



**Republic v Wambia & 5 others (Criminal Case E014 of 2022)  
[2025] KEHC 5876 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE E014 OF 2022  
REA OUGO, J  
MAY 2, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JACOB BARASA WAMBIA ..... 1<sup>ST</sup> ACCUSED**

**SAUL WEKESA WAMBIA ..... 2<sup>ND</sup> ACCUSED**

**TIMOTHY SUNGUTI LUKORITO ALIAS TIMONA LUKORITO .... 3<sup>RD</sup>  
ACCUSED**

**CAPTON WAFULA WANYONYI ALIAS MATURU ..... 4<sup>TH</sup> ACCUSED**

**SARAH NANJALA MAKOKHA ALIAS SARAH COSMA ..... 5<sup>TH</sup> ACCUSED**

**REUBEN WANJALA MAKOKHA ALIAS REUBEN COSMA ..... 6<sup>TH</sup> ACCUSED**

**JUDGMENT**

1. Jacob Barasa Wambia ( 1<sup>st</sup> Accused), Saul Wekesa Wambia ( 2<sup>nd</sup> Accused), Timothy Sunguti Lukorito alias Timona Lukorito ( 3<sup>rd</sup> Accused), Capton Wafula Wanyonyi alias Maturu ( 4<sup>th</sup> Accused), Sarah Nanjala Makokha alias Sarah Cosma ( 5<sup>th</sup> Accused) and Rebeun Wanjala Makokha alias Reuben Cosma (6<sup>th</sup> Accused) are jointly 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, “ on the 7<sup>th</sup> May 2022 at Mawangi “B” village Matulo sub-location , township location in Webuye West sub-county within Bungoma County murdered Kennedy Wekesa.
2. Each accused person pleaded not guilty. The prosecution called eight (8) witnesses to prove their case.



## Prosecution Case

3. Caroline Naswa Mumoki ( Pw1) testified that she knows all the accused persons . Jacob, 1<sup>st</sup> accused is the son of her in law. Saul, 2<sup>nd</sup> accused is a son of her in law. Timothy 3<sup>rd</sup> accused is related to her but he is not a close relative. Capton, 4<sup>th</sup> accused is their village elder, Sarah, 5<sup>th</sup> accused is a neighbour and Reuben. 6<sup>th</sup> accused is the son of the 5<sup>th</sup> accused and is a neighbour. The deceased Kennedy Wekesa was her stepson. Kennedy used to live with her. On 7.5.2022 Kennedy and Kevin left for the shamba. At about 9.00 am she decided to go and cut naiper grass for her cow. She heard people singing circumcision songs at the river. She saw a crowd of people come with the deceased singing. Kennedy was in the middle. 3 people were ahead of Kennedy. The 3 people were Jacob, Saul, and Tony Mukasa, who is not in court. Kennedy had been beaten. She thought they were taking Kennedy to the police as Kennedy had been suspected of stealing. She decided to go and inform her laws. She went back to the house to change. She heard a motorbike and she went to her door, she saw Saul and Jacob on the motorbike. Kennedy was in the middle. Saul was the rider, and Jacob was assisting him. They dumped Kennedy outside his place. She went to check on Kennedy, but he was not talking. Kennedy's head was swollen, and his mouth, hands, and chest too. Kevin was there. Later, she got a call that Kennedy had died, she attended his post-mortem. In cross-examination, she told the court that they had had disputes over land with the family of Jacob( 1<sup>st</sup> accused) and Saul( 2<sup>nd</sup> accused). She did not see a chicken in her home on the 7.5.2022 but she heard Kennedy was accused of stealing a chicken. She did not raise an alarm by shouting thief thief. She heard Mama Lona shout thief thief. Kevin was also beaten on the said day. Kevin and Tobias followed the group she saw. She did not witness Kennedy being beaten.
4. Kevin Wekesa ( Pw2) testified that he knows all the accused persons, Kennedy was his brother. On 7.5.2022 at 9.00 am, he decided to join Kennedy who was at the shamba . He saw Jacob, Saul, Tony, Mama Sarah and her son the 6<sup>th</sup> accused come with Kennedy from the river. They were singing circumcision songs. They were many people who had rungu and even pangas. Jacob and Saul had rungu and the 6<sup>th</sup> accused had a spade. He saw them beat the deceased, they led him to the market and beat him there. He followed them they continued to beat Kennedy. He went back home. Saul later dropped off his brother. Kennedy was not talking, nor could he even sit. He took Kennedy to the hospital. Kennedy died. Kennedy had injuries on the head, chest, and legs. Jacob also beat him and tied him with a rope. In cross-examination, Pw2 testified that Jacob tied his hands at the back and beat him. This was at 11.00 am after Kennedy was arrested. Rajab too was arrested. They alleged he stole the chicken as he was being beaten. He was with his mother when they took Kennedy home. Kennedy had injuries. He followed them to the marketplace. He saw about 50 people. He identified the accused persons in court Jacob, Saul Tony and Mama Sarah, and her son. Jacob, Saul, and Mama Sarah had rungu which they used to beat the deceased. He did not see Timothy. He saw the 4<sup>th</sup> accused beat the brother he slapped him and gave him blows on the head. Jacob was not there when Kennedy was taken back home.
5. Tobias Wafula Murunga ( Pw3) testified that he knows all the accused persons. On 7.5.2022, he was at his shamba at about 9.30 am. He heard shouts of “thief thief”. He left his shamba to go check along the Malaba Matulo road. On reaching the place, he found Saul, Jacob Timona, and Mama Sarah beating the deceased with a rungu. Wanjala was there too. Each one of them had a rungu. He told them to stop beating the deceased and to take him to the police station. They stopped beating him. They were 10 to 15 meters away. On their way, they met the 4<sup>th</sup> accused, the village elder. Kennedy tried to run away and they ran after him and brought him back. The accused person, including the village elder, beat up the deceased. They beat him, leading him to the market area, singing songs of circumcision. He took a video and people stopped him from taking it. This was happening inside the sugarcane farm. At



- the market area, they left him helpless. Saul put on a motorbike and took him to his boma. Saul and Barasa are his cousins. He heard them say the deceased had stolen a chicken. On cross-examination, Pw3 testified the persons who were there were about 10 people and he found six of them beating the deceased. The other 4 were watching and each accused had a rungu. He never heard that a person called Yator had been beaten for stealing a chicken. He did not see Pw1 and Pw2. Mama Sarah was there where the deceased was being beaten.
6. Justus Juma Lukorito (Pw4) testified that he is a village elder of Mawangi “B”. He knows all the accused persons. On 7.5.2022, he got a report from a lady called Gladys that there was a chicken in the house of the deceased. He advised her to go and check if she had lost any chicken. At 7.30 am he got a call from Aaron Juma asking him to go to Kennedy’s and that a thief had been found there with a chicken. he went there and found Rajab arrested. He had a chicken. There were many people there. He stopped the people from beating him. Rajab told him Kennedy had given him the chicken. They decided to take Rajab to Matisi police station. The 4<sup>th</sup> accused came with his motorbike. Jacob had 50/-. The 4<sup>th</sup> accused needed 150/- to fuel the motorbike. The 5<sup>th</sup> and 6<sup>th</sup> accused persons were not there. The 1<sup>st</sup> and 3<sup>rd</sup> accused persons were there with many other people who were not in court. He decided to go look 100/-. He left Jacob and 4<sup>th</sup> accused there. On returning, he found Jacob and Rajab there. Rajab told them Kennedy had given him the chicken. The people decided to go and look for Kennedy. He heard the people decide they would not take Rajab alone to the police station. He left for a funeral. He heard later that Kennedy had been beaten. Mary informed him the next day that her chicken, bucket, and blanket had been found at the deceased’s place. Kennedy and Rajab were staying together. None of the accused persons reported to him that the deceased was a thief. In cross-examination, he testified that all the accused persons are related to the deceased. The 1<sup>st</sup> and 2<sup>nd</sup> accused had boundary disputes with the family of Kennedy. He found a crowd of people he could not estimate their number. The 5<sup>th</sup> and 6<sup>th</sup> accused were not there. He did not see the 4<sup>th</sup> accused beat Rajab. The people there had sticks from tree branches. He does not know what the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> accused had in their hands.
  7. Mary Nalika (Pw5) testified that on 7.5.2022, she was informed by her husband that her things had been stolen from her home. Later she found her bucket and blanket at the deceased’s home. She did not know the cause of death of the deceased.
  8. David Wekesa Murunga ( Pw6) testified that on 7.5.2022, went to visit his daughter, who told him that Kennedy had been killed. He identified his body at the mortuary, and the post-mortem was done. In cross-examination, Pw6 told the court he had a dispute between his wife and his brother, but it was resolved. He has not had a land dispute.
  9. Doctor Brian Inunua Kenywi (Pw7) testified that on 10.5.2022, he did a post-mortem on the body of Kennedy Wekesa. The deceased was a male, African, and the body was well preserved. On external appearance, the deceased had multiple wounds on the left upper limb, at the posterior forearm and posterior arm, a swollen left hand, multiple wounds on the right upper limbs at the posterior arm and posterior forearm, right shin wounds bilaterally, wound on the anterior chest ( lower chest) on the right side superficial. on the digestive system, the stomach had both fluid and solid contents. On the head, there were multiple perioral wounds and perinatal wounds, both upper and lower lips. There was 3 anterior scalp wounds and 2 posterior scalp wounds. on the nervous system, there was left left-sided parieto-occipital subdural haematoma, and on the spinal column, there was cerebellar tonsillar hematoma. He formed the opinion that the cause of death was severe head injury due to left subdural haematoma from multiple blunt force trauma to the head with blunt objects.
  10. No. 231207 P.C Edwin Onyango ( Pw8) who is attached to the DCI Webuye told the court that on 7.5.2022 he was the duty officer. He got a call from the OCS Matolo police post Inspector Ruto that a



case of mob justice had been reported at Matulo area. Caroline Nausa had reported that her stepson Kennedy Wekesa, had been subjected to mob justice on allegations that he was suspected of having stolen a chicken. The victim had died, and the body was at Webuye hospital. They visited the facility and confirmed the same. The body had multiple injuries. He took statements from the witnesses, and in their statements, they identified suspects who were persons well known to them who had participated in assaulting the deceased. On 10.5.2022, a post-mortem was done on the deceased. On 20/21/5/2022, an operation was mounted to arrest the suspects. They arrested six suspects, namely: Jacob Barasa Wambia, Saul Wekesa Wambia, Timothy Sunguti Lokiorito alias Lukorito, Capton Wafula Wanyonyi alias Matutu, Sarah Nanjale Makokha alias Sarah Cosma, and Reuben Wanjala alias Reuben Cosma. He forwarded the file to the office of the ODPP who recommended that the suspects be charged with the offence of murder. The initial report was one of mob justice made by the step mother. The reporter was not at the scene. She did not name any suspects as she reported. Some witnesses were able to identify the suspects. They were from the same village and some were related to the deceased. There was a report of a stolen chicken. The deceased was killed after being suspected of stealing a chicken. The deceased was not named in the case of the stolen chicken. The chicken was recovered from the deceased's house and taken to the village elder who handed it over to the owner. He stated that he knew of a witness called Kevin Wafula Munyundo, he did not trace him. They conducted their investigations after two weeks. In cross-examination, Pw8 testified that Caroline reported that the deceased was attacked by people known to her. As the investigating officer he concluded that there was insufficient evidence to charge the accused persons because some of the witnesses were inconsistent. There was inconsistency in the weapons used despite the witnesses being at the scene. The incident of burglary was reported after the death of the deceased. He also stated that he recommended that the accused persons should not be charged because of a pre-existing land boundary dispute and also that one Rajab who is alleged to have stolen the chicken was not found. He could not find an independent witness.

## Defence Case

11. Jacob Barasa Wambia gave a sworn statement. He testified as follows: On the 7.5. 2022, there was a funeral at a neighbour's place called Wanyonyi Ford. He slept there, helping with the work. He left the place to go change clothes so that he could go back there. He went home and changed. On his way on the road he met with a group of ten people, David Melabi, Justus Juma Lukorito a village elder of Mwangi " B", Tony Mukasa, Gladys Melabi and Kevin Muyundo who were in the said group. They had 2 boys, one of them was Yatola Wekesa and Rajab. Yatola is Kevin who testified in court. They were tied because of a kuku and they had been beaten. He asked Justus who told him that the two had been found with the kuku and that they must be taken to the police station so that the owner could be informed. They decided to look for transport to take them to Matisi police station. he had 50/-. They got a rider called Capton. Jackton decided to get 100/- from home to add to his 100/-. Mukasa delayed. Capton left because of the delay. They lacked the means to take them. He went to the matanga. He left them with Gladys and the others. At the matanga, he found the chief, and he told him that there were thieves along the roadside. He stayed at the matanga until 5.00pm. He did not see Kennedy Wekesa that day. Kennedy and Yatola, and his cousins. They have a family dispute and maybe that is why they said he was there. The dispute is between his father and Kennedy's father. It has been there since he was born.
12. Saul Wekesa Wambia , the 2<sup>nd</sup> accused testified as follows; on the 7.5.2022 he was in his home in the morning. They had a matanga a neighbour's wife had died. The neighbour is called Fred Wanyonyi. 7.5.022 was the burial day. As he prepared to go for the funeral, he heard screams; a woman was screaming, it was Mama Caroline. She was shouting thief thief. He left his boma to go to the boma. He found mama Caroline shouting thief thief towards the swampy area that leads to the river. He went along with her and found Rajab had been arrested with a kuku. Tony Mukasa and Okumu Kiluwake



were there as a crowd of children. Tony and Okumu had arrested the thief with the kuku. Justus Juma Lororito came and asked Rajab where he had gotten the kuku. Rajab told them Kennedy had given him the kuku. Rajab had been beaten. Mukasa told people not to beat him. he did not know the others in the crowd. They went up to Kennedy's place. They found Kevin Wekesa, Yatola. They asked him the whereabouts of Kennedy. He left Mukasa with them as he went for the matanga. Mukasa was with Tony Mukasa, Lokorito, Okumu Kiuake, Tobias Murunga and Yatola. He stayed at the matanga until 2.00 pm since he had visitors. On his way back home he saw Kennedy lying on the mutaro (ditch). He stopped a boda to assist take Kennedy to hospital. Kennedy was alone. He got a boda called Daniel Munyalo. They helped each other, and they carried Kennedy to his door. Caroline asked them why they were taking him to his door yet he was injured. He told her that they had no money to take him to the hospital and said to her that if she had money he should take him to the hospital. He does not know why they would testify against him. He knows that they have a boundary dispute at home. This could have caused them to testify against him. They are cousins.

13. Daniel Munyalo testified as follows; he is boda boda person. On the 7.5.2022 he was doing his business from Webuye to Malaha. On reaching Matolo stage about 10 meters he saw a crowd of people. Saul saw him and called him. He asked him to help transport his cousin who had been injured and was besides the road. They put him on the bike and took him to his home. He left them there. He did not see anyone in home. He was the rider and Saul was holding the deceased.
14. Timothy Sunguti Lokorito, the 4<sup>th</sup> accused told the court that; on 7.5.2022 at 7.00 am he went to cut grass for his cows. He saw a boy running from the side of Caroline going towards Chemi Chemi. He did not know the boy. He heard shouts. Caroline was shouting. He decided to follow the boy. He found him arrested by Okumu, Eric Kangani and Tony Mukasa. The boy had been beaten. He had been cut with a panga on the head and he bleeding. It was alleged he stole a kuku. The kuku had been thrown in a bush. They got it. people increased and they took him to Mama Caroline's place. He saw Tobias Wekesa, Gladys Merabi and Caroline Wambi. Mzee wamutaa ( village elder ) joined them and Justus came after they collected the boy. It became a police case. The boy told them that Kennedy Wekesa had given him the kuku. They went to Kennedy's place and found Kevin. They did not find Kennedy there. He left them going to look for Kennedy. At 9.00 am he heard noise again people were chasing a thief. It was Kennedy being chased. Kennedy went to hide in the sugarcane. He did not attend to Kennedy as he was attending to his cow. His wife was not in she had gone for a burial. He heard people sing circumcision songs. He decided to go check and he found the people had arrested Kennedy. Kennedy had been beaten. He was walking and was being pushed. He found Ben, Tony Mukasa Amos Mzee and Eric Kagani. He thought that Kennedy looked like he was drunk, but he had been beaten and that is why he was walking like that. He followed them but Kennedy could not go beyond the main road. His co-accused person were not there when Kennedy was being beaten they found Rajab along the road a fundi there was attending to his wound. He did not see Kevin. He saw Caroline and Tobias. He did not stay there he returned home to attend to his cow. He was seen at the place because the deceased was arrested on his side. They testified against him because Kennedy was beaten on his side of the shamba.
15. Tom Wafula Lokorito ( Dw5) testified that he stays a Matulo. He knows the accused persons. He is related to the 3<sup>rd</sup> accused Timothy he is the son of his elder brother. On 7.5.2022 at 7.00 am he went to his shamba to spray his maize. At about 9.00 am to 10.00 am he heard shouts of thief thief they were heading towards his shamba. He saw a boy called Kennedy running. On seeing him he took a corner and entered the sugarcane of his brother called Andemi. He was being followed by Tom Mukasa Lukorito. He also saw Amos Mzee and Bernard. Mzee and Robert followed Kennedy. Kennedy ran faster than them. He did not recognize the other people who were following Kennedy. Tony is his neighbour. Tony went to his boma and took 2 dogs with a panga hammer and nails. Tony went to the shamba and cut trees and he left again with his dogs. Tony gave the sticks to the boys. Kennedy was



found in the sugarcane. When they reached his shamba the dogs got him. The dogs bite Kennedy. The boys reached him and began beating him with the rungu and pangas. He pleaded with them not to beat Kennedy. They were beating him and singing. Then the 3<sup>rd</sup> accused person went to his shamba. He told him that the boys had arrested a thief. He asked him to assist to ensure the boy goes to the police. He did not get involved again he went to his home and then he went for the burial. He did not follow them when they took Kennedy to the road. He did not see any of the accused persons amongst the crowd of people. The accused persons did not beat the deceased. By the time the 3<sup>rd</sup> accused had reached his shamba Kennedy had been beaten.

16. Capton Wafula Wanyonyi ( Dw6- 4<sup>th</sup> Accused) testified that he stays at Musala A. He is a mzee wa Kijiji ( village elder) of Musaka 'A'. He knows the deceased Kennedy Wekesa. Kennedy was not from his village. He was Mawangi 'B'. On the 7.5.2022 at 7. 00am he left to go for a funeral at Musikhu. He took his motor bike and began his journey. When he reached Malaha he saw a crowd of people. He went slowly up to the said place. He saw 2 boys tied up. One of them was the brother of the deceased called Kevin. The other boy Rajab had visited them. Rajab had a chicken. His hands were tied but he was holding the chicken. The boys had been beaten thoroughly. Rajab was bleeding. Mzee Jutus Mokorito was there too. He also saw David Melabi in the crowd , Gladys Melabi , Paul Murunga, Tobias Murunga, Jacob Barasa. He spoke to them. They were trying to take the boys to the police station. Justus Mzee was Kijiji requested him to take the boys to the police station which is 3 kms away. He could not take them he did not have enough fuel to take them. He requested them to pay Kshs. 150/- . Jacob removed 50/- . Justus told him he was going to get 100/- to enable him take the boys to the police station at Matisi police station. Justus took long to return. He saw time was going and he told Jacob and David to try and take the boys to the police. He had waited 15 mins. He left for Musikhu. He got there about 8.00 to 9.00am. He attended the burial of his cousin called Erastus Lichuni. He returned in the evening at about 5.00pm to 6.00pm. He did stop anywhere. He went straight to his home. The next day he met John Wanjala his friend who told him that one of the 2 boys had died, the one who had been found in the sugarcane. He did not see the deceased on 7.5.2022. he only saw Rajab and Kennedy. Tobias was at the place where the 2 boys were. Kennedy was not at the place. He heard Tobias say he beat Kennedy. He works with the security officers who provide security. It is easy for one to say Mukasa was there. He was not there when Kennedy was beaten. Kevin is the brother of the deceased.
17. Sarah Nanjala Makokha ( 5<sup>th</sup> Accused) testified as follows; she did not know the deceased person. On the 7<sup>th</sup> May 2022 she was inside her house in the morning. Her son Reuben ( 6<sup>th</sup> Accused) went to her house at 6.30 am and told her that he was going to do repairs in his kitchen. He told her he had sent the wife to go get him water. His wife Naomi returned and found them together. She told that there was noise around Makulo and she asked them to go check what was happening. Reuben asked her to stay at home to guard the home and the sewing machine. Reuben and her left, on reaching the road they saw people about 200 meters away at Matulo. They proceeded to the place and found Mama Caroline (Pw1) and Tobias Wafula Murunga there. They also found Kevin and Rajab whose hands were tied. Rajab was holding a kuku in his hands. There were many people about 12 of them. She asked Caroline why the boys were tied and she told that they had stolen a kuku and that they were waiting for Mukasa. The boys had already been beaten. She decided to leave as it was a police case. She went back to her home and left them there. She was mentioned by the witnesses as she went there. She returned home with Reuben. They did not leave the home thereafter.
18. Reuben Wanjala Makokha ( 6<sup>th</sup> Accused) testified as follows; he does not know Kennedy Wekesa. On the 7<sup>th</sup> of May 2022, he was home. He woke up and went to his mother's house. He had intentions of repairing his kitchen. Before he left his mother's house, his wife Naomi Wanjala informed him she had heard screams from outside. His mother told her to remain in the home as they went to the said



place. He accompanied his mother. It was about 7 am. On reaching the road they saw a crowd of people about 200 meters away. On getting to the place they found 2 boys who had been made to sit down. The 2 boys were Kevin and Rajab. He also saw Caroline Wandia Munwoki, Tobias Murunga, David Merachi, Gladys Merachi, and Paul Murunga. The 2 boys were tied at the hands and together they were holding a cock. Paul Murunga told him that the 2 were arrested because they had stolen a kuku at Matulo corner area and that they were waiting for the village elder to take them to Matisi police post. The 2 boys had been beaten. Rajab had been beaten more and was bleedings. They were there for 8 to 10 minutes. The village elder did not come and they went back home. He did not see Kennedy on the 7<sup>th</sup> May 2022. He has had disputes with Tobias and Caroline family. Joram a relative of Caroline had attacked and robbed him in 2019. 3 of the people Joram was with were arrested and taken to Webuye police station. Joram ran away and he has not been returned. He was injured during the incident and he was later bonded to appear in court. He knows he is in court because of the said case. He finished the case in February 2022 and then he was charged in May 2022.

19. Naomi Namsimiyu Nalika (Dw9) testified that Reuben Wanjala is her husband. On 7.5.2022 she went to withdraw water at tap near their home. She left her husband at home. On her way home she heard screams or noise from across on the other side. She did not hear what they were saying. She went and told her husband and her mother-in-law that they were home yet there were screams outside. She did not go there. Her husband and mother-in-law returned at 7.45 am. She remained at home. They did not tell her what was happening there. She did not go there.
20. At the close of the defense case the prosecution and defence file written submissions. The prosecution submitted as follows; Pw1- Pw6 adequately placed all the accused persons at the scene on the 7<sup>th</sup> of May 2022 and in their respective defences they confirmed being at the scene and interacting with the deceased. Identification was by way of recognition. The offence was committed in broad daylight and the witnesses positively identified the perpetrators. Reliance was made in the case of Wamunga vs Republic (1989) KLR 426 and the case of Charles Gitonga Stephen vs Republic eKLR( 2006). During cross-examination, the accused confirmed they knew the witnesses well and there was no chance that the witnesses might be confusing them. On malice afterthought, it was submitted that the accused persons beat the deceased violently inflicting multiple injuries on the deceased including the hand, chest, and head specifically pressure and bleeding in the brain amongst injuries ( see evidence of Pw7). It was the evidence of Pw1-Pw6 that the six accused persons together with others not before the court jointly assaulted the deceased on suspicion that he was a chicken thief. They used sticks and blows to assault the deceased. Their intention to kill or cause grievous harm was sufficiently disclosed. It was further submitted that all accused persons were sufficiently linked to the death of the deceased and they jointly assaulted the deceased leading to his unfortunate death. On weakness and rebuttal evidence in the defence it was submitted that the 1<sup>st</sup> accused raised the issue of a boundary dispute which was not substantiated and that the issue of boundary dispute was not raised with the prosecution witnesses and there was no chance to react to the alleged dispute and therefore since it was the first time such an issue was being raised and therefore the issue is an afterthought. That apart from denying that they assaulted the deceased their defences match on events leading to the death of the deceased and that all their defences were mere denials devoid of any substance and cannot shake the credible evidence of the prosecution which was credible, consistent and watertight.
21. The defence counsel submitted as follows; the cause and death of the deceased was proved. On whether the accused persons caused the unlawful act or omission that caused the death of the deceased, it was submitted the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the accused persons unsafe. It was submitted that Pw1, Pw2, Pw3, and Pw4 who claim to be eyewitnesses of the events of 7.5.2022 in describing the scene of crime gave many versions as their number bringing into question their credibility as truthful witnesses.



Counsel analysed the evidence of Pw1, Pw2 and Pw3 and pointed out what was contradictory in the evidence. He pointed out that Pw1 alleged she was home with Pw2, yet Pw2 claimed he followed the crowd to the market. Pw2 stated he did not see Pw3, yet Pw3 said he was at the scene. Pw2 did not report his alleged assault to the police. Pw2 alleged he saw a crowd of 50 people. He couldn't see who assaulted the deceased. It was submitted that Pw4 was the only independent witness and that his evidence was a complete despatch from the evidence of Pw1, Pw2, Pw3, and Pw6 and that his testimony corroborated the testimony of the accused in as far as their presence when Rajab was being assaulted. It was submitted that Pw7 discredited the evidence of Pw2 that sticks were used to pierce through the deceased's stomach. Counsel discredited the evidence of Pw2 and Pw3 stating Pw2 was not a consistent witness and was easily swayed from one position to another during cross-examination and that Pw3's evidence contradicted Pw1's evidence on account of the events. There was also further contradiction in the evidence of the prosecution's evidence. Pw1 told the court that she saw a crowd of 20 people, Pw2 told the court he saw 50 people and Pw3 said they were 10 people. On cause of death it was submitted no suspicion can amount to proof of a criminal charge. The deceased suffered death at the hands of an irate mob. Only two out of the six accused persons saw the deceased on the material day. The defense was consistent. There were two incidents on the material day and Pw1, Pw2 and Pw3 failed to testify on the first incident where Rajab was beaten by a mob. The contradictions and questions raised must be resolved in favour of the accused persons. On malice aforethought, it was submitted that the prosecution having failed to link the accused persons to the death of the deceased the 3<sup>rd</sup> element was not proved.

### **Analysis And Determination**

22. I have carefully considered the evidence, the written submissions, and the law. The accused persons are charged with the offence of murder. The prosecution has the task of proving the following; the death of the deceased, that the death was caused by an unlawful act of commission or omission by the accused, and that the accused had malice aforethought. These ingredients were set out in the case of Antony Ndegwa Ngari vs Republic [2014 ] where it was held that, “ For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are (a) death of the deceased and the cause of death (b) that the accused committed the unlawful act which caused the death of the deceased and ( c) that the accused had the malice aforethought.
23. That the deceased died is not in doubt. His death was proved by the post-mortem produced by doctor Brian Inunua Kenwi who testified that he conducted the post-mortem on 10.5.2022 and he formed the opinion that the cause of death was severe head injury due to left subdural hematoma from multiple blunt force trauma to the head with blunt objects. The deceased's body was identified by the father Pw6. Pw1, Pw2, and Pw3 also testified on the death of the deceased.
24. On whether the prosecution has established that the accused persons caused the death of the deceased I have analyzed the evidence of the prosecution witnesses and that of the defence. It is not in dispute that the incident happened during the day and that the accused persons are known to Pw1, Pw2, Pw3 , Pw4 and Pw6. Pw2 testified that on 7.5.2022 the deceased left to go to the Shamba. At about 9.00 am he decided to join the deceased. On his way there he saw the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused, Tonny who was not arrested, the 5<sup>th</sup> accused, and 6<sup>th</sup> accused come with the deceased from the river. They were singing circumcision songs. There were many people who had rungu. Pw2 saw the 1<sup>st</sup> accused with a rungu and 2<sup>nd</sup> accused too had rungu, , and 6<sup>th</sup> accused with a spade. He saw them beat the deceased. He went back home. Later his brother was dropped home. Pw3 Tobias was at his shamba at 9.30 am on the same day. He heard shouts of thief thief and reaching the place he found Jacob, Saul and Timona ( 3<sup>rd</sup> accused) and Mama Sarah the 5th accused beating the deceased with rungu. He requested them to stop beating the deceased. On the way, they met the village elder the 4<sup>th</sup> accused. Kennedy tried



to get away and they ran after him and brought him back. The 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 5<sup>th</sup> and 4<sup>th</sup> accused persons beat up the deceased leading him towards the market. At the market, the deceased was left helpless and the 2<sup>nd</sup> accused Saul put the deceased on a motorbike and took him to his boma. He heard them say he had stolen a chicken. Pw1 was in her home at 9.00 am on 7.5.2022. She heard people singing circumcision songs whilst cutting naiper grass. She saw a crowd of people with Kennedy. Kennedy was in the middle. She saw 3 people Jacob, Saul, Tony and Mukasa who is not in court. She thought they were taking Kennedy to the police as he had been suspected of stealing. She decided to go back to the home to change to go inform her in-laws. Whilst at her door she saw Saul and Jacob dump Kennedy outside his place. She went to check on Kennedy and she saw his head was swollen, and his mouth, hands, and chest too. Kennedy was not talking. Kevin who was home took Kennedy to hospital where he died. The accused persons denied beating Kennedy the 1<sup>st</sup> accused denied seeing the deceased. The 2<sup>nd</sup> accused testified that he heard Pw1 shout thief thief he left his home and went along with her and found Rajab arrested with a chicken. There were other people Juma Lororito asked Rajab where he had gotten the chicken and Rajab told him Kennedy had given him the chicken. They went up to Kennedy's place and they found Kevin and then he left. The 3<sup>rd</sup> accused testified on the incident at 7.00 am according to him he saw Pw1 go towards chemi chemi and Pw1 was shouting thief. He followed and found the boy beaten. The boy told them Kennedy had given him the chicken. At 9am he heard noise again and Kennedy was being chased. Kennedy went to hide in the sugarcane. He did not attend to Kennedy. Later he saw Kennedy arrested and beaten. The 4<sup>th</sup> testified on the events of 7.00am when Rajab was caught with a Chicken and was beaten by the mob. Kennedy was not at the place. The 5<sup>th</sup> and 6<sup>th</sup> accused testified on events of 7. 00 am where they saw Kevin and Rajab tied up Rajab was holding a chicken.

25. The prosecution's case is that there were two incidents on 7.5.2022. The first incident took place at 7. 00 am. All the accused person mentioned this incident in their defense. During the first incident at 7.00 am, Rajab mentioned that he had been given the chicken by Kennedy. This incident led to the event of the 2<sup>nd</sup> incident which took place around 9.00 am. The incident of 9.00 am relates to the deceased. Pw4 testified that after he met the crowd beating Rajab and on the learning that Kennedy had given him the chicken the crowd left to go and look for Kennedy. He left for a funeral. Pw1, Pw2, Pw3 testified that the accused persons were persons known to them. They are related and the 5<sup>th</sup> and 6<sup>th</sup> accused persons are their neighbours. Identification therefore was by way of recognition. The court in the case of Hamisi Swaleh Kibuyu vs R [2015] stated as follows;

“On this issue of recognition, we are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU versus REPUBLIC (1975) EA 139). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit. In the case of Cleophas Otieno Wamunga Versus Republic (1989) KLR 424 this court correctly stated in this regard:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R. VS. TURNBULL (1976) 3 ALL ER 549at page 552 where he said:-



“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

“Although a fact may be proved by the testimony of a single witness, “this does not lessen the need for testing with the greatest care the evidence of such single witness respecting identification.” This is particularly so where the conditions are not conducive to proper identification or where conditions favouring a correct identification are difficult.” ( Emphasis mine)

26. Pw1, Pw2 and Pw3 testified on what they saw. It was 9.00 am. Pw1 heard people singing, and then she saw a crowd of people she was able to identify 3 people the 1<sup>st</sup> accused Jacob, Saul the 2<sup>nd</sup> accused, and Tony who was not in court. Kennedy was in the middle, later she saw Kennedy on a motorbike, Jacob was riding the bike Kennedy was at the centre and Saul was holding him and they dropped him at his place with severe injuries. Kennedy died the same day from the injuries inflicted on him. Pw2 testified that saw Jacob, Saul, Tony, and 6<sup>th</sup> accused. Jacob, Saul, and Tony had rungu and the 6<sup>th</sup> accused had a spade they were with the deceased from the river sides and they were beating him. He followed them as they led him to the market but he chose to go back home and later Saul dropped off his brother by then Kennedy was not talking. Kennedy had injuries on the head chest and legs. He was later beaten by Jacob. Pw3 was at his shamba at 9.30 am when he heard shouts of thief and on going to the place he saw Saul, Jacob, Timona ( 3<sup>rd</sup> accused and Mama Sarah 5<sup>th</sup> accused and 6<sup>th</sup> accused beating the deceased with rungu. He was about 10 to 15 meters away. He pleaded with them not to beat Kennedy but to take him to the police station. They led the deceased to the marketplace. They were singing circumcision songs and at the market place they left Kennedy helpless ,Saul put him on a motorbike and they took him home. He heard them say he had stolen a chicken. Pw1, Pw2, Pw3 witnessed what was happening from about 9 am. Their evidence corroborates each other on what happened to the deceased. From the evidence of Pw2 and Pw3 the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons were armed with rungu and inflicted injuries on the deceased. Their evidence on the number of persons in the crowd does not negate the prosecution case. Pw1 saw them approach the home, Pw2 saw them with the other people from the riverside and followed them to the market and turned back, Pw3 saw them at the sugarcane place when they were beating the deceased and followed along asking them not to beat him. He saw Saul get a motorbike to take the deceased home. Dw3 Daniel Munyalo confirmed that he dropped the deceased at home and that he was with Saul. Saul is the one who stopped Dw3. DW3 evidence placed Saul at the scene where he found the deceased having been beaten helplessly. Pw1 said Jacob was the driver, this evidence only does not negate the positive recognition of the accused persons. Her evidence on who was riding the motorbike in my view did not form a material contradiction. Dw3 admitted dropping the deceased in his home and he was Saul. Saul's evidence that he was merely helping is not persuasive.
27. The evidence against the 4<sup>th</sup> accused is that he joined the other accused persons on the way and that when the deceased tried to get away the 4<sup>th</sup> accused beat him. It is not clear what he used to beat the deceased to inflict injuries on him. There was no evidence that he had used a weapon on the deceased as did the other accused persons. By the time he met with the crowd, the deceased had sustained injuries. I find the evidence against the 4<sup>th</sup> accused insufficient as to whether he also inflicted injuries on the deceased. This incident took place at 9.00 am and the accused persons were persons known to Pw1, Pw2, and Pw3. The witnesses denied that they had a bad relationship. Pw1 admitted that they had a boundary dispute with the family of Jacob and Saul before. I am persuaded having heard the witnesses testify that this is not a case where the 3 prosecutions wanted to fix the accused persons. Pw7 testified that the cause of death was that the cause of death was severe head injury due to left subdural hematoma



from multiple blunt force trauma to the head with blunt objects. In cross-examination, he testified that the objects used were something solid and heavy. The weapon could have been a metal or wooden object that was used and from the injuries, he was defending himself. The evidence adduced was that the deceased was beaten using rungu also described as tree branches. The deceased died due to the injuries inflicted on him as a result of the beating inflicted on him by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused person. Their actions were unjustified. The deceased was suspected of stealing a chicken. Taking the law into their hands was an unlawful act for which they are responsible and they have to be held criminally liable for their unlawful actions. The accused blamed other persons for having beaten the deceased, it could be that there were others involved but the evidence of Pw1, Pw2, and Pw3 is that they were involved. The evidence of the accused persons could align with Pw4s evidence as what he testified about happened at 7.00 am, not 9.00 am.

28. On the defence raised the accused persons testified of events of 7.00 am and denied being involved in the 9.00 am incident. The 5<sup>th</sup> and 6<sup>th</sup> accused raised a defence of an earlier incident between them and Joram's family members and the victim's family. This evidence was backed by documentary evidence which did not demonstrate that they had a case with Joram. I agree with the prosecution that it was an afterthought. The defences raised don't displace the prosecution evidence. Despite their denials, the accused persons were placed at the scene by Pw1, Pw2 and Pw3.
29. On malice aforethought. Section 206 of the *Penal Code* states that malice aforethought is established if the act or omission causing the death or grievous harm will cause the death or grievous harm to some person. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> accused persons used rungu to inflict serious and grievous harm. The injuries were multiple on his hands, chest, and head. The deceased died due to head injuries due to left subdural hematoma from multiple blunt trauma to the head with a blunt object. Their vicious attack on the deceased was a clear indication that they intended to cause harm to the deceased, which led to his death. In my view, malice aforethought has been proved. The prosecution evidence against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons proved and established that they were identified as being part of the mob of people who caused grievous harm in what is commonly known as "mob justice" instead of "mob injustice"
30. The evidence against the 4<sup>th</sup> accused is insufficient and he is acquitted of the charge of murder. He is free to go unless lawfully held. I find that the prosecution has proved their case beyond reasonable doubt against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused person. I find the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons guilty of charge of the murder of Kennedy Wekesa and convict each one of them accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 2<sup>ND</sup> MAY 2025.**

**R.E.OUGO**

**JUDGE**

In the presence of:

1st Accused – Present

2<sup>nd</sup> Accused - Present

3<sup>rd</sup> Accused- Present

4<sup>th</sup> Accused- Present

5<sup>th</sup> Accused - Present

6<sup>th</sup> Accused- Present

M/s Matere -For the ODDP



Mr. Maloba - For the Accused persons

Wilkister - C/A

