons inflict on the deceased before he succumbed.
28. My observation is that the evidence of the prosecution witnesses was consistent and cogent, the sequence of events was corroborated and the testimonies were also not shaken during cross-examination. It is my considered view that the evidence was sufficient to establish that the accused persons committed the act that resulted in the death of the deceased.
29. The prosecution having proved the actus reus, the next issue is whether "malice aforethought" can be inferred from the actions of the accused persons. The offence of murder is complete when "malice aforethought" is established if, as prescribed in Section 206 of the [Penal Code](#), the evidence proves 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."



30. In the case of *Morris Aluoch v Republic* [1997] eKLR), the Court of Appeal quoted *Rex vs Tubere S/O Ochen* (1945) 12 EACA 63 that:

“If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days late.

31. In the case of *Hyam v DPP* {1974} A.C. the Court held inter alia that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

32. In the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR, the Court of Appeal stated as follows;

“..... In the persuasive decision of *Chesakit v Uganda*, CR App No 95 of 2004, the Court of Appeal of Uganda stated that 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.”

33. In this case, from the evidence tendered in Court, it is clear that the accused persons struck the deceased multiple times, with a hoe and a big stick/log, and the areas of the body targeted or hit, included, inter alia, the head, neck and stomach.

34. On the use of a stick in an assault leading to death, in the case of *Morris Aluoch v Republic* (supra), the Court of Appeal, again cited from the case of *Rex vs Tubere* (supra), the following quote:

“With regard to the use of stick(s) in cases of homicide, this Court has not attempted to lay down any hard and fast rule. It 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 flow more readily from the case, say, of a spear or knife than from the use of a stick; that is not to say that the Court takes a lenient view where a stick is used. Every case has, of course, to be judged on its own facts. The same remarks applies as regards the view that which this Court takes were a ruptured spleen is the cause of death.”

35. As pointed out above, every case must depend on its own facts. In this instant case, my finding is that the element of “malice aforethought” is easily inferred from the nature of the weapons used – a hoe, in conjunction with a big stick, which was also described as a “log”. “Malice aforethought” is also inferred from a consideration the parts of the body targeted – head, neck and stomach. The accused persons aimed their blows at such sensitive and vulnerable areas of the body and clearly knew, or ought to have known, that hitting a human being repeatedly with the kind of blunt weapons they used, on the head, stomach and/or neck could lead to the death of the person or at the least, cause him grievous bodily harm. I form the view that it was the intention of the accused persons to cause maximum injuries on the deceased since inflicting of the repeated blows by both of them in unison, simultaneously, was completely unnecessary and excessive use of force in the circumstances. To my mind, these facts easily establish the existence of “malice aforethought”.



36. I note that the 1<sup>st</sup> accused raised the defence of self-defence and the 2<sup>nd</sup> accused alleged an “alibi”. In respect to the burden of proof relating to the defences raised by the accused persons, the Court of Appeal, in the case of *Benson Mbugua Kariuki v. Republic* [1979] eKLR, guided as follows:

“The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was not provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge.”

37. In his defence, the 1<sup>st</sup> accused claimed that on 10/05/2016, he left work at Pan Paper and headed home to herd his cattle, when he finished herding, he walked to the gate outside and while standing there, he saw the deceased coming from his gate which was adjacent and he had a stick in his hand. He claimed that the deceased jumped and grabbed him by the neck, he (1<sup>st</sup> accused) managed to escape and ran to his home but the deceased followed him telling him that he must die “today”. He claimed that the deceased then hit him on the head with the stick and he started bleeding, that he grabbed the stick from the deceased and hit him on the back of the neck, and the deceased ran to his home stating that he was going to bring a panga. He stated that he fled to the Pan Paper Police Post and reported the matter and then went to the clinic for treatment, that while there, the police came and arrested him and took him to the police station and that when his mother came to visit him, she, too, was arrested. This account is contradicted by the testimony of PW1, PW2 and PW3 (all eye-witnesses) who all testified that it is the 1<sup>st</sup> accused, either alone, or in the company of his mother (2<sup>nd</sup> accused), who emerged and called the deceased from a neighbour’s home where the deceased and PW3 were working. The claim that it is the deceased who confronted the 1<sup>st</sup> accused with a stick which he hit him with and that the 1<sup>st</sup> accused simply dispossessed the deceased of the stick and hit the deceased back is also contradicted by the witnesses. The witnesses were emphatic that none of the protagonists was initially armed and it is after the altercation escalated that the 1<sup>st</sup> accused ran and fetched what PW1 referred to as a “big stick while PW2 and PW3 referred to it as a log, and hit the deceased with. The weapon was produced in evidence and in my mind, it is actually a log of wood.

38. The testimony of the eye-witnesses was consistent and was not shaken in cross-examination. No reason or motive was also given by the 1<sup>st</sup> accused as to why all these witnesses would so easily gang up against him and give false testimony against him. He did not allege that the witnesses held any grudge against him. At no time also did the 1<sup>st</sup> accused’s Counsel even advance this purported theory when cross-examining the Prosecution witnesses. It is clearly an afterthought and a deliberate distortion of the true picture of events. Even in his demeanour, the 1<sup>st</sup> accused did not strike me as a truthful or credible witness. In this case, I find that the allegation of self-defence was an afterthought and further, it was not supported by the evidence on record. The evidence that the deceased was hit, he fell down and was again hit multiple times on the head, neck and shoulders by the accused persons while lying helplessly on the ground dispels any indication of self-defence.



39. The 1<sup>st</sup> accused also claimed that a few days before the incident, the deceased had been arrested because he had slashed somebody with a panga, that the deceased's mother approached the 1<sup>st</sup> accused for a loan to bail out the deceased whereupon the 1<sup>st</sup> accused gave her Kshs 10,000/-. The 1<sup>st</sup> accused seems to allude that it is his pestering for repayment of the loan that could have irritated the deceased and led to the attack. This defence is very doubtful as it was never put to any of the witnesses during their testimony, not even the investigating officer. Secondly, it is pure speculation even by the 1<sup>st</sup> accused himself as he did not state that this is what the deceased alleged during the confrontation. It is purely a figment of his imagination. According to PW1, PW2 and PW3, from what they overheard the protagonists argue about, the confrontation seems to have revolved around a romantic relationship with a neighbour by the name Mama Osama. None of them mentioned overhearing any talk about any loan.
40. On her part, the 2<sup>nd</sup> accused alleged that on 10/05/2016, she was at her farm in the forest when at around 9-10 am, the deceased's mother phoned her, asking her to return home as there was "an incident". She stated that when she returned, people started beating her, the sub-chief came and put her in his motor-cycle and she could see her that her house had been set on fire, a land-rover from the police station came and took her away and she was later taken to Court and charged. Again, I find this allegation to be obviously false as PW1, PW2 and PW3 all placed the 2<sup>nd</sup> accused at the scene of crime and all also gave an account of the 2<sup>nd</sup> accused's active participation in the confrontation and assault, including the part where she continued hitting the deceased with a hoe even after the deceased fell down after the initial attack by the 1<sup>st</sup> accused and even as the deceased lay helplessly on the ground. It is no surprise that even in his Submissions, Counsel for the accused persons "steered clear" of this purported defence of "alibi" and never mentioned or argued it at all.
41. In this case, I am clear in my mind that the accused persons committed the act that resulted in the death of the deceased and further, that there was "malice aforethought" in their actions. In these circumstances, I am satisfied that the prosecution has through the facts and evidence, proved the charge beyond reasonable doubt. The evidence remained credible, cogent and irresistible to point at the accused persons as the culprits.
42. For the above reasons, I find both the accused persons guilty of the charge of murder contrary to Section 203 of the [Penal Code](#) and as a consequence, convict them both.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 25<sup>TH</sup> DAY OF APRIL 2025**

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**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Both Accused persons present in open Court

Mr. Mathai for both Accused persons

Mr. Okaka for the State

Court Assistant: Brian Kimathi

