



**Republic v Viambaka & another (Criminal Case E066 of 2020)
[2025] KEHC 11641 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E066 OF 2020
DB NYAKUNDI, J
JULY 29, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

EMMANUEL WAFULA VIAMBAKA 1ST ACCUSED

GODWINE SIRENGO WEKESA 2ND 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 7th October, 2020 at Mbururu Police Post in Likuyani County, jointly murdered Dennis Lusava Malango alis Mkali. The accused persons were arraigned before this court and entered a plea of not guilty, thereby placing the burden on the prosecution to prove guilt beyond reasonable doubt as stipulated in Art. 50(2)(a) of *the Constitution*. The accused persons were under the leadership of Mr. Oduor, Advocate and Mr. Miyiinda, Advocate respectively whereas the prosecution was under the leadership of Ms. Kirenge Sidi, Prosecution Counsel.
2. The subjects pleaded not guilty to the Information. The prosecution called twenty-one (21) witnesses to establish a prima facie case against the subjects and the evidence is captured as hereunder:

The Prosecution's version

3. The first witness to testify was the deceased's mother one Shikonjela Ambale Agnes who testified as PW1 and stated that on 7th October 2020 she was at home having breakfast with her son when a friend called him to step out. She was later on informed by her neighbour Janet, that her son had been arrested and taken to the police post. At 1:00pm she went to the post and found her son handcuffed to the window. He had been beaten and was unable to stand up. She arranged for food which was taken to



- him but her son was unable to eat as his hands were swollen. She testified that three officers beat him in order to force him to eat. The Accused Persons requested the mother to bring him clothes as Dennis only had shorts, contrary to what he had left the house in, a trousers and a maroon t-shirt. She was able to return with additional clothing for her son but was not able to furnish the Kshs. 2,000/= to secure release of her son because when she returned much later at 1830hrs the officers denied her the opportunity to see her son. They informed her they had already released him. She looked for him for several days until she found his body at Webuye Mortuary on 12th October 2021. She identified his body for the post-mortem which was produced as Exhibit 1.
4. PW2- Rhoda Ayuma Ambare a sister to PW1 stated that on 7th October she was with PW1 and Dennis in the morning when Dennis was called by a friend. At 9:30 they were informed that Dennis had been arrested. They went to see him at the Police Post at 1:00pm. Dennis was at the cell, handcuffed to the window unable to speak. She went to bring food but Dennis was unable to eat. The officers beat him and asked for Kshs 2000 for his release. She stayed at the post from 1pm to 4pm as PW1 went to pick clothes for Dennis. She left the post at 5pm to get a jacket for Dennis. When she returned to the post she was not allowed to see him. The Accused Persons informed her that they had released Dennis. His body was later discovered at Webuye Hospital. She participated in two ID parades where she was requested to identify the officers who were at the station on 7th October 2020. The ID Parade forms were tendered as Exhibit 3.
 5. PW 3 Janet Naliaka Simosi was in the market on 7th October 2020 when she heard somebody say, "niache unaniua" as she was passing by the Police Post. She stopped and she saw Dennis being put inside room 2 at the post. She went and informed PW1 and advised her to go to the post as her son was being beaten.
 6. PW 4 Reuben Obadiah Ongai received a call at 8:00pm from the 1st Accused (his long-term friend) on 7th October 2020. The 1st Accused was borrowing his car, KBH 939J stating that his colleague's wife was in labor and needed the car to take her to hospital. He gave the Accused his car and the accused gave him his motorcycle. The car returned at 3:00am. The car was later impounded for investigations and was released by this Honourable Court upon the hearing of an application made by PW4.
 7. PW 5 Jared Wamalwa a resident at Mbururu. On 7th October 2020, he was called by the 1st Accused person to repair a motor cycle at the Police Post. While there, he saw the Deceased who he knew as Mkali being beaten using a cable by the 2nd Accused. He saw the Deceased with a lot of injuries and blood oozing from his body. The following day, he discovered that the Deceased who he had last seen in the company of the 2 Accused Persons at a cell at the Post could not be traced.
 8. PW 6 Stephen Indesha Malongo the father of the Deceased stated that at the time of the Deceased's arrest, he was in Kisumu. He was informed by PW1 that his son had been arrested. Later the Assistant Chief informed him a body had been recovered from River Nzoia. He went and identified the body of his son at Webuye hospital.
 9. PW 7 Juma Khaemba on 11th October 2020 at around 9:30am spotted a floating object on the river. It appeared to be a body. He went and alerted other people to confirm what he had seen. The body had a rope from the head, round the waist and the legs. The police later came and took the body.
 10. PW 8 Moses Wanyama Werunga was on 12th October 2020 at the shop when he was called to the River to see a body spotted by PW 7. The body was retrieved from the river. It had a rope on the neck to the legs.
 11. PW 9 Mary Naliaka Barasa a village elder was called on 11th October 2020 after a body was sighted floating in the river. The divers were able to retrieve the body and the police took it away.



12. PW 10 Policarp Kweyu, the head of DNA section at Kisumu Government Chemist testified that he received items and samples for analysis in respect to the investigations into the murder of Dennis Lusava. He was able to observe stains on the t-shirt, towel, sisal rope, car reflector, wire cable and car mat obtained from KBH 939J that all tested positive for human blood. He was able to positively identify the body as Dennis Lusava Malongo following a 99.9% match with samples obtained from PW1, his biological mother. The blood stains observed above further matched the DNA profiles of Dennis Lusava. The Exhibit Memo Form together with the exhibit surrendered to the Government Analyst and the resulting report were collectively produced as Exhibit 5.
13. PW11 Chief Inspector Gilbert Tanui a Document Examiner at DCI Headquarters testified on behalf of his colleague Chief Inspector Suko who was away for training. He testified that the laboratory received specimen handwritings of the Accused Persons and Wycliffe Uhuru together with the Occurrence book of Mbururu police station. The request by the Investigating Officers was to determine the maker of questioned handwritings and signatures in the occurrence book. The report, the memo and the Occurrence book were produced as Exhibit 6.
14. PW 12 Chief Inspector Muli OCS, Maralal Police station and PW 13, Chief Inspector Joseph Odongo DCI Sotik testified on the Identification parade conducted on both accused persons at Kitale and Kiminini Police station respectively. The forms were produced as Exhibits 3.
15. PW 14 Dr. Dickson Muchana a pathologist based in Kakamega testified that he conducted a post-mortem on the Deceased. The skin on the body was slipping and he estimated the death as 2 weeks from date of post-mortem. He stated that the body had extensive bruises on the upper half of the back, back of left arm, back of left side, front and inner part of the leg extending to left foot, right elbow and right forearm. The left lung lower lobe had injuries, the stomach had little food signifying he died 4 hours after his last meal. The head had bruises on the back-left side but no fractures. There were extensive soft tissue injuries on the neck, chest and back resulting in failure of circulation. The overall cause of death was circulatory collapse secondary to extensive soft tissue injury following assault. The post-mortem form was produced as Exhibit 9.
16. PW15, Nelson Wafula Baraza, a clinical officer within Mbururu testified that on 7th October 2020 he heard screams from the post that was 50 meters from his clinic. He also heard sounds of someone being beaten. At lunch hour, he saw the Deceased walking out of the post with the two accused persons following him. His hands were handcuffed at the back. Dennis went to the entrance of the clinic where he fell at the door. The two Accused persons went for him and continued beating him as they dragged him back to the base. At around 4-5pm the 2nd Accused requested a member of his staff for painkillers. He asked the staff to prepare the medicine but before he could leave the clinic, the 2nd Accused spoke to his staff through the fence informing her they had decided to refer the person to Kitale County Referral.
17. PW 16 PC Robert Kipruto Too testified that on 8th October 2020 while at Matunda Police Station he received two ladies looking for the deceased who had been arrested by officers from Mbururu police station. The deceased was not at the station. Later the OCS directed him to accompany him to Mbururu police post where they found a crowd of people. He met PW1 who informed him the officer had arrested her son, and she wanted him back. He took the OB which had loose papers and confirmed her son was booked in at 12:00 noon and then released. The crowd became rowdy, and the officers left. When they returned later, the post had been razed down. He further testified that on 9th October 2020, the 2nd Accused requested him to rewrite his entry in the OB after the same had been repaired. The OB was then handed over to CPL Uhuru. He then issued PC Yator, PW 17 with a p3 form for filling.



18. PW 17, PC Reuben Yator was an officer attached to Mbururu Police Station. On 4th October 2020, he was with the 2nd Accused person patrolling the marketplace. They stopped at the butchery where he heard the Deceased shouting. They got into a confrontation with the Deceased, after he (the Deceased) had declared that he would kill the police and torch down the Mbururu Police Post and in which the Deceased bit PW 17's thumb and his middle finger was dislocated. PW 17 was assisted by the 2nd Accused person however they were unable to arrest the Deceased as the crowd in the marketplace refused and became rowdy. He went to Matunda sub-county hospital for treatment. A P3 form was produced as Exhibit 10. On 7th October he left the post for home through Nairobi. He was away when the deceased was arrested.
19. PW 18 PC Charles Wachira, OCS Kakamega testified that on 11th October 2020 he was informed of a case of drowning in River Nzoia. He responded with other officers to the crime scene which was 600 meters from the Webuye bridge. There was a body floating on the river. The body was retrieved by divers from the area. The body had been tied with a nylon rope on the neck and leg. The officer photographed the scene, and the body was taken to the mortuary. He handed over the photos to the team from DCI Homicide, Nairobi.
20. PW 19 Chief Inspector Lillian Saka a crime investigator with the DCI testified that she was called to process several scenes in relation to the investigations into the murder of the Deceased. She attended the post-mortem at Kakamega Mortuary, she processed the police post where the deceased was held and the motor vehicle that was used to ferry the body. At the post, several exhibits were recovered from the pit latrine including sticks that were allegedly used to beat the deceased She thereafter produced the photos and documentations as Exhibits 11 to 13 respectively.
21. PW 20 Corporal Jonathan Limo a Liaison officer at Safaricom testified that they received a request letter from DCI seeking call data records and subscriber details of 0729xxxxxx, 0703xxxxxx and 0703xxxxxx. He retrieved the information from the system and produced them as Exhibit 14 and 15 accordingly. The same information was able to establish as follows:
 - a. Accused 1 was holding 0703 290 059 who switched off his phone on 7th October 2020 at around 2123 HRS at Ndalú in Moi's Bridge, the line was switched on later on 8th October 2020 at 0717HRS.
 - b. Accused 1 also had his original line being 0721xxxxxx which he used to communicate with PW4 on the night of 7th October 2020.
 - c. Accused 2 was holding 0729737 905 registered under switched off the phone on 7th October 2020 at around 2123 HRS while at Ndalú in Moi's Bridge, the line was switched on later on 8th October 2020 at 1024HRS.
22. PW 21 Chief Inspector Peter Kamau testified as the Investigating Officer in the case. He stated that he was assigned the matter on 13th October 2020 where he proceeded to Kakamega to investigate the death of Dennis Lusava with a team of two other officers. They established that Dennis was arrested and held at Mbururu Police post. Efforts to have him released by his mother and aunt were unsuccessful and his body was later discovered at River Nzoia. The reason for the Deceased's arrest was an altercation with PW17 that happened on 4th October 2020 which was witnessed by the 2nd Accused Person. They proceeded to Matunda Police Station where they received the duty roster which he produced as Exhibit 16. They then went to the post where the scene was processed, and several samples were obtained for analysis. A bloody towel was recovered from the post that matched the DNA of the deceased person. In the pit latrine they retrieved sticks which he produced as Exhibit 2. The team attended the post-mortem where the cause of death was established together with samples required for testing. Investigations



revealed that the altercation with PW 17 led to the arrest of the deceased however the Occurrence Book had been interfered with. They collected handwriting specimens for analysis by the Document Examiner. The 2nd Accused during the investigations aided the team by leading them to the owner of the motor vehicle that was used. The officers were able to impound the vehicle for processing and arrest the owner. The samples collected were subjected to analysis and a positive match with the DNA of the deceased was obtained. Further, the 2nd Accused led the team to the bridge at Webuye where the body was dropped. PW 21 was able to sketch the scene and produced the same as Exhibit 21. Thereafter the 2nd Accused took the team to where they disposed of the clothes of the deceased at another bridge. The sketch of this scene was produced as Exhibit 22. The accused persons upon interrogation by the team revealed information that amounted to a confession to the crime. The team requested Chief Inspector Caleb Owino to record the statements however the officer died on 31st December 2022 and his signal of his death was produced as Exhibit 23. The officer also organized for an ID parade which was conducted and the two accused persons were identified by PW2.

23. At the close of the prosecution's case the court ruled that a prima facie case had been made out by the prosecution to warrant each of the accused persons be placed on his defence in terms of section 306 as read with 307 of the Criminal Procedure Code.
24. With regard to the 1st accused person Emmanuel Wafula Viambaka, he acknowledged being a police officer attached to matunda police station, he denied the offence of murder as alleged by the state and its witnesses. He narrated the events of the 4th October, 2020 by briefly stating that he was on leave having been issued with a bonafide exit to be absent from duty. Some of which he was to recuperate from a road traffic accident which had occasioned injury to his left arm. He recalled that on the material day, he happened to have passed through Mbururu police post where he met PCs Sirengo and PC Yator where he was informed of an incident between PC Yator and the deceased. That following that alleged incident, the deceased seemed to have taken flight from the jurisdiction of the police post. He managed to pursue the occurrence book No 54 of 2020 in which it was recorded that the deceased had assaulted a police officer being PC Yator. It did not take long according to the 1st accused when PC Sirengo, the 2nd accused informed him that he had seen the deceased walking along the road near the police post. He then sent for the deceased by using this motorcycle which doubled up as an income earner to his benefit. The 1st accused went further to explain to the court that this very suspect was known to him prior to the arrest. He took steps to place him in Police custody for further investigations. It is at that moment he took the liberty of explaining to the suspect the reasons of his arrest and being placed in police cells. However, it did not take long, the in-charge PC Uhuru directed that the deceased from custody to await PC Yator to return from Nairobi. To the best of his recollection, the deceased was released as per the direction given by in Charge of the Police Post. With regard with the alterations in their aforesaid entries to the occurrence book he denied any such involvement. The accused was also able to recall that upon release of the deceased from police custody, his mother appeared inquiring as to his whereabouts but she was informed that her son had been released. The mother did not take that explanation lying down, she sought assistance from the neighbourhood who moved with rage and set ablaze the police post. He denied any forensic evidence presented by the prosecution linking him with the commission of the offence.
25. On the other hand, the second accused PC Godwine Sirengo on his part told the court that on the alleged material days on the 7th October, 2020, happened to be one of the Police officers at Matunda Police post deployed to perform general crime duties. It was during that period the OCS of Matunda Police Post required of him to proceed to Mbururu Police Post to assist with investigations. He denied the allegations by the prosecution that in company with the 1st accused, they committed the offence of murder against the deceased. It was further the testimony of the 2nd accused that on 4th October, 2020



he was at his house when PC Yator visited him and asked him to accompany him to the market where they passed through Ambo Hotel. In that facility they were served with the order and in a little while, he heard of someone screaming “Nyinyi!” and at no time he assaulted PC Yator. As both of them tried to take positive steps to calm down the situation, members of the public stepped in and that occasioned a major commotion culminating in the deceased taking flight from the scene. It so happened that on or about 7th October, 2020, he was informed by PC Emmanuel Viambaka that the deceased had been spotted in the market centre. Given their previous knowledge of the deceased being a suspect for the offence of an assault against PC Yator, a quick decision was made to have him arrested and placed in Police custody. He was booked vide OB No. 7/10/2020. While in Police custody, the mother to the deceased visited the police post at around 12:10 PM and in a conversation which ensued, the uncharged corporal Uhuru had a discussion with them to concede to have him released from custody on a free bond. He denied that he never knew the whereabouts of the deceased from the moment he was released from police custody under instructions of Corporal Uhuru of Mbururu Police Post. Besides their own testimony, additional witnesses who were summoned in support of their defence included one Jane Rose Nekesa (DW3). According to DW3, on the material day of the 7th October, 2020 she was selling in a grocery shop when a lady came to her seeking her company to escort her to the police station. In the course of the conversation, the said lady who happened to be the mother to the deceased by the name Dennis informed her that he was under arrest by the police post officers. In their encounter, DW3 further told the court that the deceased explained to them that previously he had fought with the police officer and that is the reason why he had been arrested. According to DW3, she did not witness any unusual situation circumstances or conditions on the part of the deceased.

26. The next witness was Nelson Lucas who also on oath told the court that on 7th October, 2020 he was at his home making burial arrangements of his father who had passed on. It was during those moments, the deceased passed through his home and explained that he had differed with the police officers who had arrested him but has been released.
27. Finally, the defence summoned the evidence of Andrew Mwenyi whose evidence was to the effect that on 7th October, 2020 while they were making funeral arrangements, the deceased passed through their home and informed them that he had been arrested by the police officer because he had fought with one of them but fortunately, he had been released from custody. The witness confirmed that he did not know what happened to the deceased only to learn of his death after 7th October, 2020.

Prosecution submissions

28. Prosecution Counsel Ms. Kirenge Sidi filed written submissions dated 30th May, 2025 highlighting the four essential elements for the offence of murder.
29. Concerning the first element establishing the fact of death, the prosecution argued that it was not in contention that the victim Dennis Lusava was dead. The prosecution relied on the evidence of PW 6, the father who went to identify the body at Webuye Hospital, and PW 14, the pathologist who performed the post mortem examination. The pathologist confirmed that the deceased died from circulatory collapse secondary to extensive soft tissue injury following an assault, thereby proving the fact of death beyond reasonable doubt.
30. On the second element regarding unlawful causation of death, the prosecution referenced the decision in *Uganda v Lydia Draru alia Atim HCT-00-CR-SC-0404* arguing that unlawfulness as a component of the offence of murder under Section 203 is regarded as a voluntary act or conduct by an accused person against the legally protected right to life under Article 26 of *the Constitution*.



31. The prosecution further elaborated on the requirement of actual causation of death, explaining that there must be a cause-and-effect relationship between the accused's conduct and the deceased's death. Citing *Republic v Kangela* (Criminal Case E007 of 2021) [2025] KEHC 4045, the prosecution submitted that what the law envisages in an unlawful act or omission is the factual evidence that the fatal injuries would not have occurred but for the accused's unlawful act or omission. Once the prosecution introduces evidence that the accused's negligent act or omission caused or increased the risk of harm to the deceased, and that the harm so sustained is conclusive as the cause of death, then the burden of proof has been discharged beyond reasonable doubt.
32. Learned Counsel emphasized that before any conviction based on circumstantial evidence can be reached, the evidence adduced must be adequate to prove the case on the required standard of beyond reasonable doubt. They referenced the criteria established in *Republic v Kangela* (Criminal Case E007 of 2021), which requires that evidence must be logically connected to the case, must prove or disprove a fact relevant to the case, should be reliable and trustworthy with minimal chance of falsehood, that its potential to influence a decision should not outweigh the probative value, and that the evidence should not be hearsay.
33. Regarding the third element of malice aforethought, Ms. Kirenge submitted that this element is established as the mens rea of the offense under Section 206 of the Penal Code. The prosecution submitted that malice aforethought refers to an intentionally harmful act that typically leads to someone's death. Learned counsel outlined that malice aforethought in their case was deemed to be established by evidence as stipulated under Section 206, which provides one or more of the following elements: 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; knowledge that the act or omissions causing death will probably cause the death 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; an intent to commit a felony; and 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.
34. The prosecution argued that the accused had malice aforethought in killing the deceased, submitting that the second accused, while in company of PW 17, were out on 4th October in the market purchasing items for supper when they met with the deceased. PW17 and the deceased got into a fight and the deceased allegedly bit the finger of PW 17. The two officers attempted to arrest the deceased, however the people at the market prevented them from doing so. That the first accused was away on leave when this transpired, but upon his return, he was informed about the incident, and a plan was hatched to arrest the deceased.
35. Throughout their submissions, learned counsel maintained that the evidence adduced established all four essential elements of murder beyond reasonable doubt, and that the conduct of the accused persons, from the initial confrontation through the planned arrest, systematic assault, disposal of the body, and subsequent deception of the community, demonstrated clear malice aforethought and a deliberate intention to cause the death of Dennis Lusava Malongo.

1st Accused written submissions

36. Learned Counsel Mr. Oduor, appearing for the 1st accused person, advanced comprehensive arguments challenging the prosecution's case on three main issues identified for determination: whether the 1st accused murdered the deceased, whether the accused was seized of requisite mens rea, and whether the prosecution proved their case beyond reasonable doubt.



37. It is submitted for the 1st accused person that the prosecution failed to establish the essential elements required to prove murder under Section 203 of the Penal Code. Counsel argued that while the prosecution successfully proved that the person died, the cause of death was known, the death was unlawful, and was caused by the 1st accused person, they critically failed to prove that the 1st accused person intentionally caused the death of the deceased. The defense noted that the evidence showed the deceased died as indicated by the post-mortem form stating the cause was an assault resulting in soft tissue injury leading to circulatory collapse, the death was by unlawful means, and the deceased was found in river Nzoia dead.
38. However, counsel submitted that the prosecution failed to prove several crucial elements, including the exact date of death of the deceased and when the accused died, that the 1st accused killed the deceased, that the deceased died at Mbururu Police Station, that the 1st accused person was linked to the weapon used to kill the accused person, and that the deceased was actually killed with weapons. Consequently, counsel argued that the prosecution failed to prove the offense of murder due to these evidentiary gaps.
39. Learned Counsel further submitted that the prosecution's case was fundamentally undermined by evidence showing that the deceased was released from prison on 7th October 2020 as indicated in the Occurrence Book. This record was countersigned by the supervisor, Corporal Wickliffe Uhuru, and was not altered or falsified. Counsel emphasized that the deceased was never in the borrowed motor vehicle registration number KBH 939J which the 1st accused allegedly borrowed from PW4. Rather, the forensic report indicated that the deceased was in motor vehicle registration KBH 939T, which the 1st accused had never been in. Furthermore, the motor vehicle registration number KBH 939J was never brought as evidence before the court for forensic analysis.
40. Regarding the confession evidence, counsel submitted that the confession relied upon by the prosecution was unlawful and unconstitutional as provided for in The Evidence (Out of Court Confessions) Rules. The defense argued that the officer who recorded the confession never testified in court contrary to Rule 13 of the said rules, and the confession was not made in the presence of a judge or magistrate or in the presence of a third party of the person's choice as provided in section 25A (1) of the *Evidence Act*.
41. On the vehicle evidence, it is submitted that the only link between the death of the deceased and the 1st accused was alleged to be the motor vehicle registration number KBH 939T, which was never involved in an accident and no weapon was found in the motor vehicle nor in the possession of the 1st accused. That even if the 1st accused had used a motor vehicle to dispose of the deceased's body, which had never been proved, this would not link the 1st accused person with the deceased's death, rather an intention to cause it.
42. Addressing the mens rea element, counsel submitted that the 1st accused person lacked the requisite intent to murder the deceased for several reasons. The deceased and the 1st accused person enjoyed cordial relations as the deceased was entrusted with the motorcycle by the 1st accused person. There was no motivation on the part of the 1st accused person to murder the deceased as PW17, Mr. Yator, who was assaulted by the deceased at the Police Station, did not enjoy any seniority to the 1st accused person. The defense emphasized that the prosecution must prove malice aforethought or mens rea, and that the first element to prove in a criminal case is actus reus, without which there is no point in proving the mental status of the accused.
43. Counsel further submitted that no proof had been tendered by the prosecution that the 1st accused person caused the death of the deceased, arguing that it defied logic to prove mens rea without first establishing that the accused committed the actus reus. The prosecution failed to prove that the 1st



accused person ever beat or assaulted the deceased, and no prosecution witness saw the 1st accused person beating the deceased in prison as alleged by the Investigating Officer. While the Investigating Officer claimed he was told by eye witnesses that the 1st and 2nd accused persons were dragging the deceased naked, none of these witnesses testified before the court. Therefore, the Investigating Officer's evidence was hearsay and inadmissible under sections 33 and 34 of the *Evidence Act*.

44. Regarding the motor vehicle evidence, counsel submitted that the prosecution presented evidence of motor vehicle registration number KBH 939T alleged to have been used by the 1st accused person to carry the deceased's body, but the prosecution's own evidence contradicted this allegation as the alleged owner of the motor vehicle distanced himself from the motor vehicle registration number KBH 939T. The prosecution conducted forensic analysis on motor vehicle registration number KBH 939T and found that the deceased's blood was in the said motor vehicle, but the 1st accused's DNA was absent. Conversely, the 1st accused person proved that the motor vehicle he borrowed was KBH 939J, and PW4, the owner of this vehicle, also testified to this effect.
45. On the doctrine of last seen alive, counsel submitted that the prosecution failed to prove this crucial element as they did not produce the call directory record to prove that the 1st accused went to river Nzoia on the material day or that the 1st accused was with the deceased person. The prosecution was required to prove that the deceased left the Police Station as a dead person, but the last person who saw the deceased alive was PW5, Jared Wamalwa, who repaired motorcycles between 4 p.m. and 5 p.m., while no prosecution witness saw the deceased person dead at the Police Station.
46. In conclusion, learned counsel submitted that the case presented by the prosecution relied on hearsay evidence and empty arguments in an attempt to blindfold the court into unjustly convicting the 1st accused person. The defense argued that such arguments were unlawful and infringed on the 1st accused person's right to be presumed innocent as per Article 50 of *the Constitution*. Counsel emphasized that mere arguments without evidence are insufficient to infer guilt, and such arguments must be accompanied by actual evidence. The defense cited the principle from H.L. (E) Woolmington vs. DPP (1935) A.C 462 pp 481, that throughout the web of English Criminal Law, it is the duty of the prosecution to prove the prisoner's guilt, and if reasonable doubt remains, the prosecution has not made out the case and the prisoner is entitled to acquittal. To this end, learned counsel urged this court to acquit the 1st accused person.

2nd accused written submissions

47. Learned Counsel Mr. Miyianda submitted that the prosecution's case hinges on six critical issues that this Honourable Court must determine:
48. First, whether the deceased actually died at Mbururu Police Post cell on 7/10/2020. Second, whether the 2nd accused was involved in the death of the deceased. Third, how the body of the deceased was found in Nzoia River. Fourth, whether malice aforethought can be apportioned against the 2nd accused. Fifth, whether the prosecution has proved its case against the 2nd accused beyond reasonable doubt. Finally, whether the 2nd accused should be acquitted or convicted.
49. Counsel for the 2nd accused argued that the prosecution evidence fundamentally fails to establish any connection between the 2nd accused and the alleged murder of the deceased. It is submitted that the evidence presented by prosecution witnesses PW6, DW1, and witnesses 2, 3, 4, and 5 demonstrates that no evidence has been led linking the 2nd accused with the murder of Dennis Lusava Malango.



50. Mr. Miyianda contended that the evidence shows the deceased was released from the Police Post, as confirmed by multiple witnesses. Learned Counsel submitted that this fact alone creates reasonable doubt about the prosecution's theory that the deceased died while in police custody.
51. It is submitted for the applicant that a significant contradiction exists in the prosecution's evidence concerning the motor vehicle allegedly involved in the case. Counsel argued that while the prosecution alleged that the body was taken to Nzoia River, the court was told that phone number 0721xxxxxx belonging to A2 was not being investigated. Furthermore, the defence pointed out that the prosecution alleged the deceased was being assaulted in a cell, but no witness testified to seeing A2 assault the deceased.
52. Learned Counsel highlighted a critical discrepancy whereby the motor vehicle allegedly involved and dusted for evidence (KBH 939T) was different from the vehicle (KBH 939J) that was actually examined and referred to by prosecution witnesses A1 and A2. This inconsistency was confirmed by forensic examiner Lutta PW10, who testified about examining a different vehicle entirely.
53. Counsel argued that the DNA evidence presented by the prosecution actually supports the defence case. It is submitted that PW10 Polycarp Lutta Kweyu, the Government Chemist, prepared a report dated 28/12/2023 which revealed crucial findings. The DNA analysis conducted on motor vehicle KBH 939T found no DNA samples of A1 or A2 on the vehicle examined.
54. Learned Counsel submitted that the forensic evidence demonstrates that DNA profiles of Emmanuel Wafula Vyambaka and Godwine Wekesa Sirengo (the accused persons) and Reuben Obadiah Ongai (PW4) did not match any of the DNA profiles generated from the items examined. This scientific evidence, the defence argues, definitively excludes the 2nd accused from any involvement in the alleged crime.
55. He submitted that the prosecution witnesses provided contradictory and unreliable testimony. Counsel argued that the witness testimonies reveal that the deceased died on 7/10/2020, but this date does not align with the post-mortem report which indicated that death occurred between 7/10/2020 and 11/10/2020.
56. It is submitted that DW2 Godwine Wekesa Sirengo's testimony corroborates the defence position. Counsel argued that his evidence shows he moved to Matunda Police Station on 7/7/2020 and was instructed on 2/10/2020 to go to Mbururu Police Post. On 4/10/2020, P.C Yator was assaulted by the deceased at Mbururu center, leading to the deceased's arrest and booking under OB 7/7/10/2020 under the instructions of CPL Wycliffe Uhuru.
57. Mr. Miyianda submitted that on 8/10/2020, they received information that people would come to torch the Police Post, and the 2nd accused confirms he did not tamper with the OB on 7/10/2020 and was not involved in the murder of the deceased.
58. Learned Counsel Mr. Miyianda submitted that the prosecution has fundamentally failed to prove the essential elements of the offence of murder against the 2nd accused. It is submitted for the applicant that the evidence demonstrates beyond doubt that the 2nd accused person was not involved in the murder of the deceased, as confirmed by the release of the deceased from the Police Post and corroborated by multiple witnesses.
59. Counsel argued that the forensic evidence, including the DNA analysis, definitively excludes the 2nd accused from any involvement in the alleged crime. The defence contends that the prosecution's case is built on speculation and contradictory evidence that fails to meet the standard of proof beyond reasonable doubt required in criminal proceedings.



60. In conclusion, counsel submitted that based on the totality of the evidence presented, including the lack of any direct evidence linking the 2nd accused to the murder, the contradictory witness testimonies, the exonerating forensic evidence, and the credible defence evidence showing the deceased was alive when released from custody, this Honourable Court should find that the prosecution has failed to prove its case against the 2nd accused beyond reasonable doubt. He therefore urged the court to acquit the 2nd accused person forthwith.

Analysis and determination

61. The prosecution bears the continuous responsibility throughout trial proceedings to prove the accused's guilt beyond reasonable doubt, as mandated by Section 107(1) of the *Evidence Act*. Any party seeking a favourable court ruling on legal rights or obligations must substantiate the factual basis underlying their claims. Furthermore, Section 109 establishes that the evidentiary burden for proving specific facts rests with the party asserting their existence, except where statutory provisions explicitly assign this responsibility to another party.
62. In *Re Winship* 397 US 358 (1970) the court succinctly summarized the concept of beyond reasonable doubt as follows;

“First in a Judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief the degree to which a fact finder is convinced that a given act actually occurred can, of course vary. In this regard, a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusion... the standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons. but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

In a criminal case... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty... in the context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”

63. Article 50(2)(a) of Kenya's 2010 Constitution establishes the fundamental principle that an accused person remains presumed innocent until proven guilty through either direct or circumstantial evidence. Direct evidence provides immediate proof of a fact without requiring inference, such as eyewitness testimony or video recordings of the alleged crime. In contrast, circumstantial evidence requires logical reasoning to connect proven facts to the conclusion, allowing courts to infer guilt



from a chain of related circumstances that, when considered together, point toward the defendant's culpability.

64. In *People v Bretagna* (298 NY 323, 325-326 [1949]) the court addressed itself in the following language:

“Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. Circumstantial evidence . . . never proves directly the fact in question. In other words, direct . . . evidence, as the term is commonly used, means statements by witnesses, directly probative of one or more of the principal . . . facts of the case, while circumstantial evidence puts before the tribunal facts which, alone or with others, are in some degree but indirectly, probative of one or more of those principal . . . facts, and from which one or more of those principal facts may properly be inferred” see *People v Hardy*, 26 NY3d 245, 251 [2015] By contrast . . . direct evidence . . . requires no inference to establish (a particular fact)”; *Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986]”

65. Every criminal offense requires two essential elements: mens rea and actus reus. Trial courts must ensure that both components are established beyond reasonable doubt before entering any conviction, as emphasized in *Joseph Kimani v R* (2014) eKLR. In murder cases specifically, the prosecution must prove each ingredient of the offense to this exacting standard, relying on concrete evidence rather than speculation or suspicion.

66. As a matter of reiteration, section 203 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder. The elements of the offence are well settled being:

- a. The death of the deceased occurred.
- b. The death was caused by unlawful acts.
- c. That the accused committed the unlawful act which caused the death of the deceased; and
- d. That the accused had malice aforethought. (see *Anthony Ndegwa Ngari v Republic* [2014] eKLR)

67. This being a criminal charge, the duty rests squarely on the prosecution to prove every essential element constituting the offence beyond reasonable doubt. Again, there is no duty whatsoever on the part of the accused to prove his innocence or even to prove anything on his part. As Article 50(2)(a) provides, every person suspected of an offence has a right to be presumed innocent until the contrary is proved. The Supreme Court of Nigeria in *Bakare vs State* (1985) 2 NWLR stated:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”

68. In the landmark case of *Miller Vs Ministry of Pensions* [1947] 2 All ER 372, Denning J stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of



doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

69. Starting with the first element, there is overwhelming evidence that Dennis Lusava Malango died on or about 7th October 2020. The prosecution relied on the evidence of PW6, Stephen Indesha Malongo, the father of the deceased, who identified the body of his son at Webuye hospital. Most significantly, PW14, Dr. Dickson Muchana, a pathologist based in Kakamega, testified that he conducted a post-mortem on the deceased. The pathologist confirmed that the deceased died from circulatory collapse secondary to extensive soft tissue injury following assault. The post-mortem form was produced as Exhibit 9, thereby proving the fact of death beyond reasonable doubt. This element has been satisfactorily established by the prosecution.
70. The second ingredient requires establishing that the death of Dennis Lusava was caused by an unlawful act or omission. It is settled law that every homicide is unlawful unless excusable as stipulated in Article 26(3) of *the Constitution*. The provisions of Section 213 of the Penal Code define what constitutes causation issues in offences against the person which includes murder. In the case of Republic v Joseph Chege Njora 2007 eKLR, the court held:
- “A killing of a person can only be justified and excusable where the accused’s action which caused the death was in the course of averting a felonious attack and no greater force than this necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or part arising from a sudden and serious attack by his victim. It must also be shown the reasonable force was used to avert or forestall the attack.”
71. The evidence demonstrates beyond reasonable doubt that the deceased met his death through unlawful acts of assault while in police custody at Mbururu Police Post. PW1, Shikonjela Ambale Agnes, the deceased’s mother, testified that when she went to the police post at 1:00pm on 7th October 2020, she found her son handcuffed to the window, beaten and unable to stand up. She witnessed three officers beating him to force him to eat. PW2, Rhoda Ayuma Ambare, corroborated this evidence, stating that Dennis was at the cell, handcuffed to the window, unable to speak, and that officers beat him and demanded Kshs 2000 for his release. PW5, Jared Wamalwa, provided crucial direct evidence when he testified that while repairing a motorcycle at the police post, he saw the deceased being beaten using a cable by the 2nd accused, with a lot of injuries and blood oozing from his body. The post-mortem findings revealed extensive bruises on the body, extensive soft tissue injuries on the neck, chest and back, confirming the unlawful nature of the assault. There is no cogent evidence that the deceased's death falls within the exceptions contemplated in Article 26(3) of *the Constitution* as read with Sections 17, 207 and 208 of the Penal Code.
72. The prosecution must establish beyond reasonable doubt that it was the accused persons who committed the unlawful acts that caused the death of Dennis Lusava. The evidence in this case is predominantly circumstantial, supported by direct evidence from key witnesses. In Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, the Court of Appeal stated:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to



deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence.”

73. The Court of Appeal in *Abanga alias Onyango v R* Cr. App. No 32 of 1990 set out the conditions for circumstantial evidence:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

74. The identification evidence is particularly strong in this case. PW1 and PW2 positively identified both accused persons as they were familiar with them from their work at the police post. This was not a case of identification by strangers but recognition by persons who knew the accused persons. In *Roria v Republic* (1967) EA 583, the court held:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

75. The forensic evidence provides compelling corroboration. PW10, Policarp Kweyu, the head of DNA section at Kisumu Government Chemist, testified that items and samples received for analysis revealed blood stains on the t-shirt, towel, sisal rope, car reflector, wire cable and car mat obtained from motor vehicle KBH 939J that all tested positive for human blood. Crucially, he positively identified the body as Dennis Lusava Malongo following a 99.9% match with samples obtained from PW1, his biological mother. The blood stains observed further matched the DNA profiles of Dennis Lusava. This scientific evidence creates an irrefutable link between the deceased, the crime scene, and the motor vehicle associated with the accused persons.

76. The evidence of PW4, Reuben Obadiah Ongai, demonstrates the 1st accused's possession of the motor vehicle used to transport the deceased's body. He testified that the 1st accused borrowed his car KBH 939J on 7th October 2020 at 8:00pm, claiming his colleague's wife was in labour. The car was returned at 3:00am, and was later impounded for investigations. The Safaricom call data records produced by PW20, Corporal Jonathan Limo, established that both accused persons switched off their phones on 7th October 2020 at around 2123 hours at Ndalui in Moi's Bridge, with the lines being switched on later on 8th October 2020. This pattern of behaviour is consistent with consciousness of guilt and an attempt to avoid detection.



77. The final element to be established is malice aforethought, which constitutes the mens rea of the offence under Section 206 of the Penal Code. Section 206 provides that 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;
 - c. An intent to commit a felony; and
 - 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.
78. In *Rex v Tubere s/o Ochen* (1945) 12 EACA 63, the court held:
- “The court has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick.”
79. The Court of Appeal in *Joseph Kimani Njau v R* (2014) eKLR further clarified:
- “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.”
80. Malice aforethought is manifested from the evidence by the nature and extent of the assault inflicted upon the deceased. The post-mortem report revealed extensive bruises on the upper half of the back, extensive soft tissue injuries on the neck, chest and back, and defence wounds indicating the deceased fought for his life. PW5’s direct evidence of seeing the 2nd accused beating the deceased with a cable, targeting vulnerable parts of the body, demonstrates a clear intention to cause grievous harm. The systematic nature of the assault, the use of implements like cables, and the deliberate targeting of vital organs such as the chest and neck area, all point inexorably to an intention to cause death or grievous harm. The accused persons continued the assault despite the deceased’s obvious distress and the presence of witnesses, showing a reckless disregard for human life.
81. This analysis would be incomplete without factoring in the doctrine of common intention under Section 21 of the Penal Code. Section 21 provides:
- “When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence



is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”

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

- a. There must be two or more persons;
- b. The persons must form a common intention;
- c. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
- d. An offence must be committed in the process;
- e. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.”

83. In *Ismael Kisegerwa & Anor. Vs Uganda*; C.A. Crim. Appeal No. 6 of 1978, the court stated:

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused person shared with one another a common intention to pursue a specific unlawful purpose and in the prosecution of that unlawful purpose an offence was committed the doctrine of common intention would apply irrespective the offence committed was murder or manslaughter.

It is now settled that an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate themselves from the assault, it can develop in the cause of events though it might have not been present from the start, it is immaterial whether the original common intention was unlawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence. Where the doctrine of common intention applies, it is not necessary to make a finding as to who actually caused the death.”

84. The evidence demonstrates that both accused persons acted in concert in the systematic assault and subsequent disposal of the deceased's body. The 2nd accused led the initial assault while in custody, and the 1st accused participated in the transportation and disposal of the body using the borrowed motor vehicle. Their coordinated actions in switching off their mobile phones simultaneously, the alteration of the Occurrence Book, and their subsequent attempts to conceal their involvement all point to a common intention to cause harm to the deceased and thereafter cover up their criminal acts. Neither accused person attempted to dissociate himself from the unlawful conduct, and both participated actively in different phases of the criminal enterprise.

85. This case dependent wholly and mainly on eye witness evidence of identification. The synopsis of the witnesses culminated in the identification parade conducted on 25.10.2020 on which Rodah Ayuma (PW1) positively identified the accused persons before court. The locus classicus case of *Turnbull* (1976) 3 ALL ER 549 held inter-alia as follows:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be



mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition[,] he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ...Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made

86. When the witness went to police post, she captured the moments with accuracy and the specifics strengths of it cannot be doubted that there was mistaken identity of the accused persons. The case for the prosecution did not rest there, the issue of the occurrence book was tempered with and at the time the two accused persons were in control of the events at there place of work. It is not easy for a stranger to walk into a police station and carry out some interference on bookings made at the occurrence book. It is indeed a tool of investigations within our policy framework on investigations and complaints made to the police. The release of the deceased was a decision made by the two accused persons in court acting in concert to achieve a particular criminal enterprise. In the sense there is no error in the identification of the accused persons and placing them squarely at the scene of the crime. There are obviously facts of this case which are presumed as proven until the contrary is proved as provided for under Section 107 (1), 108 & 109 of the *Evidence Act*. It is therefore trite that presumption of fact is a rule in law of evidence at a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact, from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. (See *Nagendra Sah v State of Bihar (2021) 10 SCC 725*). The accused persons in this case on piecing together the circumstantial evidence by the prosecution failed to offer a reasonable explanation in discharge of the burden placed on them by virtue of Section 111 of the *Evidence Act*. This failure on the part of the accused persons, provided an additional link to the chain of circumstances in which the deceased met his death. There are no glaring gaps in the evidence produced by the prosecution to create a doubt regarding the incident much less the accused's persons involvement in the alleged crime.
87. This narrative is a kin to the doctrine of the last seen theory which comes into play when the accused persons arrested the deceased from the local shopping centre with an allegation that he had committed an assault against there colleague. It is from this arrest, that the accused was taken in at Mbururu Police Post, thereafter, he suffered physical injuries while in police custody, what followed was an alleged release only his body to be found dead and not within the police post but dumped at a nearby river.
88. Having carefully considered all the evidence presented, both direct and circumstantial, I am satisfied that the prosecution has proved beyond reasonable doubt all the essential elements of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The death of Dennis Lusava Malango has been established through credible medical evidence; the death was caused by unlawful



acts of assault while in police custody; the accused persons committed these unlawful acts either directly or through common intention; and these acts were committed with malice aforethought as evidenced by the systematic and brutal nature of the assault. The forensic evidence, witness testimony, and circumstantial evidence form a complete chain that leads irresistibly to the conclusion that the accused persons are guilty of the murder of Dennis Lusava Malango.

89. In the circumstances, this court finds both accused persons guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and convicts them accordingly.

RULING ON SENTENCE

90. This is a sentence which must be viewed within the spectrum of Article 26 of *the constitution* on the right to life. The right to life is a fundamental human right and any violation of it by committing offences like murder or manslaughter and in absence of any exceptional circumstances should meet the full force of the law. In cases where someone is charged with murder contrary to Section 203 of the penal code, like in the case at bar, the right to life is central to the legal process. For this case, the prosecution proved beyond reasonable doubt that the accused persons intentionally or recklessly caused the death of the deceased unlawfully so thus violating his right to life. It is also true that under Art 2(5) & (6) of the Kenyan Constitution International Law forms part of our sources of Law. Take for example the universal declaration of Human Rights adopted in 1948 which affirms the right to life as inherent and inalienable. Secondly, International Covenant on Civil and Political Rights (ICCPR) explicitly protects the right to life. This right to life which is set forth by our constitution and International Human Rights Instruments, binds all citizens to ensure the right to life of all persons are respected and that no one shall be arbitrarily deprived of his life unless on permissible grounds. There is a presumption in the biblical theology in Psalms 90:12 teaches us to number our days a right that our days may come to seventy or Eighty years before you return us back to dust with your command return to dust you mortals” The right to life as promulgated at creation by the Giver of Life for those who believe in creation and in our constitutional framework 2010, is a personal inalienable natural of every person to life, which arises at birth and is a part of a multifaceted human rights system, it is a universal, natural and inalienable human right, which is realized with equal force everywhere (See Miroshnichenko O.A, 2005) It is the duty of the State and all its citizens to protect human life wherever it is domiciled. It may be in our homes, villages, communities, all places of work it is protected from unlawful encroachment. This is exactly what happened here. The deceased was taken in as a suspect of having assaulted a police officer. All what was required was to process his wrong doing within the provisions of Article 245 of *the constitution* and the corresponding statute which is to investigate any particular offence or offences against any person so as to subject him or her to the due process as provided for in our legal system. It is also trite that the National Police Service are mandated to enforce the law against any particular person or persons. In Art. 50 (1) of *the constitution* “ every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”
91. In the chain of events, from the time the accused was arrested as a suspect of having assaulted a police officer, and subsequently being detained at Mbururu Police Post all what was required was the complainant to make a formal report duly documented in the occurrence book for the OCS to give instructions on the next course of action to bring the culprit to account. This was never the case and the evidence is very explicit. This is a country governed by the rule of law by the letter and the spirit of *the constitution*. As a matter of emphasis, I borrow in Pari- Materia the principles elucidated by the Court of Appeal in A.G, Nelco Masanya Sagwe & Peter Odero Anditi (2015) KECA 397 (KLR). In which the court observed as follows: The primary meaning of the rule of law has anybody who has anything to do with the law knows, ‘is that everything must be done according to law.’ In relation



to governmental power, this means that every government authority must justify its action, which deprived an individual of his right or infringes of his liberty, as authorized by law. This ‘is the principle of legality.’ But the rule of law demands more than just the principle of legality. It demands, and this is the second meaning of the rule of law, ‘that government should be conducted within a framework of recognized rules and principles which restricts discretionary power.’ This is the principle of due process. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by Courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.

92. It is implicit from the above case law that courts are required to approach the imposition of sentence conscious that the legislature has ordained the death penalty as the sentence that should ordinarily be the yardstick upon which the discretionary power can be exercised in arriving at a fair, just and proportionate sentence unless there is weighty justification to depart substantially from that kind of threshold.
93. The accused persons were convicted with the offence of murder contrary to the provisions of section 203 as punishable under section 204 of the Penal Code.
94. The prosecution on their part filed submissions agitating for a life sentencing given the circumstances of the case. Learned Counsel Ms. Kirenge submitted that the Judiciary Sentencing Guidelines emphasize the principle of proportionality as a fundamental consideration in determining an appropriate sentence. This principle requires that the punishment imposed corresponds precisely to the seriousness of the conduct in question, it should neither exceed nor fall short of what is justified by the nature and severity of the offence. In evaluating proportionality, she urged the court to consider the actual, intended, and foreseeable consequences of the offence, as well as the degree of culpability of the offender.
95. Further, the learned counsel urged this court to consider the following aggravating factors:
 - a. The significant degree of planning or premeditation that was done.
 - b. The mental and physical suffering inflicted upon the victim before death.
 - c. The torture or inhuman or degrading treatment prior to death.
 - d. The torture or inhuman or degrading treatment prior to death.
 - e. The use of duress or threats to enable the offence to take place.
 - f. That the offence involved an abuse of trust as given by the office of the National Police Service.
 - g. Proven abduction or kidnapping of the victim before the murder was committed.
96. It is submitted for the state that the sentence this court imposes must promote, and not undermine, human rights and fundamental freedoms. In citing the decision in *State v. Oliweo* (Criminal Case E028) of 2021) counsel argued that the convicts should be handed down a life sentence. That to date, the accused persons do not seem remorseful and have not asked for forgiveness from the family for their actions. That in fact any attempts made by them to do so ended up being attempts to delay this matter.
97. The accused persons on the other hand pleaded for a lenient sentence stating that they are first offenders and that they are remorseful.



98. Under Section 204 of the Penal Code, murder carries a mandatory death sentence. This changed significantly following the Supreme Court's decision in *Francis Muruatetu & another v R* [2017] eKLR, where the court ruled that mandatory death sentences violate constitutional principles. This landmark decision has since allowed for the review of previously imposed death sentences. However, it did not outlaw the death sentence altogether save for its mandatory nature.
99. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -
- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
 - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - 5) Community protection: to protect the community by incapacitating the offender.
 - 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
100. Following the *Francis Muruatetu* ruling, the Supreme Court modified the approach to sentencing in murder cases during re-hearings. Paragraph 71 of the judgment outlines the amended guidelines, which now include:
- a) Age of the offender.
 - b) Being a first offender.
 - c) Whether the offender pleaded guilty.
 - d) Character and record of the offender.
 - e) Commission of the offence in response to gender-based violence.
 - f) Remorsefulness of the offender.
 - g) The possibility of reform and social re-adaptation of the offender.
 - h) Any other factor that the court considers relevant
101. In determining the appropriate sentence in this case, this court must carefully balance the various sentencing objectives while considering both the aggravating and mitigating factors present. The gravity of the offence committed cannot be understated. The accused persons, entrusted with the sacred duty of protecting and serving the public, instead became the perpetrators of the very violence they were sworn to prevent.
102. The court notes several significant aggravating factors in this case. First and foremost is the profound breach of public trust. The accused persons were serving police officers who held positions of authority and responsibility within the National Police Service. Citizens place their trust in police officers to protect their lives, liberty, and property. When those very officers become the instruments of death and violence, it represents not merely a criminal act, but a fundamental betrayal of the social contract between the state and its citizens.



103. The evidence reveals a calculated and systematic pattern of abuse. The deceased was subjected to prolonged torture and inhuman treatment while in police custody. The assault was not a momentary lapse of judgment but a sustained and deliberate infliction of pain and suffering. The use of cables and other implements to beat the deceased, the targeting of vital organs, and the continuation of the assault despite the victim's obvious distress all point to a callous disregard for human dignity and life.
104. Regarding mitigating factors, the court acknowledges that both accused persons are first offenders with no previous criminal record. However, this court notes that while the accused persons claim to be remorseful, their conduct throughout the trial proceedings suggests otherwise. They have maintained their innocence and have not genuinely accepted responsibility for their actions or shown meaningful remorse to the family of the deceased.
105. The court recognizes that police officers face challenging and often dangerous situations in the course of their duties. However, this does not excuse or justify the systematic torture and murder of a person in their custody. The law provides clear guidelines on the use of force, and there are established procedures for dealing with suspected offenders. The accused persons chose to ignore these safeguards and instead engaged in conduct that was not only criminal but also fundamentally contrary to their oath of office.
106. In considering the appropriate sentence, this court has carefully reviewed the Judiciary Sentencing Policy Guidelines and the precedents set in similar cases. While the death penalty remains available for murder cases following the Francis Muruatetu decision, this court finds that a substantial term of imprisonment is more appropriate in this case, taking into account the totality of circumstances. One of the critical issues in sentencing for a trial court is indeed to establish whether the test of true remorse and regret as alluded to in the mitigation by accused persons has been satisfied within the scope of the principles in *S v Matyityi (695/09) (2010) ZASCA 127:2011 (1) SACR 40 (SCA)* at paras 16-17 in which the court held: “ There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus, genuine contrition can only come from an appreciation and acknowledgment of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions”
107. I have always wondered as I listen to many convicted accused persons, whether there is a factual basis of giving weight to the factor on true remorse if those called upon to mitigate do not step out what is going on in his or her inner self given the foundation of internalizing the chain of events which led him or her to be indicted for a punishable offence. In the case at bar, the accused person did not personally offer mitigation during the sentencing hearing proceedings so that each one of them can provide sufficient information as to the circumstances which led to the commission of the offence of murder as against the deceased. A broken and contrite heart in spiritual sense signifies a deep awareness of one’s sinfulness and a sincere desire for forgiveness and reconciliation with God and man. It involves recognizing the depth of one’s transgressions acknowledging the harm done to another human being without justification and such regret gives one complete surrender to seek restoration with his or her victims. This did not come out clearly from the mitigation offered by learned counsels on behalf of the accused persons.



108. In my considered view the measure and scope of exercising judicial discretion in sentencing the accused persons this court has considered all the circumstances of the offence, including all mitigating and aggravating factors and not to forget the pre-sentence report with full details on the personal antecedents of each accused person. In overall the court must impose a sentence which mirrors the crime which was committed reflecting the blameworthiness of each accused person for giving effect to our society of values on the right to life so that any such sentence imposed is for the protection of society needs and expectations. The deterrence sentence which I am about to pronounce is not to satisfy the public opinion but to respond to the legislative scheme on sentencing any accused found culpable in violating the provisions of Art. 26 of *the constitution* on the Right to life. In the persuasive case referenced as S V Joradan & Others (CCC20/2017 (2018) ZAWCHC) the court remarked as follows on circumstances which may be said to be similar to the facts of this case. “They are, each of them, persons against whom the odds have been stacked from the outset, which in a material sense is an indictment of our far from perfect society. Recognising these factors, however, does not afford proper reason for the adoption by the court of an attitude of maudlin sympathy for them in regard to the very serious offences in which they involved themselves. They knew that what they were doing was criminal and they must be held appropriately accountable for their wrongdoing. Society in general, and the law-abiding members of their own community, would be grievously let down if the court were not to mark their misdeeds with the gravity they deserve.’
109. For those reasons, the framework of this case recognises the significant degree of premeditation and criminality involved in planning the violation or infringement of the right to life of the deceased. Taking all the provisions of Section 204 of the Penal Code, the weight assigned to the aggravating and mitigating factors and the circumstances of the offence I sentence each accused person to thirty-five (35) years imprisonment with the discount under Section 333(2) of the CPC for the period spent in remand custody computed at 4 months.
110. 14 days right of Appeal explained.
111. Orders accordingly.

DATED SIGNED AND DELIVEED AT ELDORET THIS 29TH DAY OF JULY, 2025

In the Presence of:

M/s Kirenge for the DPP

M/s Muchemi for the Victims

Accused Persons in Person

Mr. Oduor Advocate for the 1st Accused

Mr. Miyenda Advocate for the 2nd Accused

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R. NYAKUNDI

JUDGE

