



REPUBLIC OF KENYA



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**Republic v Tanui & 2 others (Criminal Case E044 of 2021)
[2025] KEHC 12844 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE E044 OF 2021
RN NYAKUNDI, J
SEPTEMBER 19, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

JONES KOSGEI TANUI 1ST ACCUSED

TITUS KIBET KOSGEI 2ND ACCUSED

BETTY JEMOSOP KOSGEI 3RD ACCUSED

JUDGMENT

1. The three (3) 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 Jones Kosgei Tanui, Titus Kibet Kosgei and Betty Jemosop Kosgei on 20th Day of June 2021 at Mugula Village, Kapkochur Location in Marakwet West Sub County within Elgeyo Marakwet County in the Republic of Kenya murdered one Richard Kimosop Yego Alias Kipyemit.
2. During the plea taking, each of the Accused denied the offence vesting the burden of proof upon the prosecution under Article 157 (6) & (7) as read with Article 50 (2)(a) of the *Constitution* on the presumption of innocence to adduce evidence to establish every element of the offence of murder. The Lead Counsels for the Defence were Mr. Mathai for the 1st and 3rd Accused and Mr. Ogongo for the 2nd Accused. The Lead Prosecution Counsel happened to be Mr. Mark Mugun and soon thereafter having been transferred, one MS Sidi Kirenge took over the task of concluding the trial as against the Accused persons.
3. The summary of the prosecution case involved the following witnesses:
4. PW1 Charles Cheruiyot told this court that on the 19th June 2021 at about 8pm he received a telephone from his uncle by the name JONES who complained of the incident of his stock theft. According to



PW1, he was to join his uncle in pursuing the search and tracing of the stock theft namely sheep. He further told this court that he had received information on the likely location of the stolen sheep. On arrival at that location, they met the 1st Accused who told them to wait that is when he had the deceased screaming don't kill me, the sheep is here take it away. That is when the 20 heard of sheep were tied together and made a return back to their homestead. As they passed through the river, the 1st Accused instructed the 2nd Accused to escort the deceased home and the rest of them made arrangements to hire 3 motorcycles to transport the sheep. It is apparent from his testimony that they drove towards the 1st Accused's and placed the sheep in the pen. In that home, PW1 further inquired as to the whereabouts of the deceased but he never came to see him again. It is later he was to receive information about the death of the deceased from the 1st Accused. He identified the 1st Accused positively in the dock.

5. The next witness was PW2 Elijah Kosgei who told the court that on the night of 19th and 20th June 2021, at about 9pm he was going home when he met the 1st Accused and 11 other people with 4 motorcycles saying that they were on a mission of looking for their lost sheep. He accompanied them by boarding one of the motorcycles being driven by one Nelson all the way to the scene. That location was where the stolen sheep had been hidden and were duly recovered. It was further the testimony of PW2 that the 1st and 2nd Accused carried the deceased on their motorcycle with sheep which they advised that they be escorted to the police. According to PW2, the 1st Accused declined and told them to proceed to his homestead. On arrival at the river crossing, some of the sheep were almost drowning but they managed to save them. In all these circumstances, PW2 told this court that the 1st and the 2nd Accused were in the company of the deceased and were driving ahead of the rest of the team. It is at the time when they arrived at that homestead, the 3rd Accused came out of the house towards the road, she took a piece of wood and hit the deceased and full-blown fight ensued but they managed to separate them. She was acting in anger but in a little while, she heeded the call to stop, took a cup of tea, left the 1st Accused's home. It was in the morning that PW2 received information on the death of the deceased which indeed shocked him because it was not expected.
6. PW3 Conelius Kimaiyo told the court that he is a motorcycle rider and on 19th June 2021 in the night he was asleep when he received information from the 1st Accused that he needed to be assisted in travelling to a particular location to recover his stolen sheep. According to the witness, he explained to the court that he agreed to proceed to the location where the main mission was to trace the sheep for recovery. The witness further explained to the court that they arrived at the home where the sheep was recovered and the same were to be placed on the motorcycles for transportation to the home of the 1st Accused. He was able to confirm to the court that the number of the sheep recovered were 20 all positively identified by the 1st Accused. It was further in the testimony of PW3 that it was in that same very night when the wife of the 1st Accused came out screaming and while armed with a piece of wood she assaulted the deceased. The deceased sustained injuries to the head and lower limbs and we persuaded her not to continue injuring the victim. It is from those injuries, the deceased succumbed to death.
7. PW4 Hosea Korir also a motorcycle operator told the court that he received a telephone call from the 1st Accused who needed assistance to recover his stolen sheep. He agreed to facilitate the tracing and recovery of the sheep to where intelligible evidence had led them to a particular home where they were being hoarded. This recovery did take place and the sheep were tied onto the 4 motorcycles to be driven back to the home of the 1st Accused for he refused having them taken to the police station. It is at that moment that the wife of the 1st Accused came out of the house harmed with a piece of wood and assaulted the deceased who later succumbed to death.
8. PW5 Vivian Jepkorir also on oath told the court that the deceased was his brother and the accused persons happen to be their neighbours within their sub location. In her testimony, PW5 told the court



that she heard the 3rd Accused making a telephone call to a third person quarrelling him why he has not made a telephone call. According to PW5, simultaneously during those moments, the 2nd Accused drove in with the deceased on board. She was able to hear the accused persons assaulting the deceased and she positively identified their voices. She also explained to the court that she saw the 2nd Accused explaining that they should be left to assault the deceased who had stolen their sheep. It was from those injuries that the deceased had to succumb to death. That after assaulting the deceased, the 1st and 2nd Accused took a sack tied the deceased with it and they carried him away towards the road. The 3rd Accused took fright from the seen as the 1st Accused told her not to tell anybody about the death of the accused. She however could not keep it and called some of the relatives and told them about the death of the deceased.

9. PW6 was Dr. Kimosop Wilfred who conducted a post mortem report upon the body of the deceased which showed the following injuries: Oozing blood on the mouth, both hands, left leg, the wrist, index finger, bruises on the face, left cheek, multiple injuries to the back, bruises on both knees, left feet, injuries to the intestines, to the skull. As a result of the examination, PW6 formed the opinion that the cause of death was multiple injuries due to blunt force trauma. He produced the post mortem report as an Exhibit.
10. The last witness for the prosecution was PW7 PC David Mathenge who was the investigation officer of this murder incident. According to the police detective, he visited the scene, recovered the body which he took to the mortuary at Kapsowar and at the same time, he effected an arrest against the 3 suspects who are charged by this court. As the police officer charged with the responsibility of investigating the homicide, he recorded the witness statement from the witnesses and also drew a sketch plan which he produced as exhibits in support of the prosecution case.
11. These seven (7) witnesses formed the basis upon which the court established a prima facie case in favour of the prosecution under section 306 as read with 307 of the Criminal Procedure Code.

The Summary of the Defence Case

12. The 1st Accused Jones Kosgei in his defense told this court that he is aware about the death of the deceased which is traceable to the 20th of June 2021 when his stock of sheep were stolen. He searched for the stolen sheep, made inquiries from the surrounding before tracing them to the home of the deceased. On arrival at the home of the deceased, it was his evidence that they recovered a heard of sheep which were tied to the hired motorcycles and they drove them all the way to his homestead. He further told this court that they were driving to his homestead in teams and some of them were ahead of him to his compound. He only recalled that the villagers are the ones who surrounded the deceased and beat him up for having stolen his heard of sheep. He denied that he was involved in assaulting the deceased to death.
13. The other witness who testified in support of the defense was MOSES KIPTANUI who told the court that on 20th June 2021, he was told of an incident about the death of the deceased who is also his relative.
14. The other witness who was also called by the defense was James Bowen who identified himself as a retired chief of Kapturwa location. He confirmed to have known the Accused persons as ailing from his formal location where he worked as a former chief of the location. The chief told the court that following this death of the deceased, both families convened a meeting to undertake cultural rituals and customs to cleans and explore victim offender mediation. He confirmed that this was done as a condition of restorative justice and reparation within the scope established by the community. This was as also confirmed by DW4 one Kipkoech.



15. The 2nd Accused person Titus Kibet told the court that they had pursued the stolen sheep all the way to the home of the deceased. On arrival, they recovered the stolen sheep, tied them onto hired motorcycles together with the suspects and drove them to the home of the 1st Accused. It was while on their way home when they met the members of the public who stopped them and in turn started assaulting the deceased. He denied any involvement of killing the deceased.
16. The 3rd Accused Betty Jemosop Kosgei denied the offence and that she had accompanied the Accused persons to the recovery home of the deceased. She also denied that she assaulted the deceased.
17. This matter was also canvassed by way of written submissions.

1st and 3rd Accused Submissions

18. The Learned Counsel for the 1st and 3rd Accused persons Mr. Mathai submitted that the prosecution called a maximum of 7 witnesses and closed its case and the 1st accused called two other witnesses in his defence and closed its case. The learned Counsel stated that the main issue for determination is whether the prosecution has proved its case beyond reasonable doubt and whether the traditional rituals that were performed absolves the accused from the criminal charges. He also submitted that in criminal cases the standard of proof is that of beyond reasonable doubt and made reference to the case of Elizabeth Waithiegeni Gatimu Vs Republic [2015] eKLR in which the court held as follows; “To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...” The Learned Counsel also made reference to the case of Moses Nato Raphael Vs R (2015) eKLR which discussed what amounts to reasonable doubt. Counsel added that the onus is on the prosecution to prove the charge against the Accused beyond reasonable doubt and it never shifts to the Accused person.
19. On the issue of whether the prosecution has proved the charge of murder against the accused the accused person, the Learned Counsel made reference to the case of R Vs Omwenga (2009) eKLR and Anthony Ndegwa Ngari Vs R (2014) eKLR which highlighted the elements of the offence of murder. He also added that this being a murder charge, the prosecution had the onus to prove mens rea and actus reus and that the standard of proof expected of the prosecution case is set out in section 107(1), 108 and 109 of the *Evidence Act*. On the death of the deceased, counsel Mr. Mathai stated that none of the prosecution witnesses knows when the Deceased died or how he died because they all left him alive and while taking tea at the house of the deceased, nevertheless the post mortem that was produced in court the opinion of the Doctor was that the deceased died due to multiple injuries caused by blunt injuries and there is no dispute that the deceased as a result of the said injuries. He also added that the right to life is protected under Article 26 of the *Constitution* of Kenya and that unless it is excusable in any of the circumstances laid down by the same constitution or statute as it was held in the case of Guzambisi S/o Wesonga 1948 15 EACA 65 death is excusable or justified in self defence, defence of property, life third party in imminent danger of in advancement of criminal justice or that which is accidental in nature.
20. The Learned Counsel also submitted that the prosecution witnesses who testified as PW1, Nelson Kipkemei Kimaiyo, PW2- Charles Cheruiyot, PW3- Elijah Kosgei Biwot, PW4 Cornelius Maiyo Kore, PW5- Hosea Korir Yatich they all testified to accompanying the 1st and 2nd Accused person to Tangul Forest to recover the stolen sheep when the entire recovery team met at Mugula Centre before embarking on the mission none of the persons was armed with any weapon. Counsel added that the aim



and purpose of the mission was the recovery of the lost sheep and it was clear from all the prosecution witnesses that on transit to and from Tangol Forest no person was armed.

21. It was the learned Counsel's submission that all the prosecution witnesses equivocally testified that "the deceased was not assaulted but had his hand tied" and that all the five witnesses PW1 – PW5 testified that the recovery mission was successful and none of them intended to assault the Deceased and also that all the prosecution witnesses testified that the Deceased was arrested in his house and it was agreed to ferry him back to Mugula Village so that he would be presented to the authorities where the theft had been reported. Counsel stated that the prosecution witnesses on cross examination confirmed that when they reached at Mugula Centre there was a crowd of people who were waiting there and as such they assaulted the Deceased because of the resent theft of sheep and that had been happening it is when the rescue team decided to take him to the 1st Accused persons place to avoid he deceased from being assaulted by the mob who went at the centre. Counsel also submitted that PW6 testified that she heard noise in the wee hours of 20th June, 2021 at around 4.00 am when she had gone to respond to the call of nature and the witness testified that the noise intensified after a while the said witness stated that she did not see the person assaulting because it was dark but she said she heard noise and thought that it was the 3rd accused assaulting the Deceased though she did not see. Reference was made to the case of R Vs Mark Kipyego Kandie (2014) eKLR.
22. The learned Counsel also submitted that further the prosecution ought to prove that at the time of committing the offence of murder the Accused possessed both actus reus and mens rea and referred to the case of Joseph Kimani Njau Vs Republic [2014] eKLR. Counsel opined that a charge of murder may therefore not be sustained unless the mens rea for murder is proved and that the element of intention in committing the offence was examined in the case of Hyam Vs DPP (1917) ALL ER 41.
23. On the issue of whether the accused person had malice aforethought, the Learned Counsel submitted that all the prosecution witnesses stated when they went to the Deceased homestead, they went to collect the sheep that had been stolen by the Deceased belonging to the 1st Accused and that when they arrived indeed they found the sheep belonging to the 1st Accused and that when they all agreed to take the Deceased with them so that they could take him to the police and also identify the other accomplice of the Deceased who was helping him to steal sheep from Mugula. He stated that on cross examination, they all agreed that none of them was armed and none had any intention of harming the Deceased and that is all they did until when they reached at Mugula Centre where there was a crowd of people who assaulted the Deceased. It was also submitted that from the prosecution witnesses, it emerged from the prosecution that there was no one who intended to cause the death of the deceased nor was there any intention to assault or commit a felony by the people who went to fetch the Deceased. It was the Learned Counsel's submission that the prosecution in this case has failed to prove that the accused persons acted with malice aforethought hence the offence of murder has not been proved against the accused persons herein and made a reference to the case of R vs Paul Omondi Odongo [2019] eKLR.
24. It was the Learned Counsel's submission that the prosecution only proved illegal killing but did not demonstrate nor prove the offence of murder and the same ought to be reduced to manslaughter. He stated that DW1 and DW6 testified that there was no intention to cause harm to the Deceased it is common ground from the testimony of the prosecution and the defence witnesses that the purpose of the team proceeding to Tangol Forest was the recovery of the stolen sheep DW1 called 3 other witnesses. The 1st witness was Moses Tanui who stated that he is a step brother to DW1 and that upon the incident the family of the Deceased agreed to reconciliation. He stated that kshs. 200,000/= was given to cater for the burial expenses of the Deceased and later 8 cows were given to the family of the Deceased as a way of saying sorry which cows were accepted by the family of the Deceased.



25. The Learned Counsel submitted that this position was confirmed by DW3 who was the retired Chief of Mugula who confirmed that he chaired a reconciliation meeting between the family of the Deceased and the accused and he confirmed that indeed the family of the Deceased were given Kshs. 200,000/= and Eight Cows and that DW4 the current area chief also stated that the cows were given during his tenure in office. Counsel also submitted that DW6 stated that she never assaulted the Deceased and indeed it was admitted by the prosecution witnesses that DW6 the 3rd Accused did not accompany of the 1st and 2nd Accused in the rescue missions and therefore it was not possible for her to have assaulted the Deceased who was assaulted at Mugula Centre. It was the Learned Counsel's closing submission that the prosecution has not proved an offence murder against the accused persons herein and they should be acquitted of the charges of murder under section 215 of the Criminal Procedure Code.

2nd Accused Written Submissions

26. The Learned Counsel for the 2nd Accused, Mr. Ogongo Joshua, submitted that the 2nd Accused, Titus Kibet Kosgei, was charged jointly with others for the offence of murder contrary to sections 203 and 204 of the Penal Code, alleged to have been committed on 20th June 2021. The Learned Counsel recounted that the deceased, Richard Kimosop Yego, was suspected of stealing sheep belonging to the 1st Accused. The 1st Accused organised a team, including the 2nd Accused, to recover the sheep from the deceased's home. The mission was peaceful: no one was armed, and the deceased was apprehended without violence. The deceased himself directed them to collect the sheep and accompanied them back to Mugula Village.
27. He further added that on arrival, members of the public became aware that a suspected thief had been brought into the area. The deceased was attacked by irate neighbours, but the 2nd Accused intervened to stop the assault. The deceased was then taken into the kitchen and given hot tea. Sadly, he later succumbed to injuries.
28. The Counsel identified the key issue as whether the prosecution proved the ingredients of murder against the 2nd Accused beyond reasonable doubt. Counsel emphasized that under Section 203 of the Penal Code, the prosecution must prove: the death and its cause; that the accused committed an unlawful act causing the death and that the accused had malice aforethought (Section 206). It was submitted that no witness testified to the 2nd Accused assaulting the deceased. On the contrary, several prosecution witnesses (PW1–PW5) confirmed that:
- a. The mission was solely to recover stolen sheep;
 - b. No weapons were carried;
 - c. No assault was witnessed during the apprehension and transport;
 - d. The deceased's hands were tied but no harm was inflicted by the accused.
29. The Learned Counsel submitted that the evidence showed that the fatal injuries were caused by the attack from members of the public at Mugula Village, not by the 2nd Accused. On the issue of Burden of Proof, relying on the principles set out in Republic v Andrew Mueche Omwenga [2009] and Republic v Ismail Hussein Ibrahim [2016], Counsel stressed that the prosecution bore a strict burden to prove the 2nd Accused's guilt beyond reasonable doubt. The prosecution's evidence, taken at its highest, only demonstrated that the 2nd Accused participated in recovering the stolen sheep and was present during transportation.
30. On the issue of Defence Evidence, the learned counsel submitted that the defence witnesses (DW1 and DW5) confirmed that there was no intention to harm the deceased. Their purpose was limited to



recovering property, and the 2nd Accused made efforts to shield the deceased from assault. Finally, the Learned Counsel urged the Court to find that the prosecution failed to establish the essential elements of murder- particularly malice aforethought and any unlawful act by the 2nd Accused and to acquit him of the charge.

Analysis and Determination

31. Having given that background and having considered the evidence tendered and the submissions filed, it is my singular duty to establish whether the prosecution has mounted a case against the accused persons within the required standard of proof of beyond reasonable doubt as the ones who killed Richard Kimosop Yego Alias Kipyemit.

32. The prosecution's evidence is appraised as against the provisions of Section 107(1), 108 and 109 of the Evidence Act, which provides as follows:

107: (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108: The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

109: The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

33. The Court in *Mbugwa Kariuki Vs The Republic* [1976-80] 1 KLR 1085 emphasized: "That the burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence. The standard of proof is the extent to which a party ought to prove its case in order to succeed. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. This court should therefore examine whether the prosecution has discharged such a legal onus.

34. Under Article 50 (2) (a) of the Constitution of Kenya 2010, the accused is presumed innocent until the contrary is proved either by direct or circumstantial evidence. Two primary classifications are used for evidence: circumstantial evidence or direct evidence. Circumstantial evidence indirectly proves a fact whereas direct evidence directly establishes a fact. 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]"



35. An analysis of the facts of the case reveal that is purely a direct evidence case. The Black's law dictionary defines direct evidence as piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she: - saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place. It is trite that any crime in our legal system must comprise mens rea and actus reus. The trial court is under duty to ensure that before any conviction is entered both actus reus and mens rea have been proved to the required standard of beyond reasonable doubt. The Court of Appeal in Criminal Appeal No. 352 of 2012 Anthony Ndegwa Ngari vs. Republic [2014] eKLR summed up the elements of the offence of murder as follows:

- a. The death of the deceased and its cause;
- b. That death was unlawfully caused;
- c. That the accused had malice aforethought and
- d. The accused persons participated in or caused the death of the deceased.

36. I shall now endeavor to interrogate the above ingredients as with the evidence on record.

Death of the Deceased

37. Section 203 of the Penal Code defines the offence of murder and requires proof of the following elements beyond reasonable doubt, to establish the offence of murder: proof of death, the cause of that death, proof that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful killing was with malice aforethought.

38. The first issue for consideration is proof of death. In the instant case, there is no dispute of the deceased's death. I take cognizant note that the evidence of PW6, Dr. Kimosop Wilfred, confirmed that the deceased, Richard Kimosop Yego, died. The post-mortem examination revealed multiple injuries to the skull, face, limbs, and internal organs. The cause of death was established as multiple injuries due to blunt force trauma. This element is therefore proved beyond reasonable doubt.

Whether the death of the deceased was caused by an unlawful act or omission

39. Put differently, it must be presented in evidence that the victim of the murder suffered either physical or bodily harm as a result of the unlawful act of omission or commission. That the evidence demonstrates beyond reasonable doubt that the injuries inflicted leading to the loss of survival of a human being as known in law were unlawfully executed. It is therefore necessary to appreciate the scale of evidence on this ingredient as submitted before this court by the prosecution. In the present case, directly, the flow of evidence by the prosecution witnesses point out to the Accused persons as the perpetrators. In murder cases, or manslaughter for that matter, causation is a central issue. The prosecution must adduce evidence connecting the acts or omissions which contributed or caused the death of the deceased. The Prosecution establishing the cause of death is non-negotiable in so far as section 203 of the Penal Code is concerned.

40. The allegedly causative acts or omissions need not to the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death (The maxim here is that of acts or omission which occasion the acceleration of death). The provisions of section 213 of the Penal Code which defines causing death to include acts which are not the immediate or sole causes of the



death. The accused would be held responsible for another person's death although his act is not the immediate or sole cause under the following circumstances;

- a. He inflicts bodily injury on another person and as a consequence of the injury the injured person undergoes a surgery or treatment which causes his death;
- b. He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or/and proper precautions as to his mode of living;
- c. He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused;
- d. He by any act hastens the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death; and
- e. His act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

41. In the case of *R v Gusambisi s/o Wesonga (1948)* 15 EACA 65, every homicide is unlawful unless rebutted by evidence that it was either justifiable or excusable. These principles bring into play the provisions under section 17 on self-defence and section 207 as read with 208 of the Penal Code on provocation. In this respect any potential defences to the unlawful acts which causes death have been excluded in respect of all of that range of acts which caused the fatal injuries leading to the victim succumbing to death. That those acts or omissions done by the offender were in the prosecution of an unlawful purpose to endanger human life. As a matter of emphasis, the element of unlawfulness to cause death in exceptional circumstances is excusable by law in the event of an accident, natural causes, insanity self defence and also provocation.

42. Article 26 (1) of the *Constitution* guarantees every person the right to life. Therefore, no person is permitted to kill or cause the death of another person unless otherwise as provided for in our constitution or any other enabling statute. The law in Kenya presumes every homicide to be unlawful unless it is accidental or excusable or authorised by law. On this ground the court has to take into account the guidelines in *Juma Lubanga v R (1972)* HCD in which the court made the following observations:

“Grievous harm as defined in the Penal Code involves a consideration whether the harm is such as seriously to interfere with the health or comfort, and the answer to the question may depend on the nature of the injury and the circumstances of the case.”

43. From the instant case, the testimonies of PW1 to PW5, all of whom were eyewitnesses, place the Accused persons at the centre of the incident that led to the death of the deceased. The witnesses confirmed that the deceased was apprehended by the 1st and 2nd Accused, tied, and transported to the 1st Accused's homestead. It is there that the 3rd Accused (Betty Jemosop Kosgei) emerged from the house, armed with a piece of wood, and assaulted the deceased. According to PW2, a fight ensued and she was acting “in anger.” PW3 and PW4, both motorcycle riders involved in transporting the stolen sheep, also witnessed the assault by the 3rd Accused. PW5, a neighbour, testified that she heard the 2nd Accused urging that the deceased be beaten because he was a sheep thief and confirmed that the 1st and 2nd Accused later tied the deceased in a sack and carried his body away from the scene.



44. Though the defence tried to cast doubt on who caused the fatal injuries, the chain of events narrated by prosecution witnesses directly links all three Accused persons to the unlawful act. The 1st and 2nd Accused apprehended and restrained the deceased, and instead of handing him to the police, they delivered him to their homestead where he was assaulted in their presence. The actions of the 1st and 2nd Accused in bringing the deceased to their home instead of reporting to the authorities, and that of the 3rd Accused in initiating the fatal assault, collectively amount to a joint enterprise that culminated in the unlawful killing of the deceased. Therefore, from the above, the unlawful act leading to death is attributable to the three Accused persons.

Whether there was malice aforethought

45. On whether there was malice aforethought on the part of the Accused persons, Section 206 of the Penal Code defines Malice aforethought as follows:

- “206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -
- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - c. an intent to commit a felony;
 - d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

46. These provisions contain various characteristics of malice aforethought which can be individualized to specific circumstances and facts of each case. It is implicit to bear in mind though not defined under section 206 of the Penal Code, Malice aforethought is either direct or implied or inferred from the consequences of each case. Sometimes facts can speak to premeditation by the perpetrator to commit the offence of murder. Whereas on the other hand, malice aforethought may be a continuum of events manifested before, during or after the commission of the homicide itself by the offender. The extract from one of the landmark cases ever litigated in South Africa in *S V Pistorius 2016 (1) SACR 431 (SCA)*, tends to articulate this concept of intention for purposes of clarity as follows:

“In the case of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person’s intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore ‘gambling’ as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring,



and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act ‘reckless as to consequences’ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have ‘reconciled’ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions, It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.”

47. From the instant case, the following facts support the existence of malice aforethought: the deceased was tied up, restrained, and kept overnight at the 1st Accused’s home; the 3rd Accused attacked the deceased using a blunt object, despite no imminent threat or provocation; PW5 testified that the 2nd Accused was encouraging the assault and even tried to cover up the incident afterwards and that after the assault, the 1st and 2nd Accused tied the deceased’s body in a sack and moved it, indicative of a consciousness of guilt and an attempt to conceal the death. Moreover, the post-mortem evidence shows extensive blunt force trauma, consistent with repeated assault, not a single blow or accidental injury.
48. As the Court concludes this matter, it is sufficient to state that the common intention doctrine, as outlined in Section 21 of the Penal Code, is applicable in this instance. According to the provision, each person is considered to have committed the crime when two or more people have a common intention to prosecute an unlawful purpose together and, in the process, an offense is committed that is of a kind that its commission was a likely result of the prosecution of that purpose. The Court of Appeal for Eastern Africa in *Wanjiru d/o Wamerio Vs Republic* 22 EACA 521 stated as follows:
- Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.
49. The ingredients of common intention were enunciated in *Eunice Musenya Ndui Vs Republic* (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.
50. In *Njoroge Vs Republic* 1983 KLR 197 and *Solomon Munga Vs Republic* 1965 EA 363, both Courts had the following to say of the elements of the doctrine of common intention, “If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they factually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.” The accused persons, therefore, among themselves purposed to do harm to the deceased and they were all present and acted in unison. By considering the cumulative actions of the accused persons in the manner the killing of the deceased was executed, it is without any shred of doubt that the accused persons, with common intention, purposed to kill the deceased.



51. The nature, location, and multiplicity of injuries suggest that the Accused persons intended to cause grievous harm, which is sufficient to establish malice aforethought under Section 206(a) of the Penal Code.
52. Accordingly, it is my finding and holding that the prosecution has proved all the ingredients of the offence of murder against the Accused persons beyond reasonable doubt. I record and enter a finding of guilty against the Accused persons as charged. In passing the sentence, both the prosecution and the defense are called upon to file submissions for the sentence hearing scheduled on the 29th July 2025.

RULING ON SENTENCING

53. The Convicts herein Jones Kosgei Tanui, Titus Kibet Kosgei and Betty Jemosop Kosgei have been convicted of murder contrary to section 203 as punishable with section 204 of the Penal Code. The Court in its judgement found that the prosecution had established beyond reasonable doubt that the convicts on 20th day of June 2021 at Mugula Village, Kapkochur Location in Marakwet West Sub County within Elgeyo Marakwet County in the Republic of Kenya, murdered one Richard Kimosop Yego Alias Kipyemit.
54. The probation officer filed pre-sentence reports for the three convicts to aid the court in appreciating the nature and circumstances of the convicts herein whose contents have been captured as hereunder:
55. Starting with Betty Jemosop, her presentence report highlighted her family background indicating that she is the daughter of Paul Kiptum and Rebecca Kimwae who are farmers in Marakwet East. That she is the 5th born in a family of ten children. That her both families being the maiden and her matrimonial family have shown great support to her from the time she was arrested. The report further indicates that they have made efforts to seek reconciliation from the two families and some traditional rites were done. That the family incurred burial expenses which was to a tune of about Kshs. 240,000/= and additional sheep were given to the deceased family.
56. As for the circumstances of the offences, the accused person stated that they had lost 19 sheep. After asking around it was discovered that the deceased was in the possession of the said sheep. Her husband, her sons alongside other villagers set to go retrieve the sheep from the deceased. They got the sheep and carried the deceased with them so that he could explain who was behind stealing their sheep and selling them to him. On their way to the offender's home, the deceased tried escaping but they raised alarm and he was captured by an angry mob that assaulted him. They later carried him to their home where the offender was received and she offered him tea. The deceased later succumbed to injuries.
57. According to the report, from inquiry, the probation officer established that the offender and the victim are relatives; the offender and the victim's father are cousins. That apart from being relatives, the offender's husband, the 1st accused herein, and the victim were involved in an illegal cultural practice that involved stealing of sheep and selling it to the other.
58. The probation officer indicated that the offender denied committing the offence and that her only mistake was hosting the deceased after he had been assaulted by the mob.
59. The views of the victim were collected the officer who upon observation established that the deceased was a family man with two households. It was indicated that the victim's family continue to suffer emotional distress and that the burden of the two households continues to be shouldered by the two respective widows. On the issue of reconciliation and compensation, it was established that discussions had begun in line with the Marakwet cultural practices. An initial contribution of Kshs. 20,000/= converted from a few sheep was made, and the offender's family further supported the funeral expenses



of Kshs. 240,000/=. According to the victim's family, even though there existed such good gestures, justice must still be served.

60. The area chief was also interviewed and he stated that he has known the offender's family for a long time even before he was chief. He added that the offender is a hard-working person and has no criminal record within the community. He confirmed that the offender's house was burnt down after the demise but stated it was a cultural practice and that even if the offender is released, she will not live in that area. He added that he has been part of the reconciliation and there is no animosity between the two families.
61. As for Jones Tanui, his pre-sentence report indicated that he was born in 1975. That over the years he resided in his home area where he married Betsy Kosgei and together, they have five children. From the inquiry of the report the probation officer indicated that the convict did have a good reputation in the community. He was regarded as a hardworking man.
62. On the circumstances of the offence, the report highlighted that it emerged that the offender and the deceased were well known to each other and had cooperated in their farming activities, although it was alleged that they also engaged in stealing sheep together each stealing from his own village and taking the animals to the other's village as a cover. In this incident, the offender's wife had complained about an outstanding balance of sheep, and there was suspicion that the offender was diverting some to his second wife. That to prove his innocence and to demonstrate that the deceased was withholding stock, the offender orchestrated the raid, intending both to retrieve the sheep for his wife and to bring to the deceased to his wife to explain himself.
63. The attitude of the convict is reported to be for a person who accepts full responsibility for his role in the incident and acknowledges that his actions contributed to the death of the deceased. He stated that while he did not deliver the fatal blow, the uncontrolled assault by some village members resulted in the fatal injuries.
64. The views of the victim were still the same as for those as recorded in Betty Jemosop's report.
65. In concluding, the officer recommended that the court should impose a custodial sentence, while taking into account the reconciliation efforts undertaken by the parties.
66. Finally, the court has considered the report of Titus Kibet Kosgey who happens to be a child to the other two convicted persons. The circumstances of the offence as for him are indicated to be that about fifteen of his father's sheep had stolen then. And together with father and two siblings and other community members, a total of eleven people, they planned and executed a night on the deceased's homestead where they had intel that he had sheep which was in another village, a journey of almost three hours through a forest. They found and apprehended the deceased, recovered the allegedly stolen sheep, and also took additional animals they deemed to be compensation. They ended up taking thirty sheep, and also took additional animals they deemed to be compensation. They ended up taking thirty sheep to the offender's homestead.
67. The convict accepted responsibility for his role in the incident and acknowledged that his actions may have contributed to the death of the deceased. He claims that while he did not deliver the fatal blow, the uncontrolled assault by some village members resulted in the fatal injuries. Nevertheless, he accepts the gravity of his conduct. He indicated that his family sought forgiveness from the victim's relatives and offered compensation in line with the cultural customs of the Marakwet community. He is aware that no form of restitution can restore the lost life, he appealed for leniency, expressing that he has learned from the experience and is committed to making amends where possible.



68. This Honourable court now faces the solemn task of determining an appropriate sentence that balances the imperatives of justice, punitive sanctions, and societal protection while acknowledging the human dignity of the offenders.
69. Mr. Mathai, Counsel for the 1st and 3rd convicted persons mitigated on their behalf stating that the 1st Accused person is a male adult aged 50 years while the 3rd Accused is a female adult aged 40 years. He adds that they are wife and husband and together they have five children including the 2nd Accused herein and that the 1st and 3rd Accused persons were breadwinners of the family and that upon their arrest and subsequent charge of the offence of murder, the younger children who were 2 years and 4 years were left without parental care. Counsel further mitigated adding that the children were left at the mercy of the neighbours and therefore in dire need of parental care and ever since the arrest of the accused persons herein the said children have never gone to school since they were neglected by their family members and they depend on the neighbours per what they eat and shelter.
70. Counsel also mitigated stating that the Accused persons herein are first offenders and while in custody, they underwent various courses that will help them shape up their lives and the community will have the benefit of their service once given an opportunity to integrate with the community and I particular the 1st Accused has attained certificates in the following fields: Certificate in Christian Ministry; Certificate in Christian Discipleships program; Certificate in Bronze level in prison project; Certificate in animation course and Certificate of Catholic men association.
71. Counsel furthermore mitigated stating that the Accused regret the events that the deceased to lose his life and they are remorseful and as a good gesture of their remorsefulness they undertook traditional culture ceremony where they paid Kshs. 200,000 that was used for burial preparation of the deceased and paid 8 cows to the family as this position was confirmed by the former and the current chief that there was reconciliation process and the family of the deceased had been given 8 cattle and this act shows great remorseful on the part of the accused herein. The Counsel closed the mitigation by urging this Honourable Court to consider the age of the accused herein who are 50 years and 40 years retroactively who have an opportunity to gear their remaining years towards improving the society.
72. Mr. Ogongo Joshua, Counsel for the 2nd convicted person mitigated by stating that the convict is a first time offender and that for the entire duration the 2nd Accused has been in custody, has been exposed to the rehabilitation programmes offered at the Eldoret G.K prison, he has been exposed to the Christian teachings under the catholic denomination and is currently serving as the secretary of St. Jude Community Eldoret G.K prison as communicated on 17/7/2024. Counsel also mitigated stating that this Honourable Court on 15th July 2021 directed that a pre-bail report be prepared for consideration and the subject report recommended that the bond application be considered at a later stage once the concerned parties have concluded the reconciliation process and that the reconciliation process was initiated as per the Kalenjin Customs as was stated in the sworn testimony of DW 2- Moses Kiptanui, DW-3 James Ruto Kibowen, retired chief and DW-4 Charles Kiprotich Chumba- sitting chief of Kapkochur location.
73. Counsel further mitigated stating that the 2nd Accused has just completed his secondary education and was in the process of joining a tertiary institution for the purposes of pursuing nursing and he had applied to join Equip Africa Institute in Kitale before the unfortunate events as indicated in the pre-bail report. He further mitigated that the 2nd Accused is 21 years old and he is young and malleable to change and be a role model in the society.
74. Under Section 204 of the Penal Code, murder attracts the death penalty. However, the Supreme Court in Francis Karioko Muruatetu & Another v Republic [2017] eKLR held that the mandatory nature of



the death sentence for murder is unconstitutional, and courts must consider mitigating factors and the individual circumstances of each case before passing sentence. Sentencing must remain individualized, proportionate, and guided by principles of fairness, dignity, rehabilitation, deterrence, and societal protection.

75. In considering the appropriate sentence, I am guided by the Supreme Court decision in *Francis Karioko Muruatetu and Another v Republic and Others* [2017] eKLR, which established that despite section 204 of the Penal Code providing for a mandatory death sentence upon conviction for murder, the court retains discretion in sentencing. That discretion must however be exercised judiciously and not capriciously. In *African Continents Bank V Nuamani* [1991] NWLI 486, the Court stated that:

“The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”

76. In the *Francis Muruatetu* case, the Supreme Court guided as follows, both in the Original Petition and in the Directions given on 6/7/2021 while providing clarity on the judgment that had applied the principle that mandatory sentences were unconstitutional in as far as they deprived the trial courts of the discretion to mete out appropriate sentences having regard to the circumstances of each case and also denied the accused persons the opportunity to mitigate.

“vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

- (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) The manner in which the offence was committed on the victim;
- (g) The physical and psychological effect of the offence on the victim’s family;
- (h) Remorsefulness of the offender;
- (i) The possibility of reform and social re-adaptation of the offender;
- (j) Any other factor that the Court considers relevant.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in *Muruatetu*.”

77. In arriving at a just sentence, I am also reminded to consider the 2023 Judiciary of Kenya Sentencing Policy Guidelines which expressly provide that sentences are imposed to meet the following objectives:



- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
 - g. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - h. Reintegration: To facilitate the re-entry of the offender into the society.
78. In the case of *Santa Singh v State of Punjab* [1978] 4 SCC 190, as cited in *Titus Ngamau Musila alias Katitu-Criminal Case No 78 of 2014*, the court held:
- “Proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances--extenuating or aggravation of the offence. The prior criminal record', if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, society and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence.”
79. In the comparative jurisprudence in the case of *S v Malgas* 2001 (1) SACR 469 (SCA) the court stated as follows:
- “that the circumstances in which the crime was committed are undoubtedly such as to render it necessary to impose a sentence of imprisonment for life unless substantial and compelling circumstances justify a lesser sentence. The court held that the 'shooting was premeditated and planned'. The fact that the planning and premeditation occurred not long before the deed was accomplished cannot alter that. It was also carried out in the execution of a common purpose to kill the deceased. Giving all due weight to the enormity of the crime and the public interest an appropriately severe punishment being imposed for it, the court considered that the personal circumstances of the accused (her relative youth, her clean record and her vulnerability to Carol's influence by reason of her status as a resident in the latter's home at the latter's pleasure) and the fact that she was dragooned into the commission of the offence by a domineering personality are strongly mitigating factors. ”
80. The Court takes note of the family relationship between the three convicts-a father, mother, and their son- and the tragedy that their actions have brought not only to the family of the deceased but also to their own. This Honourable Court finds that while the offence committed was grave and resulted in the loss of life- which cannot be trivialized- the circumstances mitigate against the imposition of the



death sentence. The convicts are first-time offenders, have demonstrated remorse, and have taken steps toward reconciliation and rehabilitation.

81. The deceased's family appears to have partially accepted reconciliation, and traditional justice processes have complemented formal proceedings. To be particular, a traditional reconciliation process was initiated by the family of the accused with that of the deceased, culminating in the payment of Kshs. 200,000 for burial arrangements and 8 head of cattle, an act acknowledged by both former and current area chiefs. This action demonstrates remorse and respect for community restorative practices.
82. I am aware that in *S vs Rabie 1975 (4) SA 855 (A)* at 861-2 Holmes JA reminded judicial officers of the importance of being fair to both the accused and to society in handing down sentence. Justice includes the element of mercy which is the hallmark of a civilized and enlightened criminal justice system. And in the same case at p866 Corbett JA eloquently summarized the approach as follows:

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity, nor, on the other hand, surrender to misplaced pity. While not flinching from firmness where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

83. However, the sanctity of human life must be upheld, and this Court must issue a custodial sentence that reflects deterrence, retribution, and reformation, especially considering that the act involved three persons attacking a single victim.
84. Accordingly, I hereby sentence each of the accused persons, Jones Kosgei Tanui, Titus Kibet Kosgei and Betty Jemosop Kosgei to thirteen (13) years imprisonment. The sentence shall run from the date of arrest with effect from 8th July 2021 in accordance with Section 333(2) of the Criminal Procedure Code.
85. Right of Appeal within 14 days.
86. It is so ordered

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF SEPTEMBER 2025

.....

R. NYAKUNDI

JUDGE

In the presence of:

Ms Sidi for State

The accused person present in person

