



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Wangereka & another (Criminal Case 9 of 2019)  
[2025] KEHC 8722 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8722 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL CASE 9 OF 2019  
AC MRIMA, J  
JUNE 20, 2025**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**MOSES KAMAU WANGEREKA ..... 1<sup>ST</sup> ACCUSED**

**FRED KISIANGANI ALIAS MUSTAFA KHATETE ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction:**

1. Moses Kamau Wangeraka and Fred Kisiangani alias Mustafa Khatete, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons herein, were charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*.
2. The particulars of the offence are that; on the 26<sup>th</sup> day of March 2019 at Machungwa area in Sirende location, Kiminini Sub County within Trans-Nzoia County murdered Collins Wafula.
3. The accused persons pleaded not guilty.
4. At the close of the prosecution's case, this Court established that a prima facie case had been made out. Accordingly, the accused persons were placed on their respective defences.

**The Prosecution's case**

5. Dismas Wekesa Wamalwa was PW1. It was his evidence that the deceased was the son of her elder brother and that the accused are his neighbours.



6. He testified that on 26<sup>th</sup> January 2019, at about 10.00AM, he was in Kitale town when the 1<sup>st</sup> accused called him. He went and at his place he found his wife. She told her that the 2<sup>nd</sup> accused had sent the 1<sup>st</sup> accused to get the deceased.
7. It was his evidence that he went to the 1<sup>st</sup> accused with his two friends Job Wanyama and Daniel Irongi at about 12.00PM. At the 1<sup>st</sup> accused, they found that he (1<sup>st</sup> accused) had assaulted a child and had fallen down. He stated that the deceased called him and stated that the 1<sup>st</sup> accused had killed him.
8. He observed that the deceased had soiled himself. The 1<sup>st</sup> accused told him that he had killed the child because he had stolen his phone. It was his evidence that he should meet the cost of the phone and the water pump that the deceased had damaged being Kshs. 10,000/-.
9. He stated that the injuries were on the head and his private parts. He claimed that the 1<sup>st</sup> accused told him that he had disciplined the deceased so that he would not steal again.
10. It was his evidence that the deceased left the scene and they followed him. They found him at his father's gate dead. It was his evidence that he witnessed the postmortem and identified the body at Kitale District Hospital.
11. On cross-examination, it was his evidence that the 1<sup>st</sup> accused called him and informed him that he had sufficiently disciplined the deceased and that he died at the house of the 1<sup>st</sup> accused but when he arrived he had not died, he only died as he left the homestead.
12. It was his evidence that he did not get the object used to assault the deceased. He reiterated that it is the 1<sup>st</sup> accused who assaulted the deceased and he died at his gate.
13. Charles Otunga was PW2. It was his evidence that the deceased was a son to his neighbour and the both the accused persons were home guards.
14. It was his evidence that on 26<sup>th</sup> March 2019, while at Sabwani Centre Primary, he was called by Electina. He went to the deceased home where he found many people wailing. He went to the Police station and recorded a statement. Later, the deceased was not at the scene. He admitted not seeing the deceased being assaulted.
15. He testified that people were coming from the 1<sup>st</sup> accused and screaming.
16. On cross-examination, he stated that he was called by his neighbour, Electina. He stated that the deceased was at Kamau's according to the information that he was given and took him about three minutes. It was his evidence that people were coming from the 1<sup>st</sup> accused and screaming to the deceased home.
17. Geoffrey Wamalwa was PW3. He testified that he does construction work and the deceased was his neighbour's son. It was his evidence that on 26<sup>th</sup> March 2019 he left his house to PW1's home where PW1 told him that the 1<sup>st</sup> accused's wife had called him. He requested that he takes him there. They went and on the way,, they met Dan
18. At the 1<sup>st</sup> accused, they found the 1<sup>st</sup> accused, his wife and the 2<sup>nd</sup> accused. They found the deceased lying on the ground and when he (the deceased) saw PW1, he said, 'Baba, Kamau ameniua' and repeated the same words.
19. They sat down and saw feaces. The 1<sup>st</sup> accused's wife told them that he should pay Kshs. 10,000/-.
20. It was his evidence that later, the deceased left and they found him lying at the second gate of the accused home. They carried him home but the deceased grandmother found that he had died.



21. He claimed that they found him lying on the stomach, did not see the injuries but confirmed that he heard him tell his father that the 1<sup>st</sup> accused had killed him.
22. On cross-examination, he stated that he was not related to the accused, had known him since he was born. He reiterated that it is the 1<sup>st</sup> accused that killed the deceased.
23. Daniel Irongo was PW4. It was his evidence that the deceased was his neighbour and that the 1<sup>st</sup> accused was a home guard. He stated that on 24<sup>th</sup> March 2019, he was called at about 11.00AM, by PW1. He told him that the 1<sup>st</sup> accused wanted him and they went together.
24. On arrival at the 1<sup>st</sup> accused, there was the 2<sup>nd</sup> accused. It was his evidence that he saw human faeces and there was a water pump on the ground. The deceased was lying down without a shirt. The 1<sup>st</sup> accused's wife then took away the deceased's fecal matter. The 1<sup>st</sup> accused asked the deceased to leave. He observed that he was very weak.
25. It was his testimony that the 1<sup>st</sup> accused wanted Kshs. 10,000/- for the pump and PW1 said that he did not have the amount. He only had Kshs. 4,000/-.
26. He stated that as they left, they found the deceased had fallen down and died. They carried him home and reported it to Mail Saba police Station.
27. It was his case that the deceased had injuries on his elbows and on his private parts and the homestead he was found belonged to the 1<sup>st</sup> accused.
28. On cross-examination, he stated that as the deceased walked outside of the homestead, he was very weak. He claimed that it is the 1<sup>st</sup> accused who killed him, a fact he personal saw.
29. No.10XX99 Insp. Paul Njuguna was PW5. He stated that he was the investigating officer formerly attached to the DCI Trans-Nzoia West Sub County.
30. It was his testimony that on 26<sup>th</sup> March 2019, he visited the scene of crime upon being informed by the DCIO. He took photographs of the deceased and took the body to the mortuary. He produced the photographs as PExh. 1a- 1h and the certificate as PExh. 1h.
31. He stated that the house of the 1<sup>st</sup> accused had been burned down on allegation that he had killed the deceased. Upon carrying out investigations, he gathered that the accused had jointly assaulted the deceased on the claim that he had stolen an electricity cable and a phone from the 1<sup>st</sup> accused.
32. It was his evidence that on 2<sup>nd</sup> April 2018, he witnessed an autopsy after the deceased had been identified by his father one PW1 and PW2, his neighbour, Charles Otunga.
33. He stated the cause of death was established to be severe internal organ damage and head injury secondary to assault. He marked for identification the post-mortem report as PMFI-2.
34. It was his testimony that the accused persons were arrested the same day before he was assigned the case and the evidence placed them as the perpetrators.
35. On cross-examination, it was his case that the deceased body had been removed from the scene of as at the time he arrived and the deceased's father, PW1, had been informed by the deceased that the 1<sup>st</sup> accused killed him. He marked for identification the extract of OB No. 4 of 26<sup>th</sup> March 2019 as DMFI 1.
36. It was his evidence that the body of the deceased was taken back to the 1<sup>st</sup> accused by the demonstrators and that there was no blood at the compound on the 1<sup>st</sup> accused.



37. It was his position that Stephen Macheso witnessed the whole assault taking place. He admitted not recovering any trace of evidence showing that the deceased fell at the gate of the 1<sup>st</sup> accused.
38. He further asserted that he did not ascertain an grudge with the 1<sup>st</sup> accused only that the deceased used to work for him from time to time and as a result of the death, irate members of the public burnt the house of the 1<sup>st</sup> accused.
39. In the end, he stated that he had no evidence that the deceased was assaulted by his parents for stealing.
40. Dr. Dennis Nanyingi, was PW6. He stated that he is a senior Medical Officer at Kitale County Referral Hospital having graduated from Kenyatta University with MBChB in the year 2014.
41. He produced the post-mortem report as PW2, conducted by Dr Okumu on 2<sup>nd</sup> April 2019.
42. He testified that the deceased had lung, spleen hematoma, bilateral testicular hematoma, head sculp hematoma and the cause of death was severe internal organ damage and head injury secondary to assault.
43. On cross-examination, it was his evidence that the deceased's time of death is not given but the body was well embalmed. He elaborated that embalming alters the appearance of the body and there are challenged as the original state is changed.
44. He stated that embalming should not precede postmortem. He asserted that dealing with a deceased especially removal from scene ought to be documented. He agreed that crucial evidence might be lost if body is not properly transported. He also conceded that the Post Mortem report did not state that the deceased had fecal remains.
45. He stated that whereas the shape and colour of the wounds can hint on the type of weapons used and that age of the injuries are dependent on colour changes, the Post-Mortem was silent on the age and colour of the bruises.
46. He further stated that information on the scene can be obtained from the Post Mortem if an autopsy is conducted. He admitted that the report did not examine the position of the deceased when he died.
47. On re-examination, he clarified that embalming did not alter any injuries on the body of the deceased. He stated that it does not alter the body but retains the status it was at the time of embalming.

### **The Defence Case**

48. The 1<sup>st</sup> accused was DW1. It was his case that on 26<sup>th</sup> March 2019, he was at home when he sent the 2<sup>nd</sup> accused, a Kenya Police Reservist (KPR), to look for the deceased so that they could discuss the theft of cable wire from his home.
49. The 2<sup>nd</sup> accused and the deceased arrived at his home and discussed the matter to which the deceased admitted stealing the wire. He then asked his wife to call PW1 to come so that they could discuss the matter further.
50. He testified that PW1 arrived with two of his neighbours where it was discussed and agreed that the deceased would restore the stolen pump and the cost was Kshs. 4,000/-. To that end, he stated PW1 committed to doing so in a week's time.
51. It was his case that PW1 then asked the deceased to go home and he did so use the rear gate and he remained behind with PW1 and the two neighbours.



52. He stated that the deceased left his home uninjured and he (the deceased) said that he had killed him since he was not injured. It was his evidence that no one took the deceased to hospital because he was uninjured.
53. He further claimed that after discussing the issue with PW1, PW3 and PW4, they left his home using the rear gate. He denied that the deceased died in his homestead.
54. It was his evidence that he was arrested when he reported the matter to the police station. He produced the Diary as DExh. 1 where it indicated that the PW1 had also reported the incident to the police station that the deceased had been assaulted at the chief's office by the KPR.
55. While referring to the Probation Report dated 8<sup>th</sup> November 2022, he indicated that Samson Wekesa is the one who led people to torch his house, they were charged, convicted and sentenced.
56. The 1<sup>st</sup> accused claimed that report contained details how the body of the deceased was and how it was carried to his homestead from PW1's home, a distance of 2 Kms apart.
57. He asserted that it is possible the deceased could have been injured when he was being carried to his homestead. He produced the report as DExh. 2.
58. The 1<sup>st</sup> accused concluded by stating the he had no ill feelings with the deceased. He had taken him to school and was lining with him. He claimed that he was not satisfied with the way the investigations were done since those who were with the deceased when he died were treated as witnesses while the deceased died elsewhere not at his homestead.
59. He claimed further that the deceased had informed him that he did not relate well with PW1 as he had sold his share of inheritance.
60. Upon being cross-examined, it was his evidence that he knew the deceased very well and knew his father and that he lived with him.
61. He stated that by the time he arranged and had a meeting with the 2<sup>nd</sup> accused and the deceased to ascertain the theft, he had not reported it to the police station.
62. It was his testimony that he met the deceased at 9AM. He and the 2<sup>nd</sup> accused interrogated the deceased and knew that he did not relate very well with PW1, his uncle.
63. He produced the Interrogation Diary as DExh. 1 which indicated the first entry is by PW1 who reported to the police that 2<sup>nd</sup> accused assaulted the deceased, the second entry related to OB 59 of 26/03/2019 which related to him which he claimed wrongly alleged that he had killed the deceased.
64. He admitted that he went to the Police station to report the destruction of his property but did not report the theft of his pump.
65. The 2<sup>nd</sup> accused was DW2. He stated that he was a village vigilante in the year 2019. He recalled that on 25<sup>th</sup> March 2019, the 1<sup>st</sup> accused called him at about 1PM where they met at his homestead. He informed him that a Samsung phone and a water pump had been stolen at his home by the deceased.
66. It was his testimony that in the morning of 26<sup>th</sup> March 2019, he started looking for the deceased. He found him and informed him of what had happened. They agreed to go the the 1<sup>st</sup> accused's home where they had a sitting with him and the deceased. The deceased conceded that he stole the items but did not have the battery of the phone.
67. It was further his evidence that they did not beat the deceased at all. He stated that it was the deceased who called PW1 so that the matter would be decided amicably and to that end, they sat with PW1



- and 2 others who accompanied him and agreed on the way forward and thereafter the deceased went away with PW1.
68. He reiterated that the deceased left alive with no injuries. He stated that he was with 1<sup>st</sup> accused, his wife, PW1, PW3 dan PW4 and the three left after the meeting. It was his position that he had no grudge with the deceased and he was aware that PW1 sold the land belonging to the deceased's father rendering him without inheritance. He claimed that it was possible that PW1 organized to kill him in order to disinherit him.
  69. On cross-examination, it was his case that they held meeting at the 1<sup>st</sup> accused's home. It was his case that he deceased used to escape when he saw him since he used to engage in lawlessness.
  70. It was his evidence that he was with 1<sup>st</sup> accused from 9AM to 10.30AM and that PW1 came to the 1<sup>st</sup> accused's home at about 11AM and they discussed further and PW1 agreed to pay for the stolen items.
  71. He denied that the deceased was beaten by either of them. He claimed to have assisted the deceased and even got him back to school when he ran away.
  72. He asserted that after the meeting they partook lunch and PW1 and his two friends left at around 1PM. He claimed to have received a call at 2.50PM on the death of the deceased. He stated that he deceased left his slippers at the 1<sup>st</sup> accused's home after he was threatened by PW1. He vehemently denied that the deceased was beaten at the 1<sup>st</sup> accused's home.
  73. Eunice Kamau was DW3. He stated that the 1<sup>st</sup> accused is her husband. She recalled that on 26<sup>th</sup> March 2019, at around 9AM, the 2<sup>nd</sup> accused and the deceased came home.
  74. She stated that the deceased and the two accused persons talked and she is the one who called PW1 to come over. She claimed to have lived with the deceased for over 10 years.
  75. It was her case that PW1 arrived with PW3 and PW4. She denied that the deceased said that it is the 1<sup>st</sup> accused who killed him. she stated that the deceased left after being released from the meeting by PW1. He went away running and left his slippers.
  76. It was her evidence that PW1, PW3 and PW4 left together with the deceased had taken. She asserted that the deceased did not die in her homestead. She stated that PW1 was bitter with the deceased since they had assisted him to learn how to drive vehicles.
  77. On cross-examination, it was her testimony that the wires that were stolen from their home had been used at PW1's house. She stated that they did not report the case to the police but rather deiced to resolve it amicably.
  78. She stated that she called PW1 at around 10AM and continued to work in the company of Wanjiku and Vicky. She denied the deceased was assaulted within her homestead. She stated that there are so many people who attacked them and destroyed their properties.

### **Analysis**

79. Having comprehensively captured and appreciated the parties' respective cases, the only issue for determination is; whether the Prosecution proved the charge of Murder to the required standard.
80. The offence of murder is provided for by section 203 of the *Penal Code* as follows;  
203. Murder



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

81. The punishment for the offence is provided for by section 204 in the following terms;

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.

82. In Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari -vs- Republic [2014] eKLR the Court of Appeal reiterated the provision of section 203 and 204 of the *Penal Code* on the elements which must be proved beyond reasonable doubt in order to sustain the charge of murder. It observed;

- (a) the death of the deceased and its cause;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

83. I will hence interrogate each of the elements in turn.

**a. The fact of death and its cause**

84. The fact of death of the deceased is not in contest. Both the prosecution and the defence attested to that fact.

85. The evidence of PW1, the deceased's uncle, PW2, PW3 and PW4 as appreciated alongside that of PW6, the medical doctor is conclusive proof that the deceased indeed died. The first four witnesses saw the deceased lying outside the second gate of the 1<sup>st</sup> accused shortly before he died.

86. At the mortuary, before autopsy was conducted, PW1 identified the deceased. Medical doctor indeed confirmed that the deceased's cause of death was severe internal organs damage and head injury secondary to assault.

87. I have perused the Post-Mortem report produced as PExh.1. It confirms the deceased's death and cause thereof. I am satisfied that this limb of the ingredients was established.

**b. Who caused the death?**

88. An appropriate point to start from is the accused persons' own evidence. When the 1<sup>st</sup> accused testified, he stated that he sent the 2<sup>nd</sup> accused to go look for the deceased for purposes of discussing the theft that had occurred in his premises.

89. The 2<sup>nd</sup> accused found and took the deceased to the 1<sup>st</sup> accused home. They had a discussion, the three of them, which ended up in the confession by the deceased that he stole from the 1<sup>st</sup> accused.

90. Subsequently, the 1<sup>st</sup> accused asked his wife to call PW1 to ask him to come to his home to discuss the case.

91. When he was cross-examined, the first accused stated that he met the deceased at 9AM when he and the 2<sup>nd</sup> accused interrogated him.

92. Turing to the evidence of the 2<sup>nd</sup> accused, it emerged that the 1<sup>st</sup> accused looked for him on 25<sup>th</sup> March 2019, a day before deceased met his death. They met and informed him about the theft that had occurred.



93. It is on the instructions of the 1<sup>st</sup> accused that the 2<sup>nd</sup> accused looked for and took the deceased to the 1<sup>st</sup> accused premises. He admitted that they had a sit down with the deceased where they discussed and theft. The deceased agreed that he had stolen.
94. During cross-examination, it was his evidence that on the fateful day, he was with the 1<sup>st</sup> accused and the deceased from about 9AM to about 10.30AM, when PW1 arrived.
95. The evidence of DW3 further corroborates the time when the deceased, PW1 and PW2 interacted. She stated that on 26<sup>th</sup> March 2019, at 9AM, the 2<sup>nd</sup> accused and the deceased arrived at her home. She testified that the deceased and the two accused persons had a discussion before she was instructed to call PW1.
96. It emerges without question that for a period of about two hours, the accused persons herein were exclusively with the deceased. It also is the case that when the deceased arrived with the 2<sup>nd</sup> accused, he must have been in good health for him to hold discussions.
97. With the foregoing I now turn to the evidence of PW1, PW3, and PW4. From a bird's eye view, there is unanimity as to the condition they found the deceased in when they arrived at the 1<sup>st</sup> accused's residence.
98. They all stated that the deceased was lying on the ground when they arrived.
99. From an assessment of the foregoing evidence, there is a discernable disconnect between accused persons' claim that the deceased was well when he left the 1<sup>st</sup> accused residence and how he actually was when PW1, PW2 PW3 and PW4 arrived.
100. If anything injurious to the life of the deceased happened, it must have been between 9AM and 11AM, before PW1, PW2, PW3 and PW4 arrived.
101. The foregoing is fortified by the deceased's dying declarations as elucidated by the evidence of PW3. When the deceased saw his uncle, PW1, he disclosed his killer. He said "Baba, Kamau ameniua'. He declared as much twice.
102. Section 33[a] of the Evidence Act, Cap 80 provides as follows:

33. Statements by deceased person...

When statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-

(a) relating to cause of death

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of death comes into question.



103. In Criminal Appeal 1 of 2015, Mwangi -vs- Republic) [2023] KECA 246 (KLR), the Court of Appeal defined and underscored the evidentiary significance of a dying declaration. It observed;

A dying declaration can loosely be defined as a statement made by a person concerning what he believes to be the cause of circumstances of his death, when knowing that death is imminent. The statement so made earns its credibility and evidentiary value from the general belief that most people, upon realizing that they are about to die ‘will not lie’.

104. The caution courts must exercise whilst relying on dying declaration was captured by the Court of Appeal in the case of Philip Nzaka Watu -vs- Republic [2016] eKLR, when it observed;

“Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. The Court expressed itself as follows in Choge -vs- Republic (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person “

105. In this case, the dying declaration was not only uncontroverted. It also was corroborated by the fact that shortly after PW1, PW2, PW3 and PW4 arrived at the scene, the deceased was still alive lying on the ground.

106. PW4 even made the observation that he was very weak when he was tried to walk outside the homestead of the 1<sup>st</sup> accused.

107. Taking into account the totality of the circumstances herein, this court is convinced that the deceased met his death at the first accused person’s residence, in the hands of the both of the accused.

**a. Whether there was malice aforethought:**

108. The offence of Murder is not complete without proof of ‘malice aforethought’.

109. 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 fight or escape from custody of any person who has committed or attempted to commit a felony.

110. In *Joseph Kimani Njau vs Republic (2014) eKLR*, Court Appeal embellished the foregoing ingredients in the following fashion;

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

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts. It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman vs. Director of Public Prosecutions (1975) AC 55*". (Emphasis added).

111. The intensity of the deceased's injuries can be discerned from the post-mortem report. Externally, he suffered multiple bruises on the face, both upper and lower limbs, anterior chest and posterior part of the body.

112. Internally, he had lung hematoma, splenic hematoma, bilateral testicular hematoma and scalp hematoma. PW6 concluded that the cause of death was severe internal organs damage and head injury secondary to assault.

113. Applying the test of malice aforethought to the foregoing, this Court is convinced that the accused persons threw all care to the wind, took matters into their own hands, fatally assaulting the deceased.

114. The presence of the deceased's fecal matter, a fact which was not spoken to by the accused persons corroborates and is indicative of how severe the assault was in the abdominal region.

115. The mere fact that 2<sup>nd</sup> accused, acting on instructions of the 1<sup>st</sup> accused, looked for the deceased, took him to the 1<sup>st</sup> accused residence and then conveniently called PW1 after the ordeal, is indicative of the mental state of the accused persons. He desired to seek revenge in the name of disciplining the deceased for having stolen his valuables.

116. In the case of *Tubere S/O Ochen -vs- Republic (1945) EACA* the Court outlined the circumstances that a court can use to infer malice aforethought. They are as follows;



- i. The nature of the weapon used against the deceased.
  - ii. The part of the body targeted by the attacker whether vulnerable or not.
  - iii. The manner in which the lethal weapon was used and whether in furtherance to cause grievous harm the assailant used the weapon repeatedly.
  - iv. The conduct of the accused before, during and after the attack of the deceased.
117. From the foregoing, it is evident that the accused persons aggressively assaulted the deceased despite the fact that he was a minor.
118. Their failure to report the matter to the police in the name of resolving it amicably was an avenue they wanted to exploit to exert physical harm on the boy. The intention was clear. It was to create an enabling environment to ‘discipline’ him.
119. From the decision in *Tubere S/O Ochen -vs Republic (1945) EACA*, the inference of malice aforethought is made from the foregoing conduct of the accused persons.
120. In the end, this court arrives at the conclusion that the deceased was murdered by the accused persons contrary section 203 of the *Penal Code*. They are hereby accordingly convicted for the offence of Murder.
121. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**A. C. MRIMA**

JUDGE\*\*

