



REPUBLIC OF KENYA



**Republic v Wanyama & 4 others (Criminal Case 49 of 2015)
[2025] KEHC 12882 (KLR) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 49 OF 2015
AC BETT, J
SEPTEMBER 16, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

THOMAS WANYONYI WANYAMA 1ST ACCUSED

KUNDU WANYAMA NAVACHENJE 2ND ACCUSED

JOTHAM MASENGERE NABACHENJE 3RD ACCUSED

OSCAR WANJALA BARASA 4TH ACCUSED

BENARD WERE CHEBAKOO 5TH ACCUSED

JUDGMENT

1. The five (5) Accused persons are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on diverse dates of 19th and 20th September 2014 at Chepsai Village, Matete Sub-County within Kakamega County, jointly with others not before the court, they unlawfully murdered Reuben Wanjala.
2. The matter proceeded to hearing and the prosecution called five witnesses to prove that the Accused persons, who had denied the charges, did murder the deceased.
3. Justus Nyongesa, the father of the deceased testified as PW1. He recalled that on 19.9.2015 at 7.30 p.m. he was at his home when he heard a dog bark. On going out, he saw two (2) young men in his compound at the gate. It was Wanyama Edward and Specila Edward. The two said that they wanted to talk to the deceased concerning their work of tending sugar cane. The deceased, who was in his house came out and joined the two people and went outside PW1's compound as they talked. PW1 who was left with the deceased's child, went to sleep.



4. PW1 further stated that at 1 a.m. as he slept, he heard a person being beaten. Both the assailants and the victim of the beating were shouting. PW1 went out to check and found people going towards Wanyonyi's home. They had passed Teke's shamba and were entering into Wanyama's shamba. On arrival, he found that it was his son Reuben Wanjala the deceased who was being beaten. The people who were beating the deceased were Thomas Wanjala the 1st Accused, Kundu Wanyama the 2nd Accused, Jotham Masenge the 3rd Accused, Oscar Wanyama Thomas the 4th Accused and Benard Were Chevailwa the 5th Accused. There were also others that he named that were present being Wanyama Edward, Benard Edward, Mboi Edward, Simiyu Keya, Juma Wanyama Nguto, Stonie Barasa, Mbuya Kiali and Sabiri Charles. They were beating the deceased using sticks.
5. PW1 said that he saw stab wounds on the deceased's head. He entreated the people to stop beating the deceased but they refused. They continued beating the deceased even after they reached Thomas' shamba. The deceased was lying on his belly and he was being hit on the back and the shoulders. PW1's effort to find out why the deceased was being beaten bore no fruits.
6. PW1 recalled that when his wife arrived, she laid over the deceased and said it were better for her to die but the people started beating her also. He said that Thomas, Benard Chevalilwa Teke and Wanyama Edward also beat him. He said that Toyiri Musee Lupao also hit him on top of his head with his rungu. Thomas Wanyama suggested that they take the deceased to the police station and Kundu Wanyama brought a rope which Oscar Wanjala used to tie up the deceased. They escorted the deceased to Matete police station while continuing with the beating. After about 1Km, the deceased could not longer walk. They started to drag him on the ground and after about 200 metres he died. PW1 who said that he was with Tabu Manjani a brother to the deceased, decided to go back home.
7. It was PW1's testimony that as they returned home, he was shortly accosted by people who had followed him. They dragged him back to the scene near Chepsai School. There, they forced him to beat his son. When he refused, they started beating him then lay him on the ground and wanted to tie him to the deceased's body. His son, who feared that they would kill him urged him to hit the body so that the attackers would leave him. He pretended he was beating the deceased after which they pushed him over the deceased and went to the police station. He then went home in fear with his sons who arrived before him.
8. PW1 said that the following day, he went to the police station at 7.00 a.m. where he made a report and was informed that the police had picked a body at 3.00 a.m. He went to the mortuary and identified the body as belonging to his son.
9. According to PW1, the Accused persons were arrested after about a year during which period he complained about the lack of arrest. PW1 said that on the material day, he had a torch which he used to identify the Accused persons who are members of his family whom he has known for many years. He said that the incident started at 1.00 a.m. and ended at 3.00 a.m.
10. During cross-examination, it emerged that the Accused persons are close family members of PW1. PW1 said that he was present when his son died but feared that he would be killed when they forced him to beat the deceased. He said that he did not report the incident until 6.00 a.m. when he informed the Assistant Chief then went to report to the police.
11. PW2 was Silas Lubao who was a brother to PW1 and uncle to the deceased. He recalled that on 20.9.2014, at 1 a.m., he was at his house when he heard dogs barking. He opened the window and heard people shouting "thief, thief". He got out with a torch and a weapon. The shouts were coming from Thomas Wanyonyi's home. He went there and found Reuben the deceased, being beaten. He tried to intervene. He told them that he had never heard of the deceased being involved in crime. The



- deceased said he was not a thief. PW2 advised the attackers to tie the deceased up and take him to the police then went back home from where he called the Assistant chief and notified him.
12. PW2 further stated that at 5.00 a.m. he heard the deceased's mother screaming that people had killed her son. He went to where the body was. Policemen came and picked the body.
 13. According to PW2, the people who were beating the deceased were Jotham Masengere the 3rd Accused, Wanyama Edward, Barasa Edward. Kundu Wanyama the 2nd Accused was holding a lighting device and the 4th Accused tied the deceased's hand. The 1st Accused and 5th Accused had sticks but he did not see them beat the deceased.
 14. On being cross-examined, PW2 said that he recognized only seven (7) out of the people he found at the scene who were more than ten (10). He said he did not see PW1 there. He confirmed that the Accused persons are closely related to him.
 15. PW3 was Felista Juma who testified that the deceased was a son to her brother-in-law as her deceased husband was a brother to PW1. She recalled that on 20.9.2024, she was at her home when she heard shouts and on coming out she found people beating Reuben Wanjala. When she asked what the problem was, the people became violent towards her and ordered her to go back to her home. She went back to her home but then followed the people from behind. They headed towards Matete Police Station. She recognized some of the assailants. One of them was Jotham the 3rd Accused. She asked him why they were beating the deceased, but he did not respond and only beat the deceased. The deceased was tied up on the hands and crying as he was led away.
 16. PW3 said that she later heard the deceased's mother crying and she said that people had killed her son. PW3 identified the people she saw leading the deceased as Thomas the 1st Accused who had a rungu, Jotham the 3rd Accused who had a firewood and hit the deceased in her presence, Wanjala the 4th Accused who had a stick and Benard the 5th Accused who also had a stick. She said she identified them as they were close and there was moonlight. She also said that she recognized Thomas by voice as she has known him for many years for he was a brother to her late husband.
 17. PW4 was Dr. Wasaba Erick who produced the post-mortem report on Reuben Wanjala. The autopsy was conducted by Dr. William after the body had been identified by Justus Nyongesa and Ronald Nyongesa.
 18. According to the report the body was of an African male aged about 24 years and the autopsy was carried out at Webuye District Hospital. The body was laid on its back with both hands tied to the back. The head had visible injuries ranging between 1cm long and 6 cm long. There were bruises on the neck, back, abdomen, chest and legs. Internally, the lungs had collapsed. The liver had lacerations and the spleen was perforated so there was blood in the stomach cavity. There was a penetrating brain injury on both sides of the head.
 19. The Doctor's opinion was that the death was due to head injury and haemorrhage secondary to organ damage and the injuries were consistent with assault with both blunt and sharp objects.
 20. PW5 was 77738 PC Leonard Kiprotich, a police officer from Matete Police Station who testified that he took over the investigation from Corporal Wilson Tirop who had since been transferred. Since the defence had no objection, he produced the investigating officer's statement which was recorded on 23.9.2014 and gave evidence based on the statement. PW5 recounted the evidence of PW1 who knew the killers. He stated that it was alleged that the deceased was accused of attempting to steal a cow belonging to Thomas Wanyonyi and accosted by a group of people some of whom were known to the father and that he was killed in the presence of the parents at Chepsai Primary School at about



- 3.00 a.m. According to the witness, a report of cattle theft was made at Matete and by the time the police responded, the deceased had been killed. The cow that was alleged to have been stolen was photographed.
21. At the close of the prosecution's case the court found that a prima facie case had been established and the Accused persons were placed on their defence. The Accused persons chose to give sworn statements. They did not call any witnesses.
 22. DW1, Thomas Wanyonyi Wanyama stated that on the night of 19/20.9.2014, at around 1 a.m., he heard his grandchildren screaming. He woke up immediately and opened the door. He found that his grandchildren had chased and caught someone who had stolen his cow. The suspect was Reuben Wanjala. DW1 stated that the suspect struggled but was eventually caught and tied up with a rope. On interrogation, he kept quiet. DW1 directed that he be taken to Matete Police Station alongside the cow. While enroute around Chepsai area, they were surrounded by a crowd who forcefully restrained them while shouting "mwizi!" ("thief!"). They tried to move forward in vain and he pleaded to be allowed to go to the police station. They went upto the police station where they had to wait for a motor vehicle. By the time they went back to the area where they had left Reuben, they found his body. They did not know who had killed him.
 23. On being cross-examined, DW1 said that he and Wanyama his grandchild, tied up the deceased and that he, Benard the 4th Accused and Oscar the 5th Accused went to the police station. He said that he saw PW1 and PW2 that night and did not know why the two would lie against him as they had never disagreed. According to him, the deceased was assaulted by the crowd they met on the way about 1 ½ Km after they started escorting him.
 24. DW2, Kundu Wanyama Navachenje said that on the material night, he was asleep when he heard some noise. He took his One Acre lamp and proceeded where the noise was emanating from. This was in the 5th Accused's house. He found them beating the deceased. They said they were taking the deceased to Thomas's house because he had stolen Thomas's cow. He followed them to Thomas, the 1st Accused's house where he found the 1st Accused and the cow. They decided to take the deceased to Matete Police Station. DW2 said that since he noticed that the 1st Accused had good company including the 5th Accused who is a Nyumba Kumi elder, he left them and went back to his house. The next morning, he heard the deceased's mother saying that her son had been killed. He was arrested a year later and charged with the murder of the deceased.
 25. DW3, Jotham Masengere Navachenje denied killing the deceased. He said that on the material date at around 1 a.m., he heard voices shouting "mwizi! mwizi!" ("thief! Thief!"). He headed towards the location the noise was coming from. It was the 1st Accused's house. He found that they had arrested the deceased on claims that he had stolen a cow. He saw the cow. Present were the 1st Accused, his grandchildren, the 2nd Accused, PW2 and the deceased's mother. The 1st Accused's efforts to talk with the deceased were futile so they decided to take him to the police station. It was DW3's testimony that he did not accompany the group that went to the police station but turned back and went to his house and the next morning, he heard that Reuben had been killed by a mob in Chepsai although he never saw the deceased being beaten.
 26. On being cross-examined, DW3 stated that when he arrived, he found the 1st Accused, Silas, Felista, Justus, Oscar, Bernard and the 1st Accused's grandchildren. Reuben, who had been restrained with ropes was well. Felista whom he heard testify arrived last. He reiterated that when he was there, no one assaulted the deceased. He further stated that the people who accompanied the deceased were the 1st Accused, Benard and Oscar.



27. DW4 was Oscar Wanjala Barasa who denied the allegations that he killed the deceased. According to him, he woke up to some noises and when he went to check in the direction of Mzee Thomas where the noise came from, he found a crowd there. He found that Mzee Thomas had decided to take the suspect to Matete Police Station. As they approached Chepsai Primary School, members of the public who were emerging from the sides in response to screams of “mwizi! mwizi!” overwhelmed them. DW4 recounted that he asked the 5th Accused who is a Nyumba Kumi elder what they should do and the 5th Accused advised that they go for help from the police station. They proceeded to the police station leaving the deceased with the crowd. At the police station, they had to wait for a motor vehicle and by the time they arrived at the location where they had left the deceased, he had already been killed and his body left in the middle of the road. They therefore took the body to the mortuary.
28. Cross-examined, DW4 denied that the 3rd Accused was the last to arrive at the 1st Accused’s compound. He maintained that as he arrived, he found the people leaving and they were more than fifteen (15). He denied that the deceased whose hands were restrained, was assaulted as he was being led to the police station. He said that despite being overwhelmed by the crowd, they did not release the deceased from the restraints.
29. DW5 was Benard Were Chebakoo who said that he was a Nyumba Kumi. In his defence, he said that on the material day, he heard noise with people saying “mwizi! mwizi! mwizi! wa ngombe”. He went out of his house and went to check Mzee Thomas’s compound where he found Mzee Thomas interrogating the deceased who had been restrained with a rope. Mzee Thomas alleged that the deceased and two others had tried to steal his cow. He implored him to try and settle the issue with the deceased’s father then went back to his home to dress up as he had walked out in his boxers. On going back, he found that Mzee Thomas had decided to take the deceased to the police station.
30. DW5 said that he went to the village elder Juma Ndori who gave them the go ahead to take the deceased to the police station. As they headed to the police station, the crowd, which had responded to the screams overwhelmed them and so he decided that they go for the police to come and rescue the deceased whom they left about 1 ½ Km from Chepsai Primary. They found no vehicle at the police station and had to wait for a while. When the vehicle arrived, they went back and found that the deceased had succumbed to the injuries. According to DW5, it is the crowd that assaulted the deceased. He tried to restrain them from beating the deceased but they assaulted him.
31. During cross-examination, DW5 said that on arrival at the 1st Accused’s home, it was dark. He found the 1st Accused’s grandchildren, Justus, and the deceased’s mother. There were about ten (10) people but since it was dark, he did not recognize them. According to him, the screams began while they were on the way to the police station after they left the village elder’s house. He could not contact the police as his phone had run out of battery. He also said that although his co-Accused had said that by the time they reached the scene with the police, there was no one, there were people who dispersed due to fear of the police. He said he did not identify the people who attacked the Accused as it was dark and they did not have a torch.
32. At the close of the defence case, both parties were given time to file written submissions.
33. The prosecution submitted that it had proved that the deceased had died by reason of an unlawful act. Relying on the case of Republic v. Teresia Wairimu Thuo [2019] eKLR among other authorities, Ms. Chala submitted that a post mortem report could be produced by a person other than its maker in proof of death. She also relied on Section 77 of the *Evidence Act* and Republic v. WOO [2020] eKLR. On the question of the identification of the Accused persons as the assailants, the prosecution submitted that there was evidence of identification by recognition by three witnesses. She further



submitted that the defence that was tendered by the Accused persons was an afterthought and that all the Accused persons had a common intention as defined by Section 21 of the Penal Code to commit the offence and are therefore liable for the same.

34. The prosecution finally submitted that the evidence adduced shows that there was malice aforethought as depicted by the gravity of the injuries caused to the deceased and in the circumstances, the evidence by the prosecution meets the standard of proof and the Accused persons ought to be found guilty as charged.
35. In turn, the Accused persons submitted that the prosecution did not prove its case. They submitted that the evidence was that they made an arrest as mandated by Section 21 of the Criminal Procedure Code, due to reasonable suspicion that the deceased had committed a cognizable offence and there was no intention to commit murder. The Accused also submitted that there was no evidence apart from that of the Accused persons as to what happened while the Accused were taking the deceased to the police station and in light of their evidence that the deceased was a victim of mob justice, the issue is whether the court can invoke the provisions of Section 119 of the *Evidence Act* to convict them.
36. The Accused further said that the doctrine of last seen is illegal and unconstitutional as it shifts the burden of proof to the Accused persons. Their submissions were that however one looks at the present case, it was the prosecution's burden to prove that the Accused persons murdered the deceased, a fact which it failed to do. Reliance was placed on the case of *State v. Kaun Owuor Abith alias Opudo* [2022] eKLR and *Emmanuel Wanjala Kasili v. Republic* [2024] KEHC 10608 (KLR).
37. This being a murder trial, the prosecution is required to prove four (4) elements which are:-
 - a. That the person named as the deceased is dead.
 - b. That his death was caused by an unlawful act or omission.
 - c. That such death was caused by malice aforethought.
 - d. That the accused persons were positively identified as the perpetrators of the offence.

Whether the person named as the deceased was dead

38. There was no dispute that Reuben Wanjala died. All the prosecution witnesses and the Accused persons attested to his death. The body of the deceased was collected from the scene of crime in the wee hours of the morning of 20.9.2014 and taken to Webuye District Hospital mortuary where an autopsy was subsequently conducted. The body was identified by two people. A body can only be taken to the mortuary, an autopsy conducted and a burial permit issued when a person is dead. In the case of *Republic v. WOO* [2020] eKLR, the court stated as follows:-

“29. Albeit the doctor who performed an autopsy on the deceased's body was not called to testify, it is clear from the evidence of the above witnesses, that there was indeed death of the deceased person. There was no way the deceased could have been taken to the morgue if he was not dead.”

Whether the death was caused by an unlawful act

39. The evidence of PW1, PW2 and PW3 was that the deceased was beaten by several people. According to them, efforts to establish why the deceased was being beaten by the said people were met with hostility. During the assault, the Accused screamed. His assailants also made noise and it is the noises that drew the witnesses to the scene where they witnessed the assault. The witnesses testified that they saw the



assailants armed with sticks, firewood and a rungu which they used in their assault. The other weapon was a piece of timber that was shaped in the form of a panga.

40. The Accused persons in their defence testified that the deceased was beaten by a mob on the suspicion that he had stolen a cow from the 1st Accused although they denied being involved in the beating.
41. PW4's testimony was that the deceased had suffered multiple injuries caused by blunt and sharp objects. He opined that the injuries stated in the postmortem report were consistent with assault.
42. The Accused persons submitted that they effected a lawful arrest of the deceased as provided by Section 21 of the Criminal Procedure Code which provides that:-
 - “(1) In making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.
 - (2) If a person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.
 - (3) Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.”

43. Even if I were to agree that the arrest of the deceased was legal, the subsequent acts of assault upon him were unlawful. In the case of *Gusambizi Wesonga v. Republic* [1948] 15 EACA 65, the Court of Appeal held thus:-

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self-defence or in defence of property.”

44. No evidence was led to suggest that the deceased suffered the fatal injuries while the assailants were acting in self-defence or in defence of their property. The cow that the deceased was allegedly caught stealing had been recovered. The deceased, who was alone had been restrained, so the assault upon him was inexcusable. Assault was defined in *DPP v. Little* [1992] QB 645 as any act in which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful force and that the term is often used to include battery which is the intentional or reckless application of unlawful force.
45. That the deceased sustained injuries which resulted in his death and that there was no reasonable explanation for the injuries as contemplated by law leads to the inevitable conclusion that the prosecution proved the unlawful nature of the assault beyond reasonable doubt.

Whether the Accused persons were positively identified as the perpetrators of the offence

46. The prosecution demonstrated that the Accused persons were well known to PW1, PW2 and PW3. PW1 recognized all the four Accused persons and others not before court as the people whom he saw assaulting the deceased that night. He said that he had a torch which assisted him in the identification. PW2 witnessed the 3rd Accused assault the deceased with a piece of timber. He confirmed that he also saw the other Accused persons standing there during the assault and the 2nd Accused had a lighting device which shone light on the place. He said that the 1st Accused castigated him when he attempted to know why the deceased was being beaten. The 2nd Accused in his defence confirmed that he had



a lamp. The 3rd Accused placed the 1st and 2nd Accused at the scene. Accused 2 confirmed that PW3 arrived at the scene after him. PW3 also saw the 3rd Accused assault the deceased. She confirmed that the 1st, 4th and 5th Accused were present and armed with a rungu and sticks.

47. The Accused persons are closely related to the three witnesses and lived in close proximity to them. The beatings took place near the homestead of PW3 who testified that the 1st Accused also talked to her and she recognized his voice. PW1 also said he had a torch which assisted him identify the culprits as well as see the injuries on the deceased. It was also PW2's testimony that the 2nd Accused had a Sunking torch which gave light in the area. Considering the length of time the assailants took as they dragged the deceased towards the police station while beating him, the possibility that there was an error in their identification is non-existent. In the case of *In Reuben Taabu Anjanoni & 2 others v Republic* [1980] eKLR the Court of Appeal held thus: -

“... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).”

48. In the present case, the three witnesses gave evidence albeit with inconsistencies or contradictions as to who committed the offence and who actually assaulted the deceased. There was nothing to suggest that PW1, PW2 and PW3 had any reason to frame the Accused persons, who are their kith and kin. Although the incident occurred at night, the conditions were favourable for positive identification. The evidence places all the Accused persons at the scene.

49. Notwithstanding the inconsistencies or contradictions, I have considered the entire evidence collectively and find that the discrepancies are not fatal to the prosecution's case as the contradictions did not affect the material particulars of the case. In *Erick Onyango Odeng v. Republic* [2014] eKLR, the Court of Appeal considered the issue of contradictions in a case and maintained that not every contradiction is fatal to the prosecution's case. They quoted with approval the case of *Twehangane Alfred v. Uganda* (Criminal App. No. 139 of 2001) [2003] UGCA 6 where the court held thus:-

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

50. The Court of Appeal further stated in *Reuben Shitula v. Republic* [2025] KEAC 12 (KLR) thus:-

“33. We have already alluded to the learned judge fleshing out the contradictions or inconsistencies, and it is not necessary to reproduce them; the critical issue is whether the identified contradictions and inconsistencies were of such magnitude as to make the conviction of the appellant unsafe. It is our considered view that the inconsistencies were a general reflection and recollection by different persons who went to the scene at different times and



we echo the apt observation in the case of Phillip Nzaka Watu vs. Republic [2016] eKLR that:

“...However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise, must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

51. The discrepancies in this case relate to the beating of the deceased. It is noteworthy that the assault occurred over an extended period of time and so it would naturally mean that each eye witness would testify as to what he saw when he arrived at the scene. Whereas PW1 said that he saw all the Accused persons beat the deceased, PW2 had a different narrative. PW3 who is said to have arrived after the 3rd Accused testified that she saw the 1st, 2nd, 4th and 5th Accused who were armed at the scene while she found the 3rd Accused hitting the deceased.
52. Upon careful analysis of the evidence of the three eye witnesses, I am satisfied that they properly identified the Accused persons albeit at different junctures, as they assaulted the deceased in concert with the others. Each of their testimonies was consistent and unshaken during cross-examination.
53. The post-mortem attributed the death to a head injury and haemorrhage secondary to organ damage. The head injury was the result of multiple cuts on the head while the blood loss was the result of a ruptured spleen and multiple lacerations in the liver. All the injuries followed an assault. Although one cannot distinguish who among the Accused caused the final and fatal injury, it is instructive to note that all the Accused persons took active part in the assault. In the case of Ali Salim Bahati & Another v. Republic [2019] eKLR, the court held:-

“We must say that it is difficult in the case of mob justice, such as in this case, to pin point that a blow or assault by a particular person in the group led to a victim’s death. It is in such circumstances that the provisions of Section 21 of the Penal Code come into play.”

54. Section 21 of the Penal Code provides:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

55. From the evidence and the conduct of the Accused persons, one can deduce that they had a common intention to assault the deceased in retaliation for stealing a cow. The 1st, 4th and 5th Accused in their defence shifted the blame for the killing to an irate mob that attacked the deceased while he was being escorted to the police station but this line of defence was never raised during cross-examination of any of the three eye-witnesses. I can only conclude that the defence is an afterthought. The 2nd and 3rd



Accused merely disassociated themselves from the offence but their defence placed them on the scene. I am convinced that the Accused persons all had the opportunity and did assault the deceased. However, I must hasten to add that under the doctrine of common intention, it is sufficient to demonstrate that a person is acting in concert with others to commit a crime and so it was not even necessary for the prosecution to prove that any of the Accused persons assaulted the deceased. In the case of Peter Odhiambo Abonyo v. Republic [2025] KECA 608 (KLR), the Court of Appeal rendered itself as follows:-

“In the present case, there was no obligation on the prosecution to demonstrate that it was the appellant who inflicted the fatal blow. Indeed, there was no need to even demonstrate that he inflicted any blow at all. The requirement was to demonstrate that he was acting in concert with a group of others and that they were pursuing a specific unlawful purpose which led to the commission of the offence. As the record amply demonstrates, the mob that accosted the deceased at the roadblock of which the appellant was a participant was acting in concert; and they were pursuing an unlawful purpose. The unlawful purpose was to eject and, at least, assault the deceased for perceived wrongful targeting of a boda boda rider with arrest. In the present case, therefore, the doctrine of common intention was appropriately applied to link the appellant with the ultimate crime committed which was murder.”

Whether there was malice aforethought

56. In determining whether there was malice aforethought, the law is now well settled. Malice can be express or implied. See *Kaburu v. Republic* [2024] KECA 536 KLR. For malice to be inferred, it is determined from the weapon used, the manner in which it was used, the part of the body targeted, the nature of the injuries inflicted, the conduct of the Accused before, during and after the accident. See Section 206 of the Penal Code and *Republic v Tubere s/o Ochen* [1945] 12 EACA 63.
57. A detailed reading of the post-mortem report establishes that the deceased suffered multiple injuries all over the body, including the vulnerable areas. In a nutshell, the assailants targeted all the areas of the deceased's body with various weapons that would naturally cause grievous harm, or even death. The Accused person's actions of tying up the deceased, a 27 years' old single youth with a rope, and beating him as they dragged him along the way while shouting “mwizi mwizi!” demonstrate persons who had formed the opinion that the deceased was guilty of stealing a cow and deserved punishment. The 1st Accused person's action in shutting up the witnesses when they sought to intervene is a pointer to a determination to punish the deceased. The action of the Accused persons in forcing PW1 to beat the deceased once they realized that he had passed on, and the subsequent attempt to assign blame for the death on mob justice point to persons who did not care about the outcome of their actions.
58. In the case of *Peter Odhiambo Abonyo v. Republic* (supra), the Court of Appeal cited the case of *Eunice Museya Ndui v. Republic* [2011] eKLR where it was held:-

“The moment that the 2nd appellant implicated the deceased as one of the perpetrators who robbed him to his fellow ‘boda boda’ operators as opposed to the police it was discernable that he did not intend to let the law take its course. Thereafter, the conduct of the said ‘boda boda’ operators who included the 1st appellant, of jointly going for the deceased in his home others [1943] 10EACA 51 applies in this case: 3 & *Kiryia Yenka S/o Tabula* approval the following excerpt with vs. quoted of Rex

“To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may



be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault’.” [Emphasis added].

59. Having considered the circumstances under which the offence was committed, and being guided by the cited authorities, I am convinced that the prosecution was able to prove that the Accused persons were actuated by malice aforethought in assaulting the deceased. Accordingly, each of the Accused persons is convicted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF SEPTEMBER 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Mr. Momanyi for the Accused

Court Assistant: Polycap

