



**Republic v Ongoro & 2 others (Criminal Case E020 of 2023)  
[2025] KEHC 9833 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9833 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL CASE E020 OF 2023  
WM MUSYOKA, J  
JULY 4, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**KEVIN ONGORO ..... 1<sup>ST</sup> ACCUSED**

**JOSEPH ONGORO WANJALA ..... 2<sup>ND</sup> ACCUSED**

**SEMI ONDUODO ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein, Kevin Ongoro, Joseph Ongoro Wanjala and Semi Onduodo, stand indicted of the murder of Patrick Wandera Oduori alias Nyando, on 12<sup>th</sup> September 2023, at Segero B village, Wakhungu Sub-Location, Samia Sub-County, Busia County, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. They denied the charges, and a trial was conducted.
2. PW1, Immaculate Akinyi Wandera, was the wife of the deceased, Patrick Wandera. She, the deceased, and her female friends were at their farm, on the material day tilling. The accused persons came to the farm. The 2<sup>nd</sup> accused had three hoes on his shoulder, and a panga, the other two accused had nothing with them. PW1 and her colleagues stopped tilling. The deceased approached the 2<sup>nd</sup> accused, who handed his panga to the 1<sup>st</sup> accused, and told him to cut the deceased, saying that he did not share a boundary with the deceased. The 1<sup>st</sup> accused did as he was instructed. The deceased was cut on the head with the panga and fell. At the time, the 3<sup>rd</sup> accused was kicking the women. Alarm was raised, the deceased was put on a motorcycle, and rushed to Funyula Police Station, and onwards to Nangina Hospital and Busia County Referral Hospital. He was admitted for two weeks, at Busia County Referral Hospital, where he died on 27<sup>th</sup> September 2023. She asserted that there was no fight, as all what happened was that the 2<sup>nd</sup> accused ordered the slashing of the deceased and it was done.



3. She explained that she and the deceased had been living at Mombasa and only re-located to the village recently. She stated that the land in question belonged to the family, and was being used by their relatives while they were away. It bordered land belonging to the 2<sup>nd</sup> accused, and there was a boundary, which the 2<sup>nd</sup> accused had interfered with. After they came from Mombasa, the accused and the deceased had sat and talked about it, and the deceased had suggested getting a surveyor to establish the boundaries. The 2<sup>nd</sup> accused reportedly became hostile and issued threats, which PW1 reported at the police station after the death of the deceased. The police referred him to the village elder and the area Chief, who said both sides should call elders. The deceased died before that could be done.
4. During cross-examination, PW1 explained that the land was registered in the name of Cornelius Musumba. She stated that the 2<sup>nd</sup> accused had sold portions of his own land to persons who had set up homes, and her home was next to those houses. She explained that there was a court case on the land, between Camulus Obiji and Patrick Ojiambo, but there was no land case between the 2<sup>nd</sup> accused and the deceased. She said there was a church building next to the land, which stood on the side of the 2<sup>nd</sup> accused, and the said church building belonged to the 2<sup>nd</sup> accused. She said that the deceased did not cut the 3<sup>rd</sup> accused on his arm. She explained that the deceased was the only male figure in the tilling party, and that Camulus Obiji came to the scene after the incident, in response to the alarm raised. She said that the 3<sup>rd</sup> accused did not attack the deceased, for he only concentrated on kicking the other women in the group. She also stated that the 2<sup>nd</sup> accused did not assault the deceased, for all he did was to instruct the 1<sup>st</sup> accused to cut the deceased, after he handed the panga to him.
5. PW2 was Christine Matilda Anyango. She was one of the women tilling the land. She saw the accused persons come to where they were working. The 2<sup>nd</sup> accused had three hoes and a panga. The 2<sup>nd</sup> accused began quarrelling, handed the panga to the 1<sup>st</sup> accused and instructed him to cut the deceased, which he did, and the deceased fell. Camulus came and took the deceased away, on a motorcycle. She stated that the deceased only asked what was going on, before he was attacked. During cross-examination, she stated that only the 2<sup>nd</sup> accused spoke, of the three accused persons. She said that no one cut the 3<sup>rd</sup> accused. She denied that the deceased provoked the fracas by hitting the 3<sup>rd</sup> accused. She said Obiji was also at the farm with them, adding that he did not assault the accused persons. She also stated that the 3<sup>rd</sup> accused did not assault her.
6. PW3, Margaret Ajiambo Obiji, was the other woman in the weeding party. The 3<sup>rd</sup> accused person came to the scene and was joined by another two people. She stated that the 2<sup>nd</sup> accused started a fight, but they told him that they were not ready to fight. He was said to have been fighting the deceased. They were exchanging words. Whereupon the 2<sup>nd</sup> accused gave a panga to the 1<sup>st</sup> accused, who cut the deceased on the head. She explained that the 3<sup>rd</sup> accused hit her, and another woman. She said that her husband, Obiji, came to the scene later, and found the fracas. She stated that no one attacked the 3<sup>rd</sup> accused, adding that his injuries resulted from a motorcycle accident. She also denied that Camulus cut the 1<sup>st</sup> accused.
7. PW4, Silvia Nabwire Oseno, was also weeding together with the rest. She explained that she saw the 3<sup>rd</sup> accused first. He passed by, as if taking pictures. Then, later, the three accused came together. The 2<sup>nd</sup> accused had three jembes and a panga, but the other two had nothing with them. The 2<sup>nd</sup> accused told them that they should not be working on the land. He then ordered the 1<sup>st</sup> accused to cut the deceased, and the 1<sup>st</sup> accused did just that. The 3<sup>rd</sup> accused took a jembe and wanted to attack her with it. She said that no one attacked the accused persons. She said that Obiji was just talking, but he did not attack anyone. She said she was unaware of any boundary dispute. She said that there was no fight between the two groups.



8. Obiji Ouma Onyango testified as PW5. He heard screams on the material day and rushed to the scene of the screams. He found that the deceased had been attacked, and had fallen down. He found the accused persons at the scene. PW5 was with Camulus. He said he found the fracas going on. The two groups were quarrelling. The 2<sup>nd</sup> accused took his implements and left. PW5 was informed that the deceased had been assaulted by the 1<sup>st</sup> accused. He said that he did not see any injuries on the 3<sup>rd</sup> accused person. He stated that the 2<sup>nd</sup> accused had a panga and two hoes, but the other two had no implements with them. He said he was not among the persons who were working on the land; and that he went to the scene after it had all happened. He denied assaulting the 2<sup>nd</sup> accused. He stated that he did not see the person who hit the deceased.
9. Camulus Oseno Musumba followed, as PW6. He was a half-brother of the deceased. On the material day, he heard screams, as he was going to his farm. He rushed to the scene, on his motorcycle. He found that the deceased had fallen. He had been cut on the head. He found the accused persons, they were chasing the women around. He placed the deceased on the motorcycle and rushed him to Funyula police station, where he was advised to take him to hospital. He first went to Nangina hospital, for first aid, before moving on to the Busia County Referral Hospital. An operation was performed. The deceased died there on 27<sup>th</sup> September 2023. He said that he did not witness the attack on the deceased, and he could not recall the accused having weapons. He said that when he got to the scene, he found people shouting and fighting. He denied hitting any of the accused persons.
10. Dr. Bildad Emase, was the medical officer who performed post-mortem on the body of the deceased. He testified as PW7. The body had a cut wound on the head, with no other significant injuries. Internally, there was scalp haematoma. He opined that cause of death was traumatic brain injury, principally the head injury. He explained that the post-mortem was done post-surgery. The history given was of the victim being struck on the head with a sharp object. The impact led to a cut wound injury and injury to the brain, leading to bleeding inside the brain and on the coverings of the brain, causing intra-cranial pressure, which interfered with the operation of the brain, causing death. An operation had been done, to drain blood from the brain.
11. No. 105446, Police Constable Benard Koech was the arresting officer. He testified as PW8. He explained that the deceased had been brought to the police station on the material day, with an assault report. His condition was not good, so he was referred to hospital. Thereafter, the accused came to the station, to also report assault by the deceased. He, PW8, and another officer, visited the scene, and took pictures. They established that a fight erupted due to a land dispute. After the deceased passed away, on 27<sup>th</sup> September 2023, he was instructed, with others, to arrest the three accused persons, which he did, the same day, 27<sup>th</sup> September 2023. He said he did not see physical injuries on the three accused persons. He referred them to hospital. They gave the medical documents to the Officer Commanding the Station, OCS. He did not see blood at the scene. He stated that the three accused persons did not resist arrest.
12. PW 9, No. 118116, Police Constable Kevin Munyoki, was the last prosecution witness, and the investigating officer. He was instructed to conduct investigations into the death of the deceased, on 28<sup>th</sup> September 2023, the deceased having died on 27<sup>th</sup> September 2023. He detailed all the steps that he took, during his investigations.
13. I put the accused on their defence; in a ruling I delivered on 16<sup>th</sup> February 2024.
14. The defence hearing happened on 29<sup>th</sup> November 2024. There was almost a one-year hiatus, as the accused persons were pursuing medical records that were in the hands of the police. The same were



handed to the court on 26<sup>th</sup> November 2024, by PW9, being medical records, P3 forms, and x-rays. The court, thereafter, handed the said records to the three accused persons.

15. The 1<sup>st</sup> accused was the first to take to the witness stand as DW1. He denied killing the deceased, on 12<sup>th</sup> September 2023. On the morning of that material day, he found a crowd at a church building on the land of the 2<sup>nd</sup> accused, beating the 3<sup>rd</sup> accused. The people in the crowd had jembes and pangas. PW6 cut the 3<sup>rd</sup> accused on his head, and the 3<sup>rd</sup> accused fell. Then PW6 lifted the jembe, trying to hit him, the 1<sup>st</sup> accused, with it, whereupon he, the 1<sup>st</sup> accused, blocked it with his hands. PW6 lifted the jembe a second time, and the 1<sup>st</sup> accused crouched, to evade it, and it hit the deceased instead. The deceased screamed, saying that his brother had injured him. PW6 left the scene, and everyone scattered leaving the deceased and the 3<sup>rd</sup> accused on the scene, both on a bending position. PW5 then shouted that the 2<sup>nd</sup> accused was coming. The 2<sup>nd</sup> accused was hit with stones by PW5, and he stopped at the spot where he was hit at. He was also hit on the shoulders by PW6. The 1<sup>st</sup> accused said that, of the three accused persons, it was only him who was not hurt. He escorted both the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons to the Funyula police station, and they were referred to hospital. They were both issued with P3 forms. He was treated at Nangina Dispensary, and his P3 form was filled and he returned it to the police station. He was given two police officers, who he escorted to the scene; and they took pictures of the scene. He explained that was all that was quiet until 27<sup>th</sup> September 2023, when he was informed that he was required at the Funyula police station. He found the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons there. He joined them, and both were arrested and charged with murder.
16. During cross-examination, he stated that when he found the 3<sup>rd</sup> accused being assaulted, he tried to ask what was going on, but he too was attacked. He said he had no chance to go and report to the authorities, as he was surrounded by the group. He said PW6 hit him with a jembe, and he was badly hurt. He said that the blow that floored the deceased, and eventually killed him, was aimed at him, by PW6, but he missed him, after he, the 1<sup>st</sup> accused, evaded the blow, and it hit the deceased instead. He said that the deceased was hit with the pin or stick or holder for the jembe, and not the jembe itself.
17. The 2<sup>nd</sup> accused followed, as DW2. He denied killing the deceased. On the material morning, he said he was going to the church building, which stood on his land, to secure a loose iron sheet. He heard noises, and a voice saying that Ongoro was coming. He identified it as the voice of PW5. He found that the people there had tilled the church compound. When he enquired as to what was going on, he was hit with stones, by PW5, on the leg, which forced him to crouch or bend down. PW6 then came to where he was and hit him with a jembe. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons then took him to Funyula police station, to report the incident, whereupon they were referred to hospital. At the hospital, they got treatment. They were given P3 forms at Funyula police station, which they took to hospital for filling, after which they returned them to the police. He got x-rayed at Family Hospital, Nangina, and the doctor confirmed that there was an injury. Later that day, the police came, and him and his co-accused took them to the scene. He and his co-accused were arrested on 27<sup>th</sup> September 2023 and charged with killing the deceased. He said that he did not kill the deceased, for he arrived at the scene when it had already happened.
18. The 3<sup>rd</sup> accused testified next as DW3. He denied killing the deceased. On that material morning, he had gone to the church building, to clean it. He found the door open, and as he was doing the cleaning, he heard digging outside. When he checked outside, he saw many people tilling the church compound. He estimated their number to be sixteen. He asked them if they had permission of the 2<sup>nd</sup> accused to till the land. The deceased asked him where he was going to go, as he had been chased away from another piece of land. He, the 3<sup>rd</sup> accused, tried to close the door of the church, whereupon the deceased attacked him with a jembe. He attempted to flee, but the crowd surrounded him. He raised alarm, and



some people responded, but part of the crowd threw stones at them. The deceased attacked him once more with a panga, and he fell, and while down he was kicked and slapped. The 1<sup>st</sup> accused came to the scene at that time. He attempted to intervene, but he was attacked too. Then PW5 shouted that the 2<sup>nd</sup> accused was coming. He, the 3<sup>rd</sup> accused, rose and went to where the 2<sup>nd</sup> accused was. It was at that time that he saw someone lying there, and he heard some say that PW6 had hit and injured him. The fight stopped, as they began to attend to the person on the ground, the deceased. The 1<sup>st</sup> accused then put the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons on their motorcycle, and took them to Funyula police station, where a report was made. He asserted that he had been sent by the 2<sup>nd</sup> accused to repair the church building, and that was when the deceased and PW6 attacked him. The police referred them to the hospital, for treatment and filling of P3 forms, which they returned to the police. He and his co-accused were arrested on 27<sup>th</sup> September 2023 and charged with the killing of the deceased.

19. DW4 was Edwin Imo. He was a Clinical Officer at Nangina Dispensary. He testified that he attended to the three accused persons on 12<sup>th</sup> September 2023. They all came with a history of assault. The 1<sup>st</sup> accused had a cut wound on his ring finger, which was bleeding. He talked of a bruised right wrist. He declined to be stitched but was given medication. He also filled a P3 form for him. He produced treatment notes and the P3 for the 1<sup>st</sup> accused. The 2<sup>nd</sup> accused had a bruise on the tender right shoulder, a bruised right knee and a soft tissue injury, due to assault. He came back for review on 19<sup>th</sup> September 2023, complaining of pains, and he was sent for x-ray, which was done. On 20<sup>th</sup> September 2023, the x-ray came out. It showed a fracture of the right clavicle, laterally. He was put on arm-sling, and was advised to go for review. He produced the treatment notes, P3 and x-ray in respect of the 2<sup>nd</sup> accused. The 3<sup>rd</sup> accused had a tender and bruised lower back, a lacerated left elbow joint, a bruised left wrist joint, a lacerated left malleolus and soft tissue injury, secondary to assault. He put him on medication. He estimated that the injuries were caused by a blunt object. He produced the treatment notes and P3 form in respect of the 3<sup>rd</sup> accused.
20. The accused persons submitted in writing, I have read their written submissions, dated 20<sup>th</sup> May 2025, and have read the arguments made in them.
21. The elements of the offence of murder are four, being the fact of the death, the cause of it, the role or involvement of the accused in the causation, and, if causation is established against the accused, whether the same was with malice aforethought. See Republic vs. Andrew Mueche Omwenga [2009] eKLR (Maraga, J), Boniface Mutua Mwangi vs. Republic [2012] eKLR (Dulu & Ngugi, JJ), State vs. FOO [2021] eKLR (Aburili, J), Republic vs. Henry Kaithia [2022] eKLR (Cherere, J) and Republic vs. Kipkemei [2024] KEHC 2388 (KLR)(Nyakundi, J).
22. On the death, there is proof beyond reasonable doubt that the deceased died. PW1 was the widow of the deceased. She was present when he was fatally injured and indicated that he died after three weeks in hospital. PW2, PW3 and PW4 were at the scene when the deceased was injured, and they too confirmed that he died after a stint in hospital. PW5 was a half-brother of the deceased. He was the one who took him to hospital, after he was injured. He spoke about hospitalization, before the deceased succumbed to death. PW7 was the doctor who performed post-mortem on the body of the deceased. He confirmed the death.
23. On the cause of the death, there was also ample evidence, beyond reasonable doubt, from PW7, that the cause of death was the injury on the head, which led to bleeding into and around the brain, causing the inter-cranial pressure, which affected the operation of the brain, which shocked the system, and caused death.



24. It is on the causation that there is controversy. The case by the prosecution is that the death was caused directly by the 1<sup>st</sup> accused. He and the other two accused persons, according to this position, happened at the same, with the 2<sup>nd</sup> accused having a panga, and two or three jembes, while the other two accused persons had no implements on them. After an exchange of words, the 2<sup>nd</sup> accused handed to the 1<sup>st</sup> accused a panga, and told him to cut the deceased, whereupon the 1<sup>st</sup> accused hit the deceased with the panga on his head, and he fell. The deceased was operated on the head at Busia County Referral Hospital, to drain blood from the brain, but he subsequently succumbed to his injuries.
25. The version by the defence is that the deceased and his group had cornered the 3<sup>rd</sup> accused, and were assaulting him, when the 1<sup>st</sup> accused materialized, and, as he enquired as to what was going on, he too was attacked. PW6 was said to have had lunged at him with a jembe, he, the 1<sup>st</sup> accused, ducked, and the blow, intended for him, landed on the deceased, who fell, and later died in hospital. The defence denies complicity, and points at PW6 as the real culprit.
26. So, I have these two competing versions on how the death was caused. Which of the two should I believe?
27. The legal burden is on the prosecution, throughout, to establish, beyond reasonable doubt, that the death was caused by an act or acts, or omission or omissions of the accused persons. The prosecution presented four witnesses, PW1, PW2, PW3 and PW4, who testified that they were all at the scene, when the accused turned up together, and the 2<sup>nd</sup> accused kicked up trouble, by initiating a quarrel, which led to the 1<sup>st</sup> accused cutting the deceased with a panga on the head. The prosecution also presented PW5 and PW6. They were not at the scene, when it happened, but they arrived thereafter, found the deceased on the ground, and the three accused persons still at the scene. PW1, PW2, PW3 and PW4 were clear on the sequence of events, that the three accused arrived, the 2<sup>nd</sup> accused gave a panga to the 1<sup>st</sup> accused, and instructed him to cut the deceased, to which the 1<sup>st</sup> accused obliged. That evidence appears to be straight forward on how the death was caused.
28. It is not in dispute that all the key players were at the scene. PW1, PW2, PW3, PW4, PW5, PW6, the deceased and the three accused persons. It is also common ground that there was an issue on the land on which the prosecution witnesses were working, which the accused were claiming. The dispute centred on the land. The prosecution states that the accused found the prosecution witnesses at the scene, while the defence counters by stating that it was the 3<sup>rd</sup> accused who was at the scene first, and it was the prosecution witnesses who came later. Whatever the case, the confrontation was over land. The issue is, who was the first to attack? The prosecution position was that it was the 1<sup>st</sup> accused who struck first, while the defence position is that the deceased attacked the 3<sup>rd</sup> accused first, and was fatally hit, by one of his own, in the ensuing melee.
29. From the evidence that I recorded from the witnesses, I have no doubt in my mind that it was PW1, PW2, PW3, PW4 and the deceased who were the first on the scene, and that it was the accused persons who confronted them. I say so as I do not find flow in the narratives of DW2 and DW3. DW3 testified that he was the first to go to the scene, to repair or clean the church, on instructions of the 2<sup>nd</sup> accused or DW2, and it was while he was doing that the prosecution witnesses came and began to till land around the church, provoking the trouble, which led to the death of the deceased. The 2<sup>nd</sup> accused or DW2, who, according to DW3, had sent DW3 to effect repairs at the church, did not talk of instructing DW3 to go and repair the church. He did mention that he informed his undisclosed son about the loose iron sheet, but he did not talk of asking him to do anything about it.
30. Then there is the inconsistency by the 1<sup>st</sup> accused with respect to whether he was injured. He initially testified that he was the only one who was not injured during the fight, hence it was him who took



- the other two accused persons to hospital. Then at the tail end he testified that he reported a case of assault to the police and sought medical attention, and medical records were presented to support a case that he was injured.
31. The prosecution tried to project that the accused persons turned up at the scene, and, apart from the 1<sup>st</sup> accused cutting the deceased on the head, there was no fracas or fight of any sort. However, the language of PW2 and PW3 point to a fight or melee of some sort happening. There was also testimony about the women being roughed up. Taken together with the testimonies by the defence, there was a fight or struggle of some sort, between the two groups, either before or after the deceased was hit, which should explain the injuries sustained by the accused persons.
  32. But the question remains, who inflicted the fatal injury on the deceased? PW7, the doctor who performed the post-mortem, described the injury as an “incision cut wound on the head.” “Incision” denotes a sharp cut, preferably caused by a sharp object, and suggests something narrow, caused by a quick and direct action. He pointed to a history of an assault with a sharp object. The findings by PW7 were consistent with the prosecution evidence, that the injury was inflicted with a panga and it was inconsistent with the defence, stated by the 1<sup>st</sup> accused, that the deceased was hit with the handle or stick or pin of a hoe or jembe. I have seen the pictorial evidence of the injuries in question, and it is evident that it could only have been caused by a sharp object, not a blow with a stick, which is a blunt object. The narrative about the jembe pin causing the injury has no foundation, and so it should not be the position that it was PW6 who inflicted the injury.
  33. I am persuaded that there is overwhelming evidence that the cause of death is consistent with a cut with a sharp object, and the evidence on who wielded that sharp object, the panga, pointed at the 1<sup>st</sup> accused. That evidence came from PW1, PW2, PW3 and PW4, who were at the scene. The person, from this evidence, who caused that fatal injury was the 1<sup>st</sup> accused or DW1.
  34. Did the other accused persons play a role at all in his actions, in a manner to suggest that he was in concert with them?
  35. The testimonies of PW1, PW2, PW3 and PW4 were unanimous, that the person who came to the scene holding that panga was the 2<sup>nd</sup> accused. After an exchange of words with the party, that was weeding the shamba, he handed the panga to the 1<sup>st</sup> accused, and ordered or directed or instructed or told him to cut the deceased. The 1<sup>st</sup> accused just did as instructed. The 2<sup>nd</sup> accused was the father of the 1<sup>st</sup> accused. The material, on record, indicates the 2<sup>nd</sup> accused to be sixty-one years old, while the 1<sup>st</sup> accused is said to be twenty-one years. The 1<sup>st</sup> accused was, at the time, just three or four years past minority. He was still very young and impressionable. He obeyed his father, and acted, almost on impulse, at his prompting. When he, the 1<sup>st</sup> accused, came to the scene, the witnesses noted, he had no weapon or implement in his hands. The 2<sup>nd</sup> accused incited him to cut the deceased, and, therefore, the two were in concert, although the actual conduct was attributed to the 1<sup>st</sup> accused or DW1.
  36. Like the 1<sup>st</sup> accused, the 3<sup>rd</sup> accused is said to have come to the scene unarmed. He had no weapon or farming implement in his hands. He did not do anything to the deceased. He did not speak to the 1<sup>st</sup> accused, at the material time when the 1<sup>st</sup> accused attacked the deceased. He was said to have been busy fighting some of the women. From their testimonies, his attack on them was not vicious, for none of them made reports to the police, nor sought medical attention. He came together with the other accused persons, to address the issue at hand, however, with respect to causing injury to the deceased, I am persuaded that he was not in concert with them, for he did not urge nor incite the 1<sup>st</sup> accused person to act.



37. My conclusion is that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons played a key role in the causation of the death of the deceased.
38. The last ingredient of murder is malice aforethought. This is the mens rea element of the offence. The elements of malice aforethought are outlined in section 207 of the [Penal Code](#). They largely comprise of intention and knowledge. Intention can both be direct, or implied or inferred. See Republic vs. Ali Kimoto Ali [2021] eKLR (Nyakundi, J), Republic vs. Henry Kaithia [2022] eKLR (Cherere, J) and Republic vs. Kipkemei [2024] KEHC 2388 (KLR) (Nyakundi, J).
39. It is direct where the perpetrator accompanies the act or omission, causing death, with words expressing an intention to kill. A person who says to another, “I am going to kill or finish you,” while assaulting the person, who subsequently dies, could be deemed to have expressed a direct intention to kill.
40. It would be implied in circumstances where the injury caused is grave, so grave or grievous that anyone causing such an injury could have only intended that the victim dies of the injury. Related to that is knowledge, that the person inflicting such a grave or grievous injury must have known that such injury could or would cause death, but he was indifferent to the outcome. Section 207 also provides that a death caused during the commission of any felony would lead to inference of malice aforethought. A person defiling a child or raping a woman, for example, who, the victim, then dies in the process, will be deemed to have had the requisite malice aforethought for the death. A person causing death while fleeing lawful custody will also be deemed to have malice aforethought for a death caused in the process.
41. Some of the factors considered, in evaluating whether there was malice aforethought, include the part of the body on which the fatal injury is inflicted. Focus is on parts of the body which house critical organs. A person targeting the head, which houses the brain; or the chest, which houses the heart and lungs; or the abdomen, which houses the spleen and liver, would be deemed to intend to cause an injury that would cause death, given the vital and sensitive organs located in those parts of the body. The weapon used is the other factor. If the weapon used to inflict the injury is of a kind that is likely to inflict very serious or grievous injuries, such as a firearm, or a sharp cutlass or knife, or an axe, or a heavy metal rod or bar, an inference could be drawn, of malice aforethought. The other factor is how that weapon is used or wielded, in terms of the force used to drive the weapon.
42. Regarding direct intention to kill, on the part of the accused persons, I find none. There is no evidence that the killing was pre-meditated. There is nothing, from the record, to show that when the accused persons turned up at the scene they had planned or arranged to appear there and kill someone. I am not persuaded that the killing was pre-planned. The evidence points to spontaneity. The intention to kill or to cause grievous harm appears to have been formed at the scene, at the spur of the moment. There is, of course the matter of DW1 being directed by DW2 to cut the deceased. However, he was not directed to cut him on the head or on any part of the body. He was not directed to kill. Hence, it would be an overreach, to conclude that there was a direct intention to kill.
43. However, there is overwhelming evidence that an intention to kill could be inferred from the circumstances of the infliction of the injury. Firstly, the injury was grievous. It was life-threatening. According to PW7, it was so bad that medical intervention was attempted, to drain blood from the brain, to increase the possibility of survival. It did not work. The medical intervention was not the cause of the death, according to PW7, for death was certain, eventually, even without that intervention. The force used by the 1<sup>st</sup> accused, to cause the injury, indicated an intention to cause grievous harm, which was indeed caused, and that sufficed for an inference of malice aforethought.
44. Secondly, the part of the body on which the injury was inflicted. The head, houses a vital organ, the brain, which controls the rest of the body. An injury, which compromises the working of the brain,



leading to death, can lead to an inference that the person causing the injury intended to cause the death. The injury herein penetrated the skull, which caused bleeding into the skull, and into the and around the brain, which created intra-cranial pressure, which interfered with how the brain worked, compromising its operation, causing it to shut down, and causing the death, according to PW7. The 1<sup>st</sup> accused chose to hit the deceased on his head, and hurt his skull, leading to bleeding into the brain, causing the death. An inference must be made that, by targeting the head, the 1<sup>st</sup> accused intended to kill the deceased.

45. Thirdly, the weapon of choice, for causing the injury, a sharp object, in this case a panga, targeting the head, is a pointer, that there was an intention to cause maximum damage to the head, and what lies inside it, with a view to cause death. Fourthly, and finally, the force applied to the sharp weapon was such that it enabled the panga to cut through the skin covering the skull, and the skull itself. The breach of the skull opened the way for the bleeding into the skull, and around the brain, which affected the working of the brain, causing death. The great force applied suggests an intention to kill, or an indifference that the injury to be caused could lead to death.
46. It is my finding that the conduct by the 1<sup>st</sup> accused, of cutting the deceased on the head, with a sharp object, driven with much force, following incitement by the 2<sup>nd</sup> accused person, was intended to cause the death of the deceased, as it ultimately did.
47. Overall, I find that all the elements for the offence of murder were established by the prosecution, as against the 1<sup>st</sup> and 2<sup>nd</sup> accused persons. I, accordingly, find them guilty of the murder of Patrick Wandera Oduori alia Nyando, contrary to section 203, as read with section 204, of the *Penal Code*, and I hereby, accordingly, convict them under section 322 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. I am not persuaded that the offence of the murder of the deceased has been sufficiently proved against the 3<sup>rd</sup> accused person, and I hereby find him not guilty and acquit him, accordingly.
48. For the purposes of sentencing, I hereby direct that the Busia County Director of Probation and Aftercare Services investigate the antecedents of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons, take the views of the family of the deceased and the community, and thereafter file a report. The matter shall be mentioned on 15<sup>th</sup> July 2025, for receipt of that report, and for the sentencing hearing. Orders accordingly.

**DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA ON THIS 4<sup>TH</sup> DAY OF JULY 2025.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Anthony Onanda, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Moses Ouma, instructed by BM Ouma & Company, Advocates for the accused persons.

